

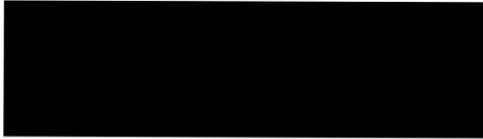
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:



MSC 05 236 11340

Office:

HOUSTON

Date:

QCT 08 2009

IN RE: Applicant:



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:



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) on 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) on February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the director in Houston, Texas. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant had been convicted of a felony committed in the United States and was therefore ineligible for temporary resident status.

On appeal counsel asserts that the director erred in classifying one of the applicant's convictions a felony, that the conviction in question should be considered a misdemeanor, and that the applicant has been convicted of just two misdemeanors, which does not make him ineligible for temporary resident status. Counsel also asserts that the applicant was continuously resident and physically present in the United States during the requisite time periods in the 1980s to qualify for temporary resident status.

An applicant for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) must establish his or her entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 through the date the application is filed. See section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish his or her continuous physical presence in the United States since November 6, 1986. See 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. See 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 the regulation at 8 C.F.R. § 245a.2(b)(1) 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 from May 5, 1987 to May 4, 1988. See CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to lawful temporary resident status. See section 245A(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1).

As defined in 8 C.F.R. § 245a.1(o):

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) [involving state crimes, inapplicable in this case]. 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.

As defined in 8 C.F.R. § 245a.1(p):

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

An applicant for temporary resident status has the burden to establish 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).

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 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 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.

The regulations provide an illustrative list of documents – which includes affidavits and “any other relevant document” – that an applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Mexico who claims to have lived in the United States since 1979, filed his application for temporary resident status under section 245A of the Act (Form I-687), together with a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet, on May 24, 2005.

As evidence of his residence in the United States during the 1980s, the applicant submitted the following documents:

- An affidavit by [REDACTED] a resident of Sealy, Texas, dated November 1, 2004, stating that the applicant is his cousin and had lived with [REDACTED] and his family since he came to Texas in 1980 – at first in Homestead, later in Bellville, and for the past 12 years in Sealy.
- An affidavit by [REDACTED] on the letterhead of Brutus Trailers in Hempstead, Texas, dated November 11, 2004, stating that the applicant worked for the company from 1982 to 1992 building farm and livestock trailers.
- An affidavit by [REDACTED] a resident of Sealy, Texas, dated November 12, 2004, stating that the applicant had been a friend of his since 1979 when they both came to the Austin County area.
- An affidavit by [REDACTED] a resident of Sealy, Texas, dated November 12, 2004, stating that he had known the applicant since 1980.
- An affidavit by [REDACTED] a resident of Sealy, Texas, dated November 12, 2004, stating that she had known the applicant since 1985.

On November 29, 2006, the director issued a Notice of Intent to Deny (NOID) the application. The director indicated that the five affidavits were substantively deficient, contained some inconsistencies, and in their totality failed to demonstrate that the applicant entered the United States before January 1, 1982 and thereafter was continuously resident and physically present in the United States during the requisite periods of time up to May 1988.

In response the applicant offered some explanations for the evidentiary discrepancies cited in the NOID and furnished new phone numbers for three of the affiants.

On August 6, 2007 the director issued a Notice of Denial, stating that the records of U.S. Citizenship and Immigrations Services (USCIS) indicated the applicant had been convicted of a felony on April 4, 2002, in the U.S. District Court for the Southern District of Texas, for violating 8 U.S.C. § 1325(a)(3). The felony conviction made the applicant ineligible for temporary resident status under section 245A(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1).

Counsel filed a timely appeal, asserting that the director improperly classified the conviction in April 2002 as a felony. Counsel points out that the maximum penalty for a first offense under this section of law is six months, which qualifies as a misdemeanor. While acknowledging that the applicant was convicted of a second offense in September 2002 for violating a related subsection – 8 U.S.C. § 1325(a)(1) – counsel claims that this conviction was also a misdemeanor because the applicant was only sentenced to 30 days in jail. Since two misdemeanor convictions

do not make an alien ineligible for temporary resident status under section 245A of the Act, counsel contends that the application should be approved.

