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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 04 328 10071

Office: NEW YORK

Date:

OCT 29 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 director denied the application for temporary residence (Form I-687) on October 22, 2007, 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.¹ The director concluded that the applicant had not met his burden of proof to establish eligibility for temporary resident status pursuant to the terms of the settlement agreements.

The applicant is represented by counsel on appeal. Counsel does not offer new evidence to establish when the applicant first entered the United States, but recites facts and discusses evidence previously submitted with the Form I-687. Counsel maintains that the applicant has met his burden of proof to qualify for temporary resident status.

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

¹ The record indicates that the applicant did not respond to the Notice of Intent to Deny (NOID) issued on September 12, 2007. The NOID was mailed to both counsel of record and the applicant at the most recent address contained in the file.

[REDACTED]

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. The applicant states on the Form I-687 that his first residence in the United States was located at [REDACTED] Marlboro, Massachusetts, and that he lived at this address from April to June, 1981 and from May, 1983 to August, 1985. The applicant submitted no documentary evidence to corroborate this assertion, *i.e.*, rent receipts, utility bills, insurance statements, bank accounts, sales receipts, statements from friends or neighbors, school or medical records, or any other documents, beyond his own assertions, that he entered the United States on or before January 1, 1982.

The applicant also claimed on the Form I-687 that his other residences during the qualifying period between January 1, 1982 and May 4, 1988 include [REDACTED] from June, 1981 to April, 1983, and [REDACTED] from September, 1985 to August, 1989. Nonetheless, no documentary evidence has been submitted to confirm this claim.

Next, the applicant stated on the Form I-687 that he was employed as a "landscape laborer" from May, 1981 to August, 1985, in both Massachusetts and Florida, and thereafter worked as a janitor at Horsefeathers Restaurant in Massachusetts from September, 1985 to December, 1988. However, the record before the AAO contains no documents from employers to corroborate this assertion, other than a W-2 earnings statement from 2003. This document is not relevant as it does not cover the requisite period, thus we assign it no probative weight.

The record contains photocopies of two different passports issued to the applicant: an Italian passport issued in 2001 and a Brazilian passport also issued in 2001 that is stamped with multiple entries in 2004 and 2005. Additionally, the record contains a letter from Citibank dated February 11, 2002, that verifies the applicant's employment as a sales assistant commencing on March 8, 2001 and continuing to the present. Other evidence of residence includes a photocopy of a record of the applicant's marriage performed in 2008, a federal tax return for 2000 and 2001, a New York state tax return for 2000, and a certificate of attendance for a language class for the

academic year 1988-89, and other certificates for classes completed the applicant in 2001. As none of these documents entirely cover the qualifying period of time, they have little probative weight.

As noted above, the burden is on the applicant to prove 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. Having reviewed all of the evidence submitted by the applicant, the AAO concludes that he has not met his burden of proof with credible, probative, independently verifiable evidence that he entered the United States on or before January 1, 1982, and remained here for the qualifying period. We affirm the director's conclusions regarding entry, residence, and physical presence during the requisite period.

Additionally, we note that the record contains evidence of the applicant's arrest in 1991 and 1995 on criminal charges in New York and Massachusetts. In contrast, when asked to identify on the Form I-687 whether he had ever been arrested or charged with a crime, the applicant checked the box marked "No." The record before the AAO reveals a certificate of disposition dated June 2, 1997 issued by the criminal court of New York City that identifies [REDACTED] (1995). The date of the offense is identified as June 7, 1995, and the original offense is marked "Dismissed/Sealed - CPL 170.55."² The record contains no explanation regarding the underlying offense and we conclude from an analysis of the New York Criminal Procedure Law that the applicant was charged with a misdemeanor offense on June 7, 1995, that he admitted sufficient facts to sustain the charge, and that a finding of guilt and imposition of sentence was withheld in

² The AAO has reviewed this section of the New York Consolidated Statutes. This section refers to Criminal Procedure Law (CPL) and provides as follows: § 170.55 Adjournment in contemplation of dismissal.

1. Upon or after arraignment in a local criminal court upon an information, a simplified information, a prosecutor's information or a misdemeanor complaint, and before entry of a plea of guilty thereto or commencement of a trial thereof, the court may, upon motion of the people or the defendant and with the consent of the other party, or upon the court's own motion with the consent of both the people and the defendant, order that the action be "adjourned in contemplation of dismissal," as prescribed in subdivision two.

2. An adjournment in contemplation of dismissal is an adjournment of the action without date ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice. Upon issuing such an order, the court must release the defendant on his own recognizance. Upon application of the people, made at any time not more than six months, or in the case of a family offense as defined in subdivision one of section 530.11 of this chapter, one year, after the issuance of such order, the court may restore the case to the calendar upon a determination that dismissal of the accusatory instrument would not be in furtherance of justice, and the action must thereupon proceed. If the case is not so restored within such six months or one year period, the accusatory instrument is, at the expiration of such period, deemed to have been dismissed by the court in furtherance of justice.

lieu of a term of probation. Upon the successful completion of the terms of probation, the original charge was dismissed and the record was sealed.

Furthermore, the record indicates that the applicant was arrested on or about April 14, 1991, by the Marlborough Police Department, Massachusetts, and charged with three counts of assault and battery on a police officer and one count of disorderly conduct. The court docket sheet indicates that on June 20, 1991, the applicant "admitted sufficient facts" to support the charges, but that a finding of guilt and entry of judgment was continued to June 19, 1992, while the applicant served a term of probation. Upon the successful completion of the terms of probation, the original charges were dismissed by the court on February 5, 1993.

As noted above, 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. *See* section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

Having reviewed the court documents, relevant criminal statutes, and the federal definition of conviction, the AAO concludes that the applicant's criminal incidents may be construed to be criminal convictions for immigration purposes. Thus, the application for temporary resident status may also be dismissed on criminal grounds. 8 C.F.R. § 245a.2(c)(1).

For these additional reasons, the applicant is not eligible for temporary resident status. The decision of the director is affirmed.

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