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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:

[Redacted]

Date:

JUL 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:

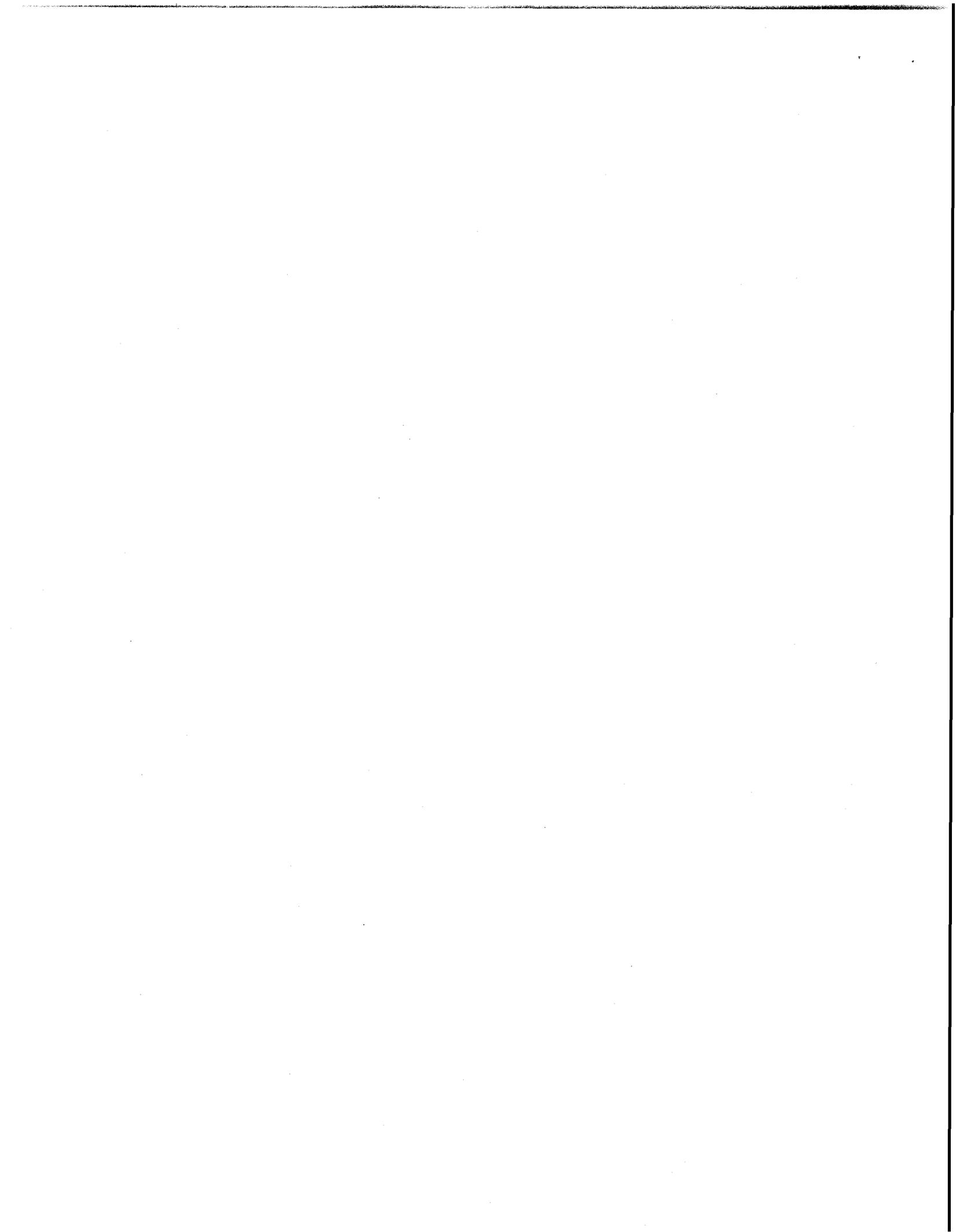
[Redacted]

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 Signature]

Chief, Administrative Appeals Office



DISCUSSION: The application for temporary resident status 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 director denied application, finding that the applicant was ineligible due to her three misdemeanor convictions, and, therefore, was ineligible for temporary resident status. On appeal, the AAO determined that the applicant has two misdemeanor convictions and one conviction for an infraction, and that the applicant's two misdemeanor convictions are not grounds for denial of the application.

On February 16, 2010, the AAO sent the applicant a follow-up communication informing her that additional documentation was required in order to complete the adjudication of her appeal, and requesting that the applicant provide additional evidence. Specifically, the AAO requested that the applicant provide evidence that she entered the United States before January 1, 1982, and that she continuously resided in the United States in an unlawful status since such date for the duration of the requisite period. The AAO also requested evidence of current employment. Further, the AAO requested that the applicant resolve several inconsistencies in the record.

