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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

MSC 06 097 14286

Office: SAN FRANCISCO

Date:

OCT 26 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 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, San Francisco. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The director denied the application for temporary residence (Form I-687) finding that the applicant failed to establish that his unlawful status was known to the government. Additionally, the director noted that the applicant's three misdemeanor DUI convictions precluded his eligibility for temporary resident status under the terms of the settlement agreements.

The applicant is represented by counsel on appeal. Counsel asserts in a brief submitted in support of the appeal that the applicant has met his burden of establishing eligibility for temporary resident status, in that he first entered the United States in 1978, and that he has remained in the country continuously for the requisite period. Counsel avers that the director erred in requiring that the applicant prove that his unlawful status was known to the government. Furthermore, counsel argues that the applicant has two misdemeanor convictions, as one conviction was vacated on constitutional grounds. Counsel concludes that the applicant remains eligible for temporary resident status, and that he has demonstrated by a preponderance of evidence that his claim is probably true.

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).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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. State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The record before the AAO contains a court order dated October 24, 2006 issued by a judge of the Superior Court of California, County of Alameda. The order identifies criminal docket no. 148683, and states that the criminal conviction against the applicant is vacated "in the interest of justice." The motion to vacate the conviction filed by the applicant with the trial court states that, at the time of the applicant's plea of guilty to DUI on November 10, 1983, the applicant was not informed of the immigration consequences of his guilty plea, in violation of section 1016.5 of the California Penal Code.

This amendment to the California Penal Code, effective in 1978, mandates that a non-citizen resident of the United States must be informed of the potential immigration consequences of entering a plea of guilty or *nolo contendere* in criminal proceedings. Counsel's petition to the court in support of the motion to vacate states that court documents relevant to the applicant's criminal proceedings in 1983 were destroyed and are not available to verify whether the applicant was informed of the immigration consequences of pleading guilty to the charge of DUI. However, section 1016.5(b) of the California Penal Code specifies that the petitioner is entitled to a presumption that he did not receive the required advisement in the absence of court records. Thus, the AAO concludes that the applicant's 1983 DUI conviction, in light of the court's order vacating the conviction on October 24, 2006, on what are presumably constitutional grounds, cannot be considered in immigration proceedings. *See Nath v. Gonzales*, 467 F.3d 1185, 1187-89 (9th Cir. 2006); *see also Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1107-08

(9th Cir. 2006); *Lujan-Armendariz v. INS*, 222 F.3d 728, 746-47 (9th Cir. 2000). The applicant admits to two remaining DUI convictions; one in Oakland County on March 25, 1987 and one in Hayward County, on March 29, 1996. See Form I-215W, Record of Sworn Statement, dated October 12, 2006. Two misdemeanor convictions do not preclude the applicant's eligibility for temporary resident status.¹

We turn to the evidence of residence. 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 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. The record includes affidavits from [REDACTED] and [REDACTED]. The affidavits are general in nature and state that the affiants have knowledge of the applicant's residence in the United States for all, or a portion of, the requisite period. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the 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.

None of the witness statements 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, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

However, the applicant's proof of residence includes independent documents that carry more probative weight. The proof of residence includes a federal tax return for 2005, 1989, a Social Security Earnings statement that shows earnings for the years 1979, 1980, 1981, and additional earnings for the years 1983 to 2002. The record also includes a W-2 statement for 1989, wage statements for 1987 and 1988, a California state tax return for 1983 and 1987, a bank statement

¹ The record before the AAO contains documents that reveal that at one point in time, the applicant was the beneficiary of an approved Form I-130 visa petition, on the basis of the applicant's marriage to a United States citizen (approval date September 22, 1985). The approval was revoked on May 28, 1991, because the petitioner failed to meet her burden of proof to establish that the beneficiary qualified for the immigration benefit sought.

for 1987, 1985, wage statements and receipts for 1986, 1984, money orders and wage statements for 1983, a photocopy of a Wells Fargo credit card for 1982, and a photocopy of a court printout that identifies a DUI violation date of December 15, 1981, with a corresponding conviction on November 10, 1983 in Hayward County, California.

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, supra.* The affidavits submitted on behalf of the applicant by friends are not considered probative evidence of the applicant's entry and residence. However, the record contains a substantial amount of other documentary evidence that supports the applicant's claim that he entered the United States on or before January 1, 1982 and remained here for the requisite period of time. The AAO concludes that, viewed altogether, the preponderance of the other documentary evidence leads us to believe that the applicant's claim is probably true. Therefore the applicant has met the requirements for temporary resident status under section 245A of the Act.

ORDER: The appeal is sustained. This director shall continue adjudication of the application.