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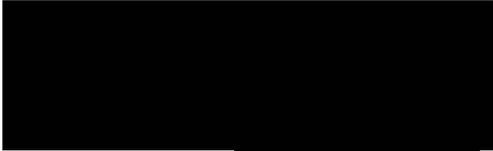
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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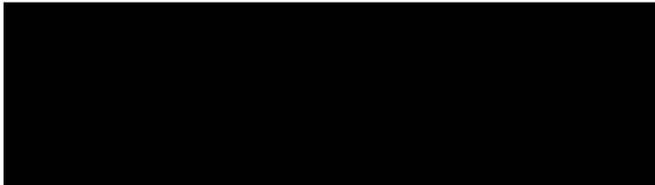


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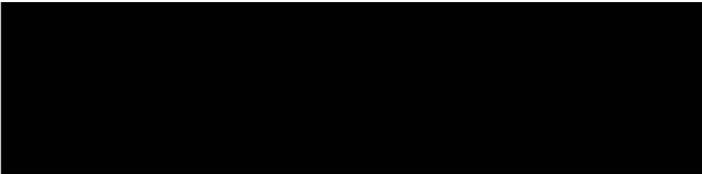
Date: SEP 10 2009

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.

John F. Grissom
Acting 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, Los Angeles. 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 June 18, 2007. The director noted that, other than his own assertions, the applicant did not submit any documentary evidence to establish his entry and residence for the requisite period, and that the affidavits submitted by the applicant were not probative or credible. The director also denied the application because the applicant did not provide final disposition records for a number of criminal arrests in California. The director concluded that the applicant had not met his burden of proof to establish eligibility for temporary resident status.

The applicant is represented by counsel on appeal. Counsel argues that the director abused his discretion in ruling that the applicant's evidence of entry and residence for the qualifying period was not sufficient to meet the burden of proof for temporary resident status. Counsel does not address the applicant's criminal record.

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.

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 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 AAO has reviewed all of the documents in the file in their entirety. We note that the director issued a Request for Evidence (RFE) on two separate occasions, February 20, 2007 and April 24, 2007, directing the applicant to provide certified disposition records for three criminal arrests on October 26, 1997, March 25, 2000, and November 6, 2000. On April 30, 2007, the applicant submitted a certified record from the Superior Court of California, Los Angeles County, stating that no criminal records exist under the name and date of birth submitted by the applicant. However, the AAO notes that the date of birth listed on the record from the Superior Court does not correspond with the date of birth listed on the RFE.¹ Therefore, we conclude that the record supplied by the Superior Court of California is not dispositive of the applicant's criminal history.

The record also contains a certified copy of proceedings from the Superior Court of California, County of Kern, North Division, Delano-McFarland Branch, dated March 13, 2006. This document identifies [REDACTED], and reveals that a felony complaint was filed against the applicant on October 31, 1995, charging him with one count of violating section 11350(a) of the California Health and Safety Code – *felony possession of a controlled substance*; one count of violating section 23152(a) of the California Vehicle Code – *driving under the influence* (misdemeanor); one count of violating section 23152(b) of the California Vehicle Code – *driving with excess .08% blood alcohol level*; one count of violating section 12500(a) of the California Vehicle Code – *driving without a license* (misdemeanor); and one count of violating section 1320(a) of the California Penal Code – *failure to attend a court ordered hearing* (felony).²

¹ Both Requests for Evidence list the applicant's date of birth as: 7.20.1964. The RFE dated April 24, 2007, also lists a number of alias names for the applicant: [REDACTED]

[REDACTED] and [REDACTED]. The response issued by the Superior Court Clerk's Office dated April 30, 2007 lists the applicant's name as [REDACTED] with a date of birth as: 7.20.1963. It appears from the record that the applicant requested the criminal record with a date of birth as: 7.20.1963. However, there is no clear, unequivocal evidence in the record to establish the applicant's true date of birth.

² Section 1320(b) of the California Penal Code reads as follows: *every person who is charged with or convicted of the commission of a felony who is released from custody on his or her own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony, and upon conviction shall be punished by a fine not exceeding five thousand dollars (\$5,000) or by imprisonment in the state prison, or in the county jail for not more than one year, or by both that fine and imprisonment. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for his or her appearance intended to evade the process of the court.* It appears from the record that this charge was added on November 16, 1995, when the applicant failed to appear for a court ordered hearing.

The applicant entered a plea of guilty to violating section 23152(a) of the California Vehicle Code – *driving under the influence* (misdemeanor); and to one count of violating section 12500(a) of the California Vehicle Code – *driving without a license* (misdemeanor). The remaining charges were dismissed pursuant to the terms of a plea agreement. The applicant was sentenced to two days in jail, 36 months probation, and ordered to pay a fine of \$1,651.

The record also contains an FBI report issued on February 20, 2007 that identifies the applicant by the name of [REDACTED] with a date of birth as: 7.20.1963. This document identifies a number of arrests: (1) deportation proceedings commenced on or about March 23, 1995; (2) an arrest on or about October 28, 1995 by the Delano Police Department for *possession of a controlled substance* under the name [REDACTED] (3) an arrest on or about October 26, 1997, by the Norwalk Sheriff's Office for *felony possession of a controlled substance* under the name [REDACTED] (4) an arrest on or about March 25, 2000 by the Los Angeles Police Department for *driving under the influence* under the name [REDACTED] (5) an arrest on or about November 6, 2000 by the Norwalk Sheriff's Office for *possession of a controlled substance* under the name [REDACTED]

These charges, except for the arrest listed at No. 2 above which corresponds with the court disposition records listed at [REDACTED] and discussed *supra*, remain unexplained and unresolved on appeal. It is clear that the applicant has at least two misdemeanor convictions to date, and a number of unresolved arrests that remain without a final court disposition despite the issuance of two Requests for Evidence and Notice of Intent to Deny (NOID). Therefore, the applicant has failed to meet his burden of proof by a preponderance of credible, probative evidence that he is admissible to the United States. His application for temporary residence (Form I-687) must be denied because of the applicant's criminal record.

The AAO has also reviewed the eleven affidavits submitted by family members and friends to establish that the applicant has met the entry and continuous residence requirements for the requisite period of time. We agree with the director's conclusion that the affidavits carry little probative weight. All contain statements that the affiants have known the applicant for several years and that they attest to the applicant being physically present in the United States during the required 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 and the application for temporary residence must be denied on this ground also. *See* 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis also.

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