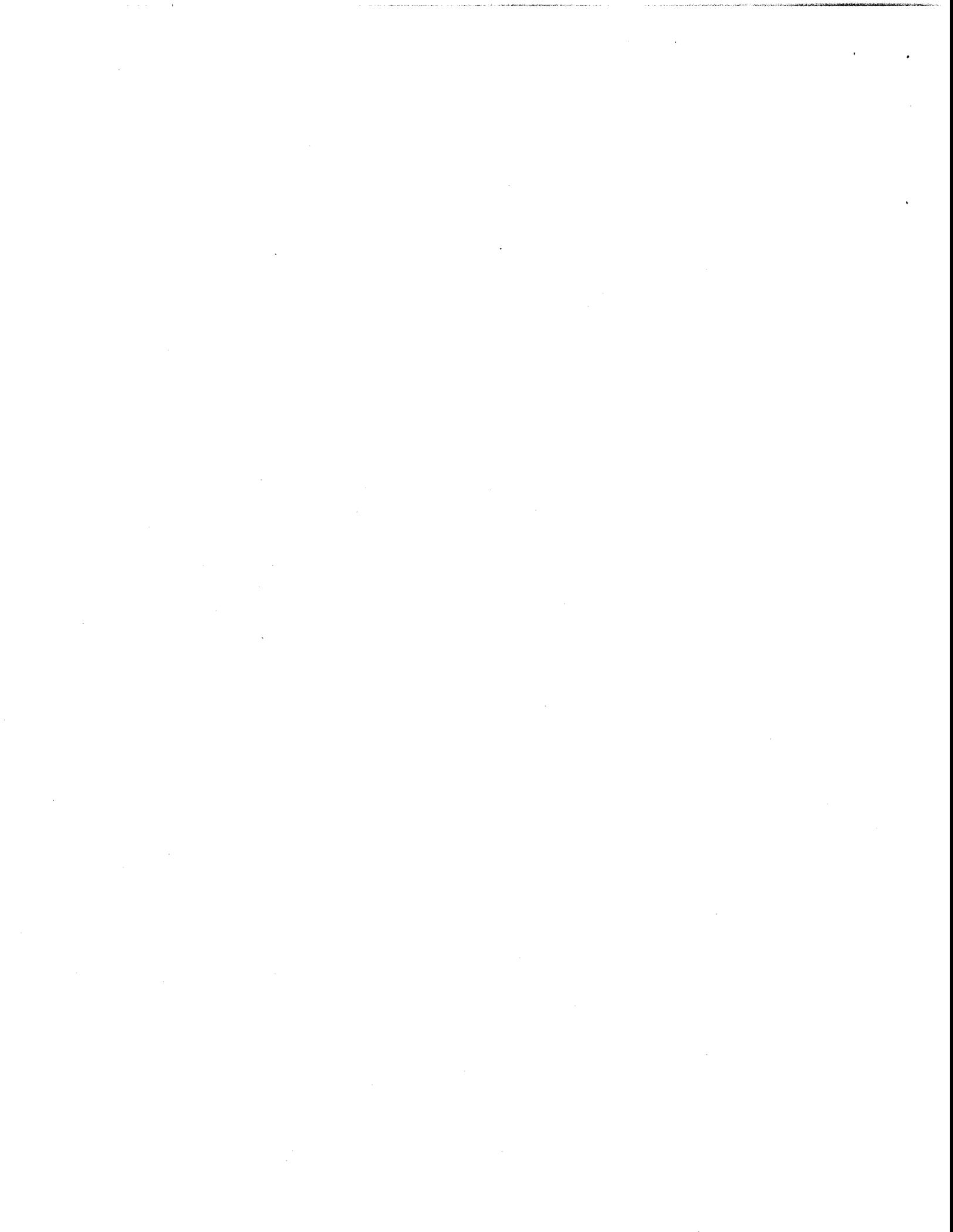
The applicant has submitted additional evidence in response to the request for additional documentation. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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 [REDACTED] 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 [REDACTED]

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

¹ 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).



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).

