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



U.S. Citizenship  
and Immigration  
Services

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FILE:

[Redacted]  
MSC 06 102 24443

Office: DALLAS

Date:

**OCT 19 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

for 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, Dallas, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of three misdemeanors in the United States.

On appeal, the applicant provided court documentation, which established he had been convicted of only two misdemeanors (section 270 PC, failure to provide, and section 242 PC, battery). The applicant also provided expungement orders for the convictions.

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 provides relevant definition at 8 C.F.R. 245a.2(c)(1).

“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 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).

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, 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. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intent to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains “convicted” for immigration purposes.

In this case, there is no evidence in the record to suggest that the applicant's convictions were expunged because of an underlying procedural or constitutional defect in the trial court proceedings. Therefore, despite the expungements of these convictions, the applicant remains convicted, for immigration purposes, of two misdemeanors.

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).

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 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 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.

In an attempt to establish continuous unlawful residence in the United States since prior to January 1, 1982, the applicant submitted:

- An affidavit from [REDACTED] who indicated that he met the applicant at one of the soccer teams in Santa Barbara, California in December 1981. The affiant indicated that he has been a coworker of the applicant at [REDACTED] since September 1984.
- An affidavit from [REDACTED] who indicated that he has known the applicant since December 1981 and that he was a coworker of the applicant from 1985 to 1999. The affiant attested to the applicant’s moral character.
- An affidavit from [REDACTED] who indicated that he met the applicant in Santa Barbara, California in 1981. The affiant indicated that he was a coworker of the applicant at [REDACTED] in Santa Barbara.
- Letters dated December 29, 2005, and October 25, 2006, from [REDACTED] of [REDACTED] in Montecito, California, who indicated that the applicant resided with her at [REDACTED] from December 1981 to July 1985. The affiant also indicated that the applicant was in her employ part-time during this period.
- Affidavits from [REDACTED] who indicated that he met the applicant in December 1981 at the applicant’s place of employment, [REDACTED], in Santa Barbara, California. The affiant attested to the applicant’s residence in Santa Barbara, California from December 1981 to June 1992, and to his absence from the United States in August 1987 for 15 days.
- A birth certificate reflecting his daughter was born January 13, 1987 in the state of California.
- An affidavit from [REDACTED] who indicated that he met the applicant on a soccer field in Santa Barbara, California in 1981. The affiant indicated that he was a coworker of the applicant at Jostens and attested to the applicant’s residence in Santa Barbara until the summer of 1992.

- A letter dated October 23, 2006, from [REDACTED] in Denton, Texas, who indicated that the applicant has been employed as a stone setter since September 19, 1984.

The AAO issued a notice to the applicant on August 10, 2009, informing him that it was the AAO's intent to dismiss his appeal based upon the fact that information had come to light that seriously compromises the credibility of his claim of residence. The applicant was advised that the employment letter from [REDACTED], lacked probative value as it 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 regulation, [REDACTED] 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. The letter from [REDACTED] raises questions to its authenticity as the company showed its location in Denton, Texas, but the applicant claimed to have been residing in the state of California from 1981 to 1992. The letter made no mention of the applicant's employment in California and no evidence such as wage and tax statements, pay stubs, or a social security printout was provided to support the applicant's claim. The wage and tax statements and earning statements provided with his Form I-687 application only establishes employment at Jostens from 2005.

The applicant was also advised that the affidavits provided did not contain sufficient detail to establish that the affiants had an ongoing relationship with the applicant for the duration of the requisite period that would permit them to know of the applicant's whereabouts and activities throughout the requisite period.

The applicant was granted 30 days to provide evidence to overcome, fully and persuasively, these findings.

Counsel, in response, submits an additional letter from [REDACTED] who indicated that the applicant was her brother and resided with her from 1981 to 1984 at [REDACTED]. The affiant also indicated that the applicant worked part-time at the family business, [REDACTED] in Santa Barbara as a prep-cook and received his wages in cash. Counsel asserts that the affiant "is the proprietor of a small, independently owned and operated restaurant. She does not own a company and as such, does not have company records."

Counsel's assertion is without merit as [REDACTED] is an entity engaging in business, and, therefore, the affiant, as the proprietor, would report business income or losses on her individual income tax return. In addition, the affiant's letters are questionable as they contradict each other. In her initial letter, the affiant indicated that the applicant worked for and resided with her from 1981 to 1985; however, in her current letter, the affiant indicates that the applicant worked for and resided with her from 1981 to 1984. As conflicting statements have been provided, it is reasonable to expect an explanation from the affiant in order to resolve the contradictions. However, no statement from the [REDACTED] has been submitted to resolve her

contradicting affidavits. As such, the affiant's letters have little probative value or evidentiary weight.

Counsel also submits an additional letter from [REDACTED] who reaffirmed the applicant's employment since September 19, 1984.

The AAO does not dispute that Jostens, Inc. is an international company and maintains facilities throughout the United States. However, in the instant case, the letters from [REDACTED] do not conform to the basic requirements specified in 8 C.F.R. § 245a.2(d)(3)(v) and, therefore, they lack probative value and evidentiary weight. The AAO's notice specifically outlined the discrepancies in the affiant's letter; however, they were not addressed in the new letter. Counsel asserts that the applicant worked at a [REDACTED] office in California, but has not provided any credible evidence to support his claim. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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 evidence must be evaluated not by the quantity of evidence alone but by its quality. The remaining affiants' statements do not provide detailed accounts of an ongoing association establishing a relationship under which the affiants could be reasonably expected to have personal knowledge of the applicant's residence, activities and whereabouts during the requisite period. To be considered probative, an affiant's affidavit 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. The affidavit must contain sufficient detail, generated by the asserted contact with the applicant, to establish that a relationship does in fact exist, how the relationship was established and sustained, and that the affiant does, by virtue of that relationship, have knowledge of the facts asserted. The affidavits from the affiants do not provide sufficient detail to establish that they had an ongoing relationship with the applicant that would permit them to know of the applicant's whereabouts and activities throughout the requisite period.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon documents with minimal probative value, it is concluded that the evidence submitted fails to establish continuous residence in an unlawful status in the United States during the requisite period.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he has continuously resided in an unlawful status in the United States for the requisite period 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.

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