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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

## PUBLIC COPY

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FILE:

MSC-05-230-13420

Office: NEW YORK

Date:

OCT 28 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, New York. The decision 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.<sup>1</sup>

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.

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<sup>1</sup> 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 (9<sup>th</sup> 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 shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is filed no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c)(1).

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to an "emergent reason". 8 C.F.R. § 245a.2(h)(1)(i). "Emergent reasons" has been defined as "coming unexpectedly into being." *Matter of C*, 19 I&N Dec. 808 (Comm. 1988).

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, 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 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 the affidavits of [REDACTED] and [REDACTED]. Their 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.

Although the witnesses claim to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness statements do 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 in the United States during the requisite period. 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 it probably did exist and that the witness, by virtue of that relationship, does have knowledge of the facts alleged. For instance the witnesses do not state how they date their initial meeting with the applicant or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The affiants also do not state how frequently they had contact with the applicant during the requisite period. The affiants do not provide sufficient details that would lend credence to their claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness statements do not indicate that their assertions are probably true.

The record contains two statements of treatment of the applicant in the emergency room of Elmhurst General Hospital on March 20, 1983 and February 19, 1985, respectively. The record also contains a boarding pass for a flight from New York to Chicago dated March 12, 1987. Although these documents are some evidence of the applicant's presence in the United States on March 20, 1983, February 19, 1985 and March 12, 1987, they do not establish the applicant's continuance residence in the United States for the duration of the requisite statutory period.

The record also contains two stamped envelopes with postmark dates in October 1982 and April 1983, respectively, sent to him at [REDACTED] in Aurora, Illinois. These envelopes are some evidence in support of the applicant's residence in the United States at some time in October 1982 and April 1983. The applicant has submitted two stamped envelopes with postmark dates of some time in 1984 and 1985, respectively, sent to him at [REDACTED] in Jackson Heights, New York. However, in the instant I-687 application the applicant did not list an address on [REDACTED] in New York as a residence at any time during the requisite statutory period. Due to these inconsistencies these envelopes have minimal probative value.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, the initial I-687 application, filed in 1990 to establish the applicant's CSS class membership, a Form I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act, and a Form I-485 application to adjust to permanent resident status and the underlying Form I-130 petition for alien relative. 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.

Beyond the decision of the director, at the time of completing the instant I-687 application, at part 32, the applicant listed one absence from the United States during the requisite statutory period from October 1987 to December 1987 to visit his family in Pakistan. On April 14, 1989 the applicant completed an affidavit to establish his CSS class membership, wherein he stated that he was absent from the United States from October 10, 1987 to December 15, 1987.<sup>2</sup> Therefore, the applicant's testimony indicates that he had an absence from the United States of at least 66 days

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<sup>2</sup> In a statement dated March 21, 1990, the applicant stated that his only absence from the United States during the requisite statutory period was from October 1986 to December 1986.

during the requisite period. As stated above, continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to an "emergent reason". The applicant has not submitted any evidence that his return to the United States was delayed due to an "emergent reason".

The applicant's admitted absence from the United States from October 10, 1987 to December 15, 1987, a period of more than 45 days, is clearly a break in any period of continuous residence he may have established. Since the applicant has not provided any evidence of an "emergent reason" for his failure to return to the United States in a timely manner, he 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.

Additionally, beyond the decision of the director, the record contains official court dispositions that reflect that the applicant has been convicted of the following criminal misdemeanor offenses in New York:

- On August 7, 1997, the applicant was charged with Criminal Possession of a Controlled Substance in the Seventh Degree, (Penal Law §220.03), Driving without Lights (VTL § 375.2A), and Operating of a Motor Vehicle by an Unlicensed Driver (VTL § 509.1). On September 12, 1997 the applicant pleaded guilty to one count of Disorderly Conduct (Penal Law §240.20).
- On August 26, 1997, the applicant was again charged with Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law §220.03). On August 28, 1997, the applicant pleaded guilty to one count of Disorderly Conduct (Penal Law §240.20) and was sentenced to serve one year of probation.
- On May 14, 1999, the applicant was again charged with Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law §220.03). On June 2, 1999, the applicant pleaded guilty to one count of Disorderly Conduct (Penal Law §240.20) and was sentenced to serve one year of probation.
- On June 8, 1999, the applicant was again charged with Criminal Possession of a Controlled Substance in the Seventh Degree (Penal Law §220.03). On June 9, 1999, the applicant pleaded guilty to one count of Disorderly Conduct (Penal Law §240.20) and was sentenced to serve one year of probation.

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 Permanent Resident status. 8 C.F.R. § 245a.18(a)(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 offense of disorderly conduct is considered a "violation" under New York law. *See* Part 2, Title E, section 55.10 of the New York Penal Code. In the state of New York, violations are not considered crimes. Although a violation carries a potential fifteen day jail term, in almost all cases the punishment imposed includes a fine and/or community service. In this case, the record indicates that the applicant was sentenced to perform community service and to a term of probation. There is no indication that the applicant was ordered to pay a fine.

Nonetheless, the applicant's four disorderly conduct convictions *are* considered misdemeanor offenses for purposes of analysis under the Immigration and Nationality Act. As noted above, "misdemeanor" means a crime committed in the United States punishable by imprisonment for a term of *one year or less*, regardless of the term such alien actually served. 8 C.F.R. § 245a.1(p). The disorderly conduct conviction, although considered a "violation" in New York, carries a maximum 15 day term of imprisonment, and therefore qualifies as a "misdemeanor" for immigration purposes. Because of the applicant's misdemeanor convictions, he is ineligible to adjust to temporary resident status. There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States.

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 residence and because of his four misdemeanor convictions. 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.