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 "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 record contains court documents that reflect the applicant has been convicted of the following offenses:

- On November 14, 1997, the applicant was charged with violating the following sections of the California Vehicle Code (VC): section 23152(A), *undue influence of alcohol/drug in vehicle*; section 23152(B), *.08% more weight alcohol drive vehicle*, and 12500(A), *unlicensed driver*. Also on that date, the applicant was charged with violating section 148(A) of the California Penal Code (PC), *resisting arrest/public officer*. On November 18, 1997, the applicant pleaded *nolo contendere*, to the charge of *unlicensed driver*, a misdemeanor, and was sentenced to summary probation for 2 years, and was ordered to pay a fine and serve 8 days in jail. The imposition of sentence was suspended.² Also on that date, the remaining charges were dismissed. (Municipal Court of Los Angeles, 7MT12125).
- On August 1, 2002, the applicant was charged with violating the following sections of the California Vehicle Code (VC): section 23152(A), *undue influence of alcohol/drug in vehicle*; section 23152(B), *.08% more weight alcohol drive vehicle*, and 12500(A), *unlicensed driver*. On August 2, 2002, the applicant pleaded *nolo contendere*, to the charge of *.08% more weight alcohol drive vehicle*, a misdemeanor, and to the charge of *unlicensed driver*, also a misdemeanor. On each charge, the applicant was sentenced to summary probation for 3 years, and was ordered to pay a fine and serve time in jail. The imposition of sentence was suspended. Also on that date, the charge of *undue influence of alcohol/drug in vehicle* was dismissed. On May 18, 2004, the

² A suspended sentence is a form of deferred adjudication. A deferred adjudication is considered a conviction under section 245A of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255a. The applicant meets the two-prong test outlined in Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). First, she entered a plea of guilty. Second, the judge ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Specifically, the judge ordered the applicant serve 2 years probation, pay a fine and serve some time in jail. Clearly, the applicant has been convicted, under the statutory definition of this term provided at section 101(a)(48)(A)(i) of the Act.



applicant's conviction for *unlicensed driver* was reduced from a misdemeanor to an infraction, pursuant to section 17(d)(2)(PC) and 19.8(PC).

The first issue in this case is whether the court's subsequent reclassification as an infraction of the applicant's misdemeanor conviction for a violation of section 12500(a)(VC), *unlicensed driver*, is valid for immigration purposes.

Section 12500(a) of the California Vehicle Code provides as follows:

A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code.

Driving without a valid driver's license in California is a "wobbler" offense. This means that, depending on the circumstances, prosecutors can charge this offense as either a misdemeanor or as a non-criminal infraction. Section 17(d)(2) of the California Penal Code defines when the prosecutor and trial court may exercise their discretion in determining the punishment to be imposed under a "wobbler" statute such as section 12500(VC).³

The court's order of May 18, 2004, that reduced the applicant's criminal conviction from a misdemeanor to an infraction, pursuant to section 17(d)(2)(PC), is entitled to full faith and credit in immigration proceedings.

A misdemeanor includes any offense which is punishable by imprisonment of a term of one year or less, except that it shall not include offenses for which the maximum sentence is five days or less. *See* 8 C.F.R. § 245a.1(o). Pursuant to 19.6 (PC), a conviction of an infraction is not punishable by imprisonment. Therefore, the applicant, for purposes of applying for temporary resident status, has two misdemeanor convictions, *driving without a license* and *.08% more weight alcohol drive vehicle*, and an infraction for *driving without a license*. Therefore, the applicant's two misdemeanor convictions are not grounds for denial of the application.

Further, the applicant has the burden of proving by a preponderance of the evidence that she has resided in the United States for the requisite statutory period. An issue in this proceeding is

³ See Section 17 (PC) -- Felony; misdemeanor; infraction; classification of offenses. ("(d) A violation of any code section listed in [Penal Code] Section 19.8 is an infraction subject to the procedures described in [California Penal Code] Sections 19.6 and 19.7 when: (1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or; (2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.") Section 19.8(PC) lists section 12500 (VC), *driving without a license*, as one of those offenses that may be reclassified as an infraction.