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 been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Counsel's claim that the applicant has not been convicted of a felony is incorrect. The pertinent statutory language, 8 U.S.C. § 1325(a), read as follows:

Any alien who

- (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
- (2) eludes examination or inspection by immigration officers, or
- (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

Thus, a first offense is punishable by a maximum of six months in prison – which qualifies as a misdemeanor under 8 C.F.R. § 245a.1(o). A second offense is punishable by a maximum of two years in prison – which qualifies as a felony under 8 C.F.R. § 245a.1(p).

The record includes two final court dispositions:

A "Judgment in a Criminal Case" filed in the United States District Court, Western District of Texas, dated April 9, 2002, confirming that the applicant pled guilty on April 4, 2002, to a violation of 8 U.S.C. § 1325(a)(3) – Attempted Illegal Entry [into the United States] by False and Misleading Representation – committed on April 2, 2002. The applicant was sentenced to a prison term of 120 days. ()

- A "Judgment" filed in the United States District Court, Southern District of Texas, dated September 9, 2002, confirming that the applicant entered a plea of guilty on that date for "knowingly and unlawfully entering the United States at a place other than as designated by immigration officers" on September 7, 2002, in violation of 8 U.S.C. § 1325(a)(1). The applicant was sentenced to a prison term of 30 days. ()

Counsel's assertion that the applicant's 30-day sentence makes the second offense a misdemeanor is faulty. Because it was his second conviction under 8 U.S.C. § 1325(a), the applicant could have been sentenced up to two years. The regulation at 8 C.F.R. § 245a.1(p) states unambiguously that a crime punishable by imprisonment for a term of more than one year is a felony, regardless of the term the alien actually served.¹

Thus, while the director erred in finding that the applicant's initial conviction in April 2002 was a felony, the applicant's second conviction in September 2002 did constitute a felony. Under section 245A(a)(4)(B) of the Act, therefore, the applicant is ineligible for adjustment to temporary resident status.

The AAO agrees with the director's assessment in the NOID that the five affidavits dating from 2004 are insufficient evidence to establish the applicant's continuous unlawful residence and physical presence in the United States during the requisite periods of the 1980s to qualify for temporary resident status under section 245A of the Act.

The affidavits are all minimalist documents with little personal input by the authors. Considering how long they claim to have known the applicant, it is remarkable how little information the affiants provide. They provide few details about how they first met the applicant in the United States, and hardly any information about the nature and extent of their interaction with the applicant in the following years. Aside from the vague information from [REDACTED] about living with the applicant for 24 years, the affiants say nothing about where the applicant resided during the 1980s. Aside from [REDACTED] statement that the applicant worked for Brutus Trailers from 1982 to 1992, a claim unsupported by any documentation, the affiants say nothing about where the applicant worked during the 1980s. Nor does the record include any documentary evidence – such as photographs or letters – of the applicant's personal relationship with any of the affiants in the United States during the 1980s. In view of these myriad substantive shortcomings, the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States during the years 1981-1988, or his physical presence in the United States at any time during the years 1986, 1987, or 1988.

Based on the foregoing analysis of the evidence, the AAO determines that the applicant has failed to establish that he resided continuously in the United States in an unlawful status from before January 1, 1982, and was continuously physically present in the United States from November 6, 1986, through the date of attempted filing during the initial one-year application period for legalization that ended on May 4, 1988. For this reason as well, therefore, the applicant is ineligible for temporary resident status under section 245A of the Act.

¹ The Criminal Complaint filed against the applicant on September 7, 2002, specifically identifies his violation of 8 U.S.C. § 1325(a) as a felony charge, following his earlier conviction under this section in April 2002.

The appeal will be dismissed, and the application denied.

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