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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  
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FILE: [REDACTED]  
MSC 05 230 13638

Office: DALLAS

Date: **OCT 29 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. 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, Dallas. 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 October 3, 2007. The director concluded that the applicant's three Texas state criminal 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 (Form I-694) that all of the arrests listed on both the Notice of Intent to Deny (NOID) dated April 9, 2007, and on the Notice of Denial dated October 3, 2007 did not result in disqualifying criminal convictions. In support, the applicant submitted additional photocopies of the criminal documents offered with the original Form I-687. Counsel concludes that the applicant remains eligible for temporary resident status, and that he has demonstrated by a preponderance of credible evidence that he is eligible for temporary resident status pursuant to the terms of the settlement agreements.

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 AAO has reviewed all of the evidence in the file in its entirety. We note that the evidence includes a number of criminal records and court documents. A certificate of disposition dated April 24, 2007 issued by the District Court of Harris County, Texas, indicates that the applicant was convicted on April 2, 1980 for unlawfully carrying a handgun in a bar, [REDACTED] (no criminal statute is identified). The applicant was sentenced to 30 days in jail. The record of judgment regarding this incident reveals that the charge was originally listed as a third degree felony. However, the court reclassified the charge to a Class A misdemeanor upon motion by the prosecutor. The AAO concludes that the applicant has a Texas state misdemeanor weapons violation incurred in 1980.

Next, the record contains certified photocopies issued by the Dallas County Clerk's Office that indicate that the applicant was arrested by the Dallas County Police Department on or about October 16, 1983, and charged with one count of violating section 46.02 of the Texas Penal Code – unlawful discharge of a handgun. However, the record also indicates that the charges against the applicant were dismissed on December 27, 1985, upon motion by the state prosecutor. [REDACTED] Therefore, this arrest did not result in a conviction and does not preclude adjustment to temporary resident status.

Thereafter, the court documents indicate that the applicant was arrested on or about September 4, 1993 and charged with one count of violating section 67.01 L/1 of the Texas Penal Code – DWI. The applicant pleaded guilty to the charge of DWI on November 4, 1994, in the Dallas County

Criminal Court, [REDACTED] The applicant was sentenced to 75 days in jail and ordered to pay a fine. This conviction is considered to be a misdemeanor

Next, the record contains a printout issued by the Dallas Police Department. The printout consists of a police report that reveals the applicant was arrested on or about December 26, 1998 and charged with a violation of section 49.02 of the Texas Penal Code – public intoxication. Our review of section 49.02 of the Texas Penal Code reveals that a violation under subsection is considered a Class C misdemeanor offense.

The applicant does not submit a final court disposition for the charge incurred in 1998, and the police report provides no indication of the ultimate outcome, except to indicate that the applicant was taken into custody and then released the next day, December 27, 1998. Counsel argues that this notation of “release” on the police report is tantamount to a dismissal of all of the charges. Thus, counsel avers that the arrest in 1998 does not preclude adjustment to temporary resident status because the arrest did not lead to a corresponding conviction and the record contains evidence of only two misdemeanor convictions.

We disagree with counsel’s conclusions. The 1998 police report is not equivalent to a final court disposition. There are any numbers of explanations for the “release” notation on the police report, which may or may not include a dismissal or conviction on the charge. It is not enough for an applicant to meet the burden of proof regarding disqualifying criminal convictions to state that no criminal records exist or to imply that additional evidence regarding the disposition of other criminal charges does not exist or is simply unavailable.

In order to prevail on this issue, the applicant must show that the evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The applicant must then submit relevant “secondary evidence.” If the applicant cannot submit secondary evidence, then he or she must establish that secondary evidence is unavailable and must do so on official letterhead. The applicant must then submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, the evidence would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest.

In this case, the applicant has submitted none of the information discussed above. 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.

As noted above, to meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so. Therefore, he has failed to establish by a preponderance of the evidence that he has no disqualifying criminal convictions and is otherwise admissible to the United States, as required under both 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

In addition to the criminal convictions noted above, the AAO has examined the evidence of entry, physical presence, and continuous residence for the requisite period. We note that the applicant's 1980 conviction indicates that he was present in the United States at that particular point in time, the remaining evidence submitted to establish residence for all of the qualifying period is inconclusive. The evidence is limited to affidavits from friends and employers attesting to the applicant's presence in the United States. 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.

The only evidence submitted by the applicant that is credible and independently verifiable to establish residence and that corroborate his own assertions commence in 1990. As this evidence is outside of the requisite period, it is not relevant to the application for temporary residence. For these reasons also, the applicant has failed to meet his burden of proof and he is not eligible for temporary resident status.

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