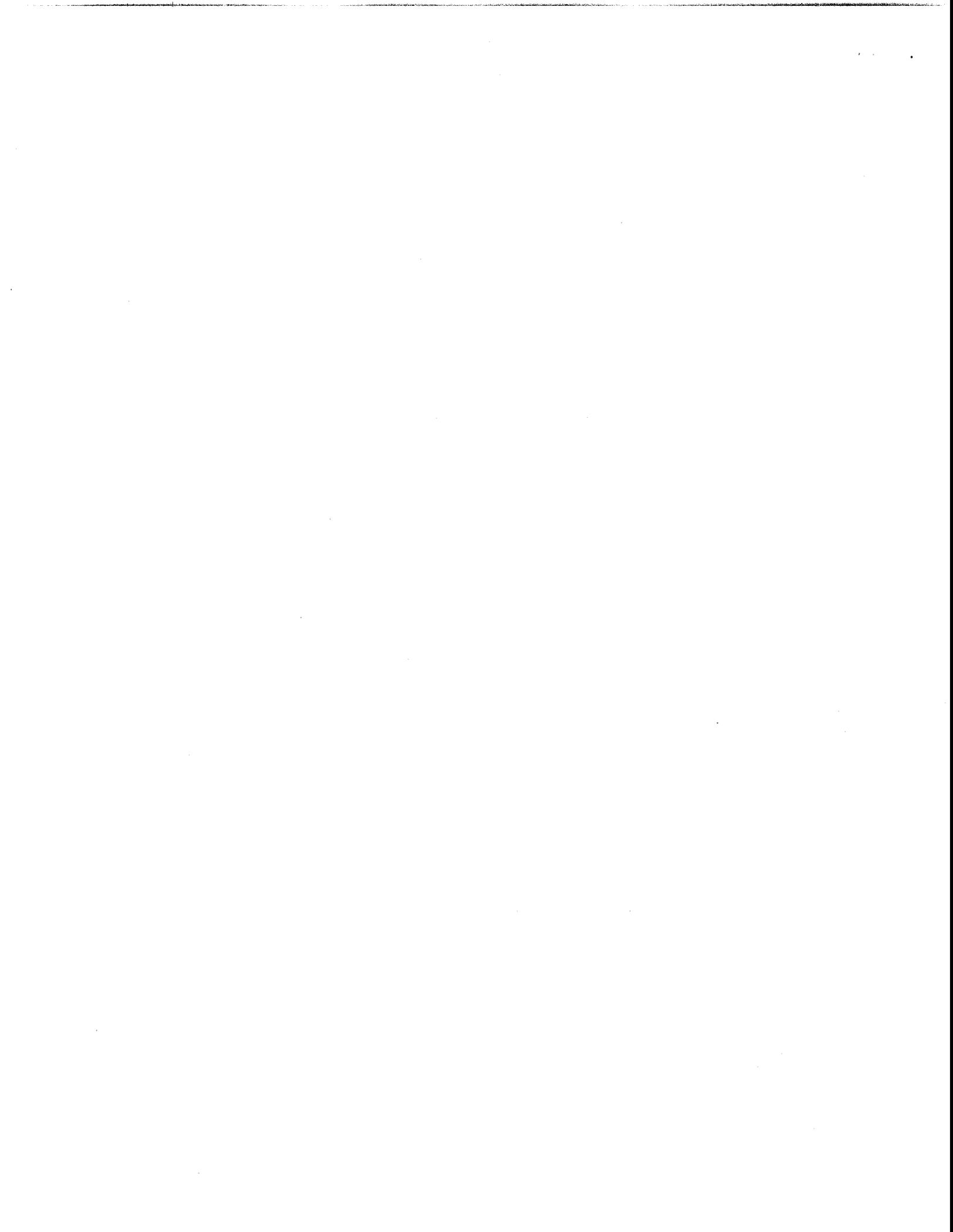
whether the applicant has establish that she (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of her claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of witness statements and documents. The AAO has reviewed each 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 witness statements from the following witnesses:

The statements are general in nature and state that the witnesses 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 her, 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 witnesses do not state how they date their initial meeting with the applicant in the United States or specify social gatherings, other special occasions or social events when they saw and communicated with the applicant during the requisite period. The witnesses 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.

In addition, state that the applicant lived in Anaheim, California from 1980 for the duration of the requisite period. However, their testimony is inconsistent with that of the applicant in the instant I-687 application, in which the applicant states that she lived in Anaheim from 1979 to 1986. states that she has known the applicant since April 1980, and that the applicant lived in Huntington Park from 1980 for the duration of the requisite period. However, in the instant I-687 application the applicant does not list any residences in Huntington Park during the requisite period. In addition, in a statement dated February 19, 2004, the applicant states that she believes she first met Ines Bracamontes in 1983 or 1985. state that the applicant lived in Los Angeles from 1985 for the duration of the requisite period;

