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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529 - 2090



**U.S. Citizenship
and Immigration
Services**

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[Redacted]

FILE: [Redacted]
MSC-05-251-10208

Office: CHICAGO

Date:

NOV 02 2009

IN RE: Applicant: [Redacted]

APPLICATION: Application for Temporary Resident Status under 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.

Perry Rhew
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, or *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 of the Chicago office 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 (LULAC) Class Membership Worksheet. The director denied the application, finding that the applicant was ineligible for adjustment to temporary resident status because he had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite time period.

On appeal, counsel for the applicant asserts that the evidence which the applicant previously submitted establishes by a preponderance of the evidence that he continuously resided in the United States in an unlawful status for the duration of the requisite time period. The applicant has not submitted any additional evidence on appeal. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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 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 physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has long been recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

The applicant 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. 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 is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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. See 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

Even if the director has some doubt as to the truth, if the applicant 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. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA).

The issue in this proceeding is whether the applicant has established that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an

unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of several witness statements and several documents. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant has submitted employment verification letters from [REDACTED] in Inglewood, California, [REDACTED] of a Citgo gas station in Calver City, California, and [REDACTED] of a dry cleaning business in Hollywood, California.

The employment verification letter of [REDACTED] states that the applicant was employed by the [REDACTED] in a truck load position from April 1983 to February 1987, although the witness does not state whether the applicant worked for the company on a full time basis. In the I-687 application, the applicant states that he worked for [REDACTED] on a part-time basis. The employment verification letter of [REDACTED] states that the applicant worked at his gas station as a part-time cashier from August 1984 to September 1986. Although in the I-687 application the applicant lists employment with Citgo, he states that he worked as a parking lot cleaner, and he does not state for what period he was employed. The employment verification letter of [REDACTED] states that he has known the applicant since 1982, and that the applicant worked for him on a part-time basis in his dry cleaning business in Hollywood, California. The witness does not state for what period the applicant worked for him or the applicant's job duties. In the I-687 application, the applicant does not list any employment with a dry cleaning business or any employment in Hollywood, California for the duration of the requisite statutory period.

The employment verification letters of [REDACTED] and [REDACTED] do not meet the requirements set forth in the regulations, which provide specific guidance on the **sufficiency of documentation when proving residence through evidence of past employment**. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letters fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, the witnesses do not state the applicant's daily duties, the number of hours or days he was employed, or the location at which he was employed. Furthermore, the witnesses do not state how they were able to date the applicant's employment. It is unclear whether they referred to their own recollection or any records

they may have maintained. For these additional reasons, the statements regarding the applicant's employment are of little probative value.

The applicant has submitted eight letters sent to him at [REDACTED] in Calver City, California on the following dates: October 12, December 18, and December 22 1981; January 14 and October 13, 1982; June 15, 1983, September 28, 1984 and May 28, 1985. Although these letters are some evidence in support of the applicant's presence in the United States on those dates from October 12, 1981 to May 28, 1985, they do not establish the applicant's continuous residence for the duration of the requisite statutory period.

The record contains copies of eight post-marked, stamped envelopes. The documents 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.2(d)(6). Further, the probative value of three of these envelopes is limited in that the postmark dates on these envelopes are not legible. The five remaining envelopes contain postmarks with dates as follows: November 17, 1981, November 10, 1982, April 25, 1983, August 22, 1986 and April 2, 1987. Although these envelopes are some evidence in support of the applicant's presence in the United States on those dates from November 17, 1981 to April 2, 1987, they do not establish the applicant's continuous residence throughout the requisite period.

The remaining evidence in the record is comprised of copies of the applicant's statements and the I-687 application. As stated previously, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Here, the applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence sufficient to establish the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

The record also reveals that the applicant has the following criminal history record:

- On August 2, 1995, the Chicago Police Department arrested the applicant and charged him with a violation of the Illinois Criminal Code, 720 ILCS, section 5/12-3, *battery*.

On August 11, 2006, the director requested the applicant to submit a final court disposition for the above offense.

In response, the applicant submitted a statement of disposition regarding the applicant's bond, showing that bond was stricken-off with leave to reinstate. The applicant failed to submit a final court disposition for the battery offense or evidence that the offense for which he was arrested did not result in a conviction.

The applicant has not provided the evidence requested by the director. For this reason alone, the application cannot be approved. The applicant's declaration at the time of his interview that he does not have a criminal record is subject to verification by United States Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying the information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5). The applicant failed to submit a final court disposition for the battery offense, or evidence that the offense for which he was arrested did not result in a conviction.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except 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 such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

An applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act, formerly section 212(a)(9) of the Act.² Congress has provided no waiver for a CIMT as a ground of inadmissibility. It is not clear from the record whether the applicant's battery arrest resulted

² An alien with one CIMT is not inadmissible if he or she meets the petty offense exception. See 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of 6 months. See 8 U.S.C. § 1182(a)(2)(A)(ii)(II). Additionally, an applicant for admissibility who stands convicted of a CIMT may be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I). The AAO notes that the arrest did not take place when the applicant was under 18 years old.

in a conviction, and, if so, whether the conviction was for a CIMT which renders the applicant inadmissible. Although simple battery is generally not a crime involving moral turpitude, it may be rendered such by aggravating circumstances. Illinois criminal statutes punish two types of battery: intentionally or knowingly causing another "bodily harm," *or* making "physical contact of an insulting or provoking nature." 720 ILCS 5/12-3(a)(1)-(2) (2003). Illinois criminal statutes list aggravations of simple battery, including, for example, when the batterer "Knows the individual harmed to be a peace officer . . . while such officer . . . is engaged in the execution of any official duties." 720 ILCS 5/12-4(b)(6)(2003). See also *People v. Hale*, 395 N.E.2d 929, 931-32 (Ill. 1979), holding that battery of an insulting or provoking variety can indeed become aggravated even if the victim sustains no bodily injury. Therefore, the applicant has failed to submit evidence to establish that his arrest for battery did not result in a criminal conviction that renders him inadmissible pursuant to the provisions of section 212 of the Act, 8 U.S.C. § 1182.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982, continuously resided in an unlawful status in the United States for the requisite period, and is otherwise eligible for adjustment of status, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant has not met his burden of proof because of his failure to establish that he maintained continuous residence in the United States throughout the statutory period, and because of his failure to establish that he does not have a disqualifying criminal conviction. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. 8 C.F.R. § 245a.18(a)(1).

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