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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**

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES

Date:

**AUG 06 2010**

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 remanded for further action, you will be contacted.

[Redacted]

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, or *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 of the Los Angeles office, and 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 a felony conviction for possession of a dangerous weapon. Counsel contends that the director erred in treating the conviction as a felony. The applicant has not submitted any additional evidence on appeal.<sup>1</sup>

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>2</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).

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 periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The

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<sup>1</sup> The record reveals that the applicant's FOIA request, [REDACTED] was processed on January 24, 2008.

<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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).

Further, an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status under the provisions of the Immigration and Nationality Act (the Act). Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255(a)(4)(B).

The regulations provide relevant definitions at 8 C.F.R. § 245a. "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 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 "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 CFR Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245.1 (p).

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 Act; 8 U.S.C. § 1101(a)(48)(A).

The AAO has reviewed all of the documents in the file, including the criminal records and the statutes under which the applicant was arrested and/or convicted. The record contains court documents that reveal the following criminal history:

- On January 16, 1994, the applicant was charged with one count of violating section 11351 of the California Health and Safety Code (HS), *possession/purchase for sale narcotic/controlled substance*, and one count of violating section 11350(a) (HS), *possession of narcotic control substance*. (Sheriff's Office, San Diego, case number 94104266A). There is no further information regarding these charges.
- On April 8, 1994, the applicant was charged with one felony count of violating section 12020(a) of the California Penal Code (PC) – *Possession of a short barreled shotgun or rifle*; and, one count of violating section 12031(a)(1) (PC) – *Carrying a Loaded Firearm on One's Person*. (Municipal Court of California, San Diego County, Case number [REDACTED]). On April 7, 1994, the applicant pleaded guilty to the first count of possession of a short barreled shotgun, a felony, and the remaining charge was dismissed pursuant to the terms of a plea agreement. As part of the terms of the plea agreement, the applicant's plea of guilty to a felony would be reduced to a misdemeanor if he had no prior felony conviction in 18 months. The applicant was committed to the custody of the sheriff for 90 days, placed on probation for 3 years, and ordered to pay restitution and a fine. On August 22, 1994, the applicant's probation was revoked and a warrant of arrest issued, due to the applicant's failure to make timely restitution. On October 25, 2006, the date of the applicant's interview on the application for temporary residence, the applicant was taken into custody for the outstanding arrest warrant.

Subsequently, the San Diego County Superior Court Judge found that the applicant's 10 days in custody satisfied any outstanding fine, penalty and interest, and also terminated the applicant's probation. See Transcript p. 4, Hearing before San Diego County Superior Court Judge, November 6, 2006.

The first issue in this proceeding is whether the applicant has been convicted of a felony, which renders him ineligible for adjustment to temporary resident status. The applicant was convicted of a violation of section 12020(a) of the California Penal Code (PC) – *Possession of a short barreled shotgun or rifle*.

Section 12020(a) of the California Penal Code states:

(a) Any person in this state who does any of the following is punishable by imprisonment in a county jail not exceeding one year or in the state prison:

(1) Manufactures or causes to be manufactured, imports into the state, keeps for sale, or offers or exposes for sale, or who gives, lends, or possesses any ... short-barreled shotgun...

In the applicant's plea agreement, the charge to which the applicant pleaded guilty is designated as a felony.<sup>3</sup> Regarding that part of the plea agreement that in the future reduces the applicant's criminal sentence from a felony to a misdemeanor, although the Ninth Circuit and the BIA have held that a trial court's decision to modify or reduce an alien's criminal sentence *nunc pro tunc* is entitled to full faith and credit in immigration proceedings, ( See *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9<sup>th</sup> Cir. 2003); *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), the applicant has not established that a court has reduced the applicant's criminal sentence. As stated above, the applicant has the burden of proving by a preponderance of the evidence that he or she is admissible to the United States under the provisions of section 245A of the Act. Therefore, the applicant, for purposes of applying for temporary resident status, stands convicted of a felony crime involving possession of a weapon. As stated above, 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. Thus, the applicant would be ineligible for adjustment to temporary resident status due to his felony conviction. See Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255(a)(4)(B).

An additional issue in this case is whether the applicant has established that he is not ineligible for adjustment to temporary resident status on the basis of multiple criminal convictions. Declarations by an applicant regarding his criminal record are subject to verification of facts by United States Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying information necessary

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<sup>3</sup> California Penal Code section 12020 PC is a "wobbler", which means that a prosecutor can charge the crime as a misdemeanor or, pursuant to California Penal Code section 18, as a felony, since it is also punishable by imprisonment in a state prison.

for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.3(g)(5). The applicant has not submitted evidence to establish the criminal dispositions regarding his January 16, 1994 arrest. This is another basis to deny the application.

Further, the AAO must also determine whether the applicant is otherwise eligible for adjustment to temporary resident status. The applicant has the burden of proving by a preponderance of the evidence that he has resided in the United States for the requisite statutory period. An 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 one witness statement. The AAO has reviewed the document in its entirety to determine the applicant's eligibility. 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 witness statement of [REDACTED]. The statement is general in nature and states that the witness has knowledge of the applicant's residence in the United States for a portion of the requisite period.

Although the witness claims to have personal knowledge of the applicant's residence in the United States during the requisite period, the witness's statement does 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 statements must do more than simply state that a witness 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 witness does not state how she dates her initial meeting with the applicant in the United States or specify social gatherings, other special occasions or social events when she saw and communicated with the applicant during the requisite period. The witness also does not state how frequently she had contact with the applicant during the requisite period. The witness does not provide sufficient details that would lend credence to her claimed knowledge of the applicant's residence in the United States during the requisite period. For these reasons the AAO finds that the witness's statement does not indicate that her assertions are probably true.

The remaining evidence in the record is comprised of copies of the applicant's statements and the I-687 application. 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 witness statement currently in the record which attempt to substantiate the applicant's residence in the United States during the statutory period is 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 is not probative.

The record also reveals that on or about November 7, 2006, removal proceedings were instituted against the applicant as an alien present in the United States without having been admitted, pursuant to the Immigration and Nationality Act (Act), as amended, section 212(a)(6)(A)(i). Those proceedings are pending.

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 and 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 additional basis.

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