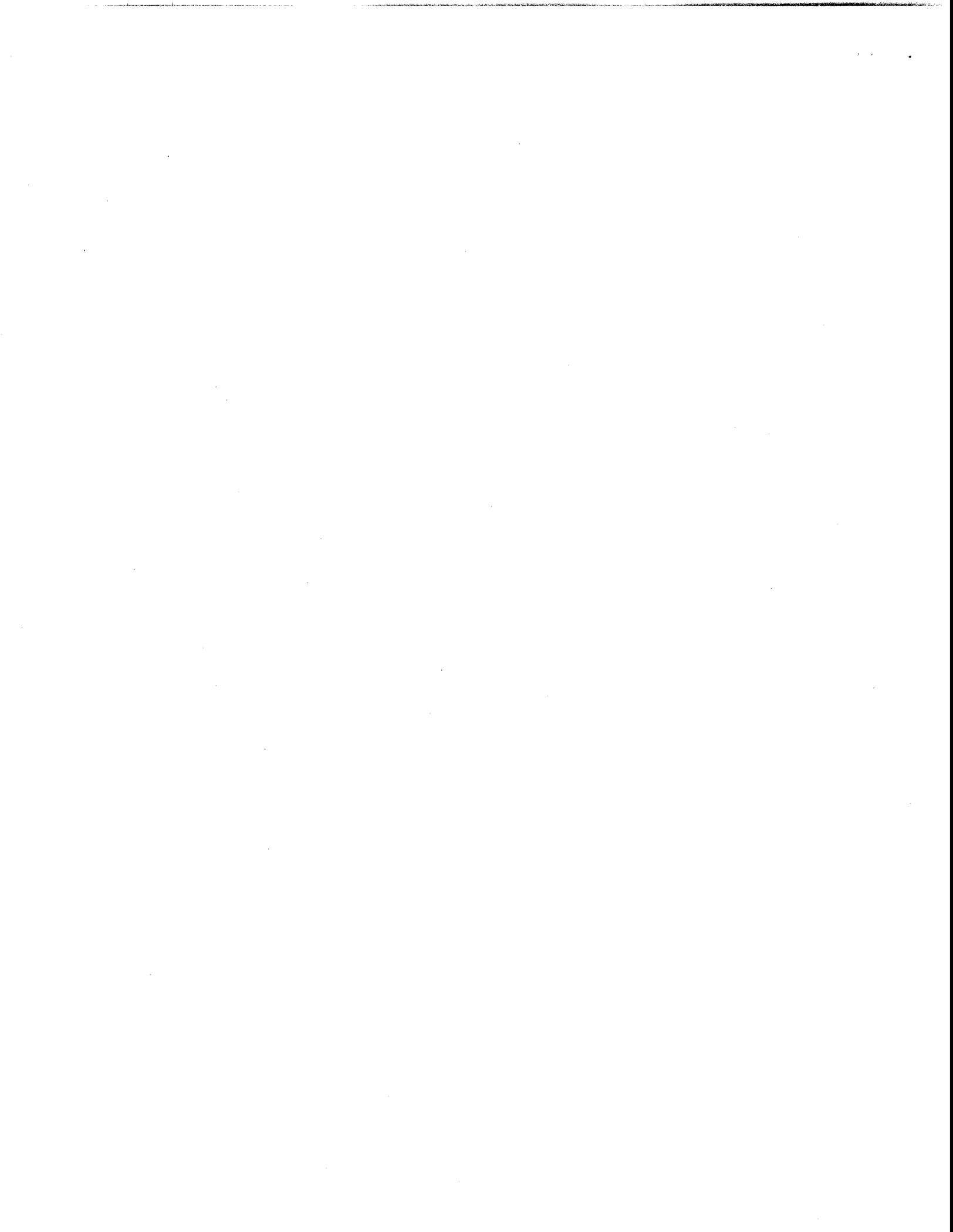


states that the applicant lived in Los Angeles from 1984 for the duration of the requisite period, and Evangelina Elizadle states that the applicant lived in Los Angeles from 1981 for the duration of the requisite period. The testimony of these witnesses is inconsistent with the testimony of the applicant in the instant I-687 application, in which the applicant states that she lived in Los Angeles from 1986 for the duration of the requisite period. In addition, [REDACTED] states that he worked with the applicant from 1984 for the duration of the requisite period at a business called Birrieria Baldomeros. However, in the instant I-687 application, the applicant does not list this company as an employer during the requisite period. Due to these inconsistencies, the testimony of these witnesses has minimal probative value.

The record contains five employment verification letters from [REDACTED] which state that the applicant worked for her as a live-in housekeeper and childcare worker in Anaheim. In the letters dated September 26, 1990, September 24, 2003, and March 14, 2010, the witness states that the applicant began working for her from their first meeting in April 1980 until August 1987. However, in letters dated June 2, 2004, the witness states that the applicant began working for her from their first meeting in January 1981 through approximately 1989. In addition to being inconsistent with itself, the testimony of the witness is inconsistent with the testimony of the applicant in the instant I-687 application, in which the applicant states that she lived at the witness's residence in Anaheim from 1979 until 1986. Due to these inconsistencies, the employment verification letters have minimal probative value.

