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FILE:

MSC 05 200 15105

Office: CHARLOTTE

Date:

**OCT 16 2009**

IN RE:

Applicant:

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:

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 if your case was 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, 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, Charlotte. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for temporary residence (Form I-687) on September 22, 2006, because the applicant did not establish by a preponderance of credible, probative evidence that he entered the United States on or before January 1, 1982, and remained here in an unlawful status for the requisite period. Specifically, the director noted discrepancies between the evidence submitted in support of the Form I-687 and the applicant's testimony regarding his initial date of entry into the United States and his continuous residence for the qualifying period. The director concluded that the discrepancies remained unresolved despite the submission of additional evidence subsequent to the issuance of a Notice of Intent to Deny (NOID).

The applicant is represented by counsel on appeal. Counsel did not submit a separate brief in support of the appeal, but states on the Form I-694 that the applicant has met his burden of proof by a preponderance of the evidence, and that any inconsistencies are explained by the applicant's inferior command of English. In addition, the applicant submitted further biographic information about a witness affiant.

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)(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 of May 5, 1987 to May 4, 1988. CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

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 period, 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. 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, "[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 or petition.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591.

Additionally, 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 temporary resident status. 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 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).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The AAO has reviewed all of the evidence in the file in its entirety. We note initially that the applicant filed the Form I-687 on April 18, 2005, and was interviewed by an adjudication officer on March 15, 2006. The director issued a NOID on April 4, 2006, that directed the applicant to provide some form of evidence to support his assertion that he initially entered the United States at the age of 11 sometime in October, 1981, to clarify when he attended primary school and college in Niger, when he was initially turned away from filing a legalization application during the original qualifying period, and when he departed and returned to the United States. *See* NOID, ¶¶ 4-6.

In response, the applicant submitted a letter from his attorney dated May 2, 2006, stating that the applicant was confused during his interview, and an affidavit from [REDACTED] dated May 2, 2006, that states generally that he met the applicant in New York City sometime in December, 1981. The AAO has reviewed all of the evidence of record and we agree with the director's conclusions regarding the applicant's entry and residence in the United States during the qualifying period.

The applicant has not submitted evidence to resolve the inconsistencies noted by the director. The applicant claims he entered the United States sometime in November, 1981 at the age of eleven with another person whose name he cannot recall. Although a child at the time of entry, the applicant provides no evidence to explain how or where he lived or who was responsible for his health, well-being, or education.

The affidavit of [REDACTED] is inconclusive. This affidavit does not contain sufficient information to establish the applicant's entry and residence for the entire requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

The statement from [REDACTED] does not provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that [REDACTED] statement does not indicate that the assertions are probably true. Therefore, it has little probative value and the application for temporary residence must be denied on this ground also. *See* 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

Additionally, the AAO notes that the record includes a series of documents that reveal the applicant's criminal history. The record contains a letter from the Commonwealth of Virginia, Department of Corrections, Adult Probation and Parole, District 17, dated August 31, 2006. The letter states that the applicant was convicted on June 2, 2005, in the Circuit Court of Smyth County, Virginia, on two felony counts of uttering a forged check. He was sentenced to incarceration in the Virginia State Penitentiary for two years, and a term of probation. The applicant was then transferred to the Circuit Court of Wythe County, Virginia on July 18, 2005, where he convicted for one felony count of uttering a forged check, for which he was concurrently sentenced to three years incarceration in the Virginia State Penitentiary.

The letter explains further that, subsequent to the completion of his Virginia term of sentence and probation, the applicant was transferred to Guildford County, North Carolina, to serve an additional 36 months probation as a result of his violation of probation from an earlier conviction on February 3, 2003 for assault with a deadly weapon. The letter explains that the applicant has not complied with the requirement of reporting to his probation and parole officer on a regular basis and that all attempts to contact the applicant have yielded no results.

The record also includes a photocopy of a sentencing order and court documents submitted with the above letter that confirm the felony convictions in Wythe County and Smyth County, Virginia. The sentencing order was issued by the Circuit Court of Wythe County and explains that on July 18, 2005, the applicant was sentenced in conjunction with his conviction for one count of violating section 18.2-172 of the Virginia Penal Code – forging, uttering, etc., other writings. This offense is marked as a felony, [REDACTED]. The record also contains a photocopy of the sentencing order issued by the Circuit Court of Smyth County, Virginia. This document identifies [REDACTED], and states that the applicant was convicted for two felony counts of uttering a forged check, in violation of section 18.2-172 of the Virginia Penal Code.

Finally, the court documents confirm the applicant's Guildford County, North Carolina felony conviction in February, 2003, for assault with a deadly weapon with serious injury, [REDACTED]. The applicant was sentenced to an indeterminate sentence of 20 to 33 months in the North Carolina State Penitentiary, and a term of probation.

Therefore, the applicant is not admissible due to his multiple felony convictions in Virginia and North Carolina. *See* INA § 212(a)(2)(B)(multiple criminal convictions) and 212(a)(2)(A)(i)(I) (crimes involving moral turpitude); 8 U.S.C. § 1182(a)(2)(A)(i)(I) and (ii)(I); *See* 8 C.F.R. § 245a.2(c)(1).

The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act because he cannot meet his burden of proof regarding entry and residence for the requisite period, as well as on account of his criminal convictions.

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