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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]
MSC 05 022 10063

Office: LOS ANGELES

Date:

MAY 18 2009

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004, (CSS/Newman Settlement Agreements) was denied by the Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet. The director determined that the applicant had not established by a preponderance of the evidence that she had continuously resided in the United States in an unlawful status for the duration of the requisite period. The director denied the application, finding that the applicant had not met her burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements. The director also denied the application based on the applicant's felony conviction in the United States.

On appeal counsel asserts that the applicant's felony conviction was reduced to a misdemeanor. Counsel asserts that the applicant has submitted substantial evidence to demonstrate she was residing in the United States during the requisite period.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255a(a)(2).

The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on

the extent of the documentation, its credibility and amenability to verification. *See* 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provide relevant definition at 8 C.F.R. 245a.2(c)(1).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The first issue to be addressed is the applicant's criminal history.

The record contains a court disposition from the Los Angeles County Superior Court, which reveals that on June 18, 1996, the applicant was charged with violating section 245(c) PC, assault without a firearm on a peace officer, and section 243(c) PC, battery against an officer, both felonies. The applicant was subsequently convicted of violating section 243(c) PC. The applicant was placed on formal probation for three years and ordered to serve 36 days in jail. The remaining charge was dismissed. [REDACTED]

On September 19, 2005, more than nine years after the applicant's felony conviction, the court amended the charge as a misdemeanor pursuant to section 17(b)(5) PC, the plea of guilty or conviction was set aside, a plea of not guilty was entered, and the case was dismissed pursuant to 1203.4 PC.

The Board of Immigration Appeals (BIA), in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), held that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. Therefore, despite the subsequent reduction (from a felony to a misdemeanor) and expungement of the charge, the applicant remains convicted, for immigration purposes, of the felony offense of battery on a peace officer.

The applicant is ineligible for temporary resident status because of her felony conviction. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

The second issue to be addressed is whether the applicant has submitted sufficient credible evidence to meet her burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

In an attempt to establish continuous unlawful residence in the United States during the requisite period, the applicant submitted:

- A baptismal certificate which reflects that the applicant was married in Mexico on March 27, 1985.
- An affidavit from [REDACTED] who indicated that the applicant resided in her home, [REDACTED], Los Angeles, California, since October 20, 1981.
- A letter dated December 13, 1987, from [REDACTED] in Los Angeles, California, who attested to the applicant's employment as a packer from October 11, 1981 to November 15, 1987.

- A letter dated August 15, 1987, from [REDACTED] of [REDACTED], in Los Angeles, California, who attested to the applicant's employment in maintenance since November 1987.
- Photocopies of prescription receipts dated November 12, 1983, and June 7, 1986, from The New Jerusalem Medical Clinic in Los Angeles, California.
- A photocopied receipt for an event on June 2, 1981.

On her initial Form I-687 application and her Form for Determination of Class Membership, the applicant indicated that she was absent from the United States during July 1987 to visit her ailing mother in Mexico.

The director, in denying the application, noted that: 1) the receipt dated June 2, 1981 did not list the applicant's name and was dated four months prior to the applicant's claimed initial entry of October 1981; 2) the prescriptions receipts was not verifiable; 3) the baptismal certificate reflects that the applicant was married in Mexico on March 27, 1985; however, the applicant claimed only one absence from the United States, which occurred during July 1987; 4) on her initial Form I-687 application, the applicant claimed to have resided at [REDACTED] Los Angeles, California; however, on her current Form I-687 application, the applicant claimed residence at [REDACTED], Los Angeles, California from 1981 to 1985; and 5) the employment claimed on her initial application contradicts the employment claimed on her current Form I-687 application.

The AAO does not view the documents discussed above as substantive enough to support a finding that the applicant continuously resided in the United States since before January 1, 1982, through May 4, 1988, as she has presented contradictory and inconsistent documents, which undermines her credibility.

The employment affidavits failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiants also failed to declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable. In addition, the employment letter from Mr. [REDACTED], raises questions to its authenticity as it was dated three months prior to the applicant's purported employment. Further, the applicant has not addressed the director's finding why the employment claimed on her current application does not correspond with the employment claimed on her initial application.

The probative value of the receipts dated in 1983 and 1986 are limited in that the receipts are photocopies rather than originals. "In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation." 8 C.F.R. § 245a.12(f). In addition, the year on the receipt dated in 1986 appears to have been altered. Assuming, arguendo, the receipts are authentic, they would only serve to establish the applicant's presence in the United States on November 12, 1983, and June 7, 1986; they do not establish *continuous* residence during the requisite period.

The applicant has not addressed the director's findings regarding the different addresses claimed on her Form I-687 applications during the requisite period and her baptismal certificate, which reflects that she was married in Mexico on March 27, 1985.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988). The applicant submitted no competent objective evidence resolving the inconsistencies in the record.

Given the numerous credibility issues arising from the documentation, it is concluded that the applicant has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the date she attempted to file a Form I-687 application as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.