Further, the employment verification letters of [REDACTED] do not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letters fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, the witness does not state the applicant's daily duties or the number of hours or days she was employed. Furthermore, the witness does not state how she was able to date the applicant's employment. It is unclear whether she referred to her own recollection or any records she may have maintained. For these additional reasons, the employment verification letters are of little probative value.

The applicant has submitted copies of money order receipts, copies of envelopes sent by and to the applicant in the United States, and copies of receipts for registered mail for the period from May 23, 1981 to May 3, 1983 and from August 29, 1985 to April 30, 1988. These documents are some evidence in support of the applicant's *residence* in the United States during some part of these years. However, several of these documents list residences for the applicant on Indiana Avenue in Venice, California and on Oak Street in Inglewood, California. These documents are inconsistent with the testimony of the applicant in the instant I-687 application, in which the



applicant does not list residences in Venice or Inglewood during the requisite period. Due to these inconsistencies, these documents have minimal probative value.

The record contains copies of rent receipts dated November 22, 1987 through March 31, 1988.⁴ The rent receipts do not list a premises address. These documents are some evidence in support of the applicant's residence in the United States for some part of 1987 and 1988.

The applicant has submitted copies of pay stubs from [REDACTED], dated November 27, 1987 through April 29, 1988. These documents are some evidence in support of the applicant's residence in the United States for some part of 1987 and 1988. The applicant has also submitted a copy of a 1987 W-2 form from [REDACTED]. However, in the instant I-687 application, the applicant did not list [REDACTED] during the requisite period. Due to this inconsistency, this document has minimal probative value.

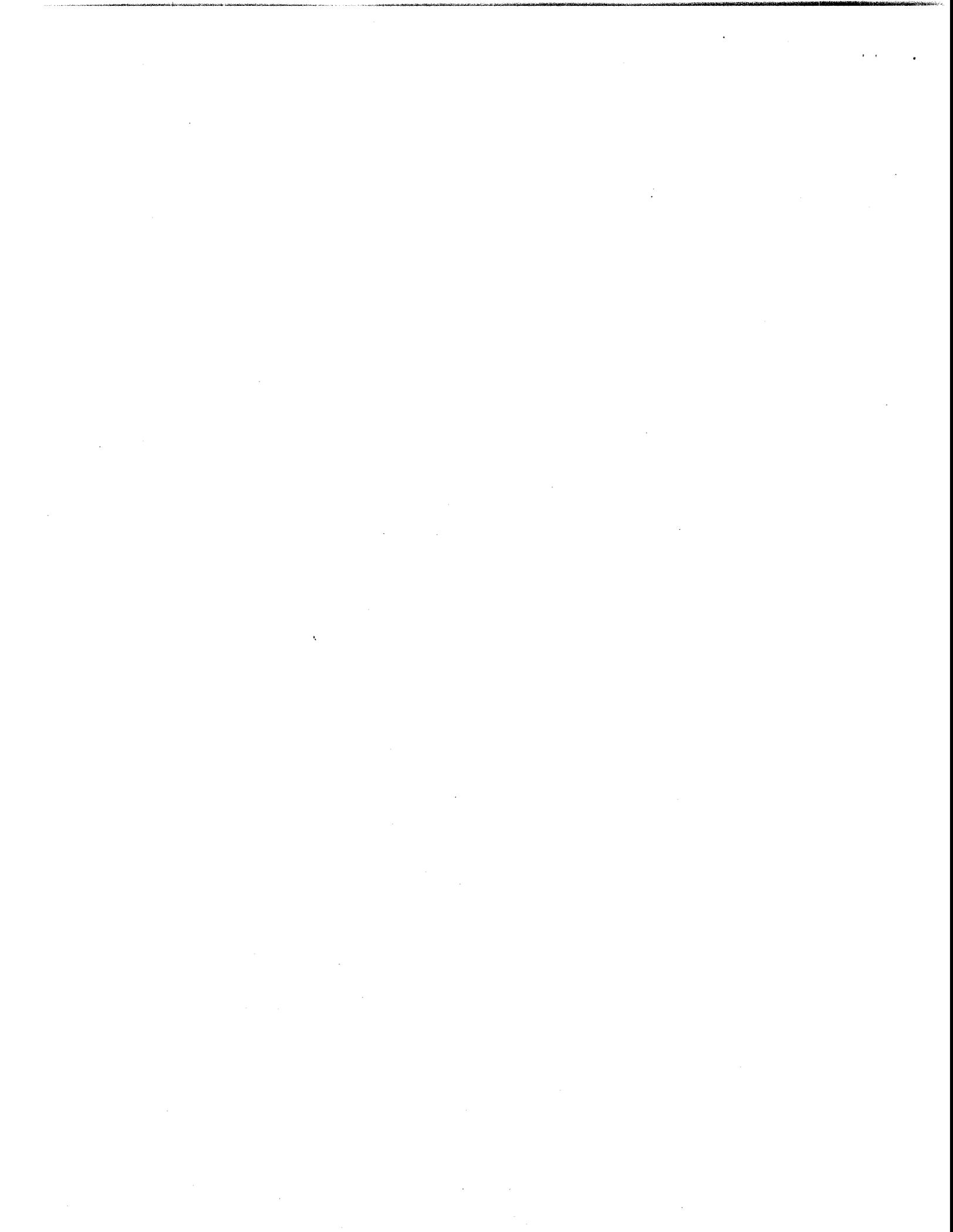
The record contains a receipt from American Music Co. The applicant contends that this receipt is dated 1983. However, the date on the receipt is not legible. Therefore, this receipt will be given no weight.

[REDACTED] of Motor Vehicles identification [REDACTED] the applicant is on Maple Avenue [REDACTED] This is inconsistent with the testimony of the applicant in the instant I-687 application, in which the applicant states that she was residing at [REDACTED] from 1979 to 1986. Due to this inconsistency, this document has minimal probative value.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, an initial I-687 application filed in 1990 to establish the applicant's CSS class membership, and an I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding her entry into and absences from the United States, as well as her residences and employment in the United States during the requisite statutory period.

In the instant I-687 application, the applicant listed residences from [REDACTED] on [REDACTED] in Anaheim, and from 1986 to 1988 on Maple Avenue in Los Angeles. The applicant listed employment from 1979 to 1987 with [REDACTED] in Anaheim, from 1986 to 1987 with DX3 Sumos Apparel in Vernon, and from 1987 to 1988 with Designers Screen Printing in Huntington Park. At the time of her interview, the applicant stated that she first entered the United States in 1979, and that she had two absences from the United States during the requisite period, from March 1986 to April 1986 (due to her mother's death) and from August 23, 1987 to September 15, 1987 (to adopt her youngest brother after her mother's death), respectively. The testimony of the

⁴ According to the copies of receipts, it appears that the applicant paid the rent twice for the month of January 1988.



applicant regarding her 1987 absence is inconsistent with a September 1, 1987 receipt for registered mail, which the applicant identifies as having been received by her in the United States on that date.

In the I-485 application, the applicant stated that she last entered the United States in October 1979. In a statement dated August 23, 2001, the applicant stated that she has not exited the United States since her first entry in October 1979.⁵ Also, in a Form I-765, Application for Employment Authorization dated February 15, 2002, the applicant stated that she last entered the United States in October 1979.

In the initial I-687 application, filed in 1990, the applicant listed residences from April 1979 to April 1980 on Indiana Avenue in Venice, from April 1980 to November 1987 on Via Montenera in Anaheim and from November 1987 for the duration of the requisite period on Maple Avenue in Los Angeles. The applicant listed employment from April 1980 to August 1987 with [REDACTED] from [REDACTED]

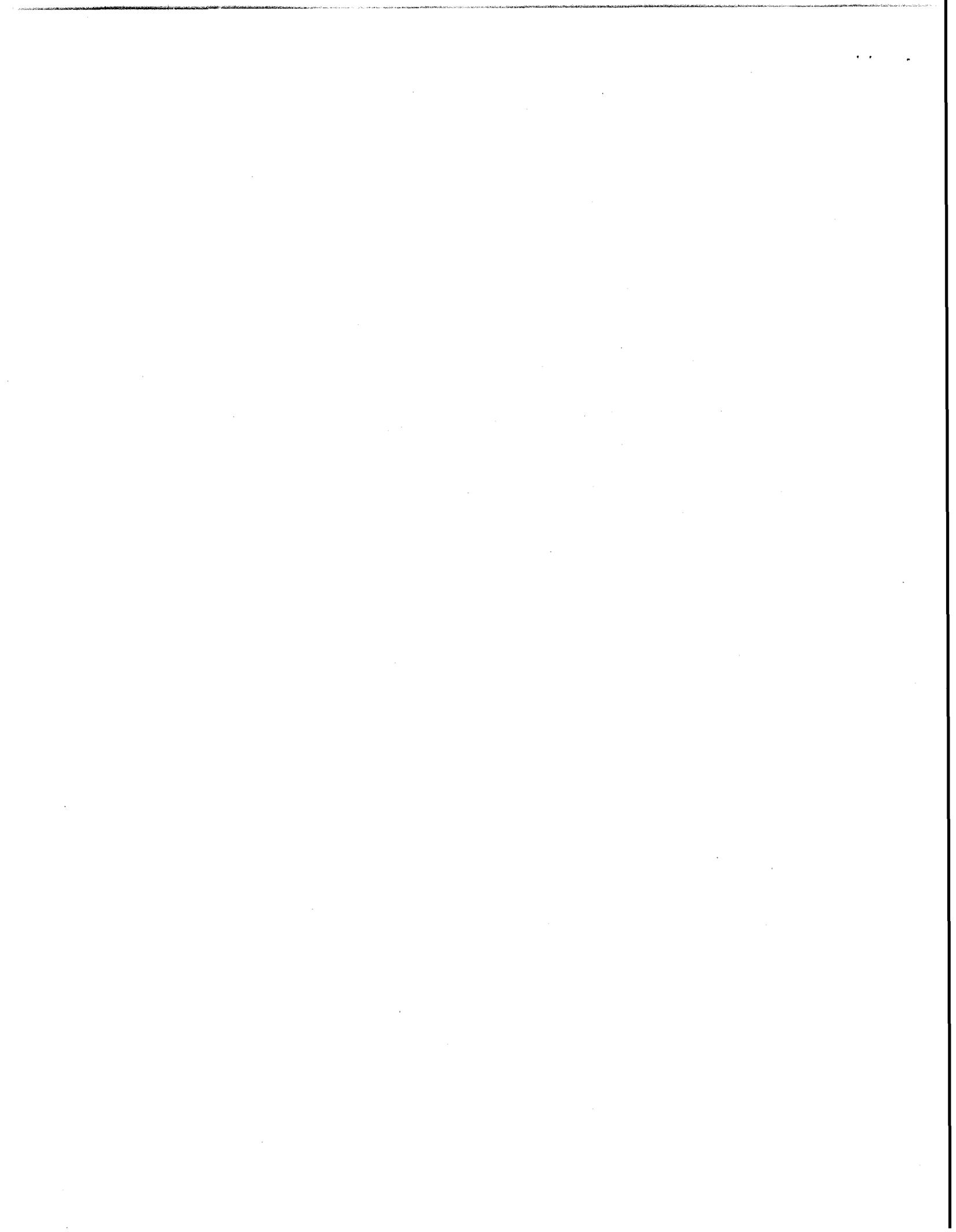
[REDACTED] The applicant listed two absences during the requisite period, in 1986 and 1987, respectively. The applicant stated that the reason for her absence from the United States in 1987 was to adopt her son.⁶ In a class member worksheet dated September 26, 1990, the applicant stated that she first entered the United States on April 2, 1979, and that she was absent from the United States from August 23, 1987 until September 15, 1987.

The AAO cited some of the aforementioned inconsistencies in a request for additional evidence (RFE) dated February 16, 2010. In response to the RFE, the applicant asserted that the evidence which she previously submitted establishes by a preponderance of the evidence that she continuously resided in the United States in an unlawful status for the duration of the requisite time period. She reasserted that she had two absences from the United States during the requisite period, in 1986 and 1987, respectively. The applicant submitted additional evidence in support of her continuous residence in the United States. However, the applicant has not explained the many inconsistencies in her testimony.

The applicant has failed to provide probative and credible evidence of her continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates the applicant entered the United States, lived and worked at particular locations in the United

⁵ In the I-485 application the applicant lists a son named [REDACTED] with a date of birth of July 4, 1978. However, the applicant stated at the time of her interview that [REDACTED] is her brother, but that she "adopted" him, and that she had a birth certificate issued naming her as his mother.

⁶ In the initial I-687 application, the applicant lists [REDACTED] as her son, with a date of birth of April 7, 1979. On appeal, the applicant has provided two birth certificates for [REDACTED] one birth certificate lists his birth date as July 4, 1978 and his mother as the applicant's mother; another birth certificate dated August 30, 1987, which appears to be fraudulent, lists his date of birth as July 4, 1981 and the applicant as his mother. The applicant has not produced any documentation evidencing that she adopted her brother. The applicant has made material misrepresentations in asserting the reason for her absence from the United States during the requisite period, and thus casts doubt on her eligibility for temporary resident status. By engaging in such an action, the applicant has negated her own credibility, the credibility of her claim of continuous residence in this country for the requisite period, and the credibility of all documentation submitted in support of such claim.



States, and was absent from the United States are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. 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). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the evidence submitted by the applicant has not established that she 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 such that they might overcome the inconsistencies in the record regarding the applicant's claim that she maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she 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.

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

