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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

PUBLIC COPY

41

[Redacted]

FILE:

[Redacted]

Office: SACRAMENTO

Date:

JUL 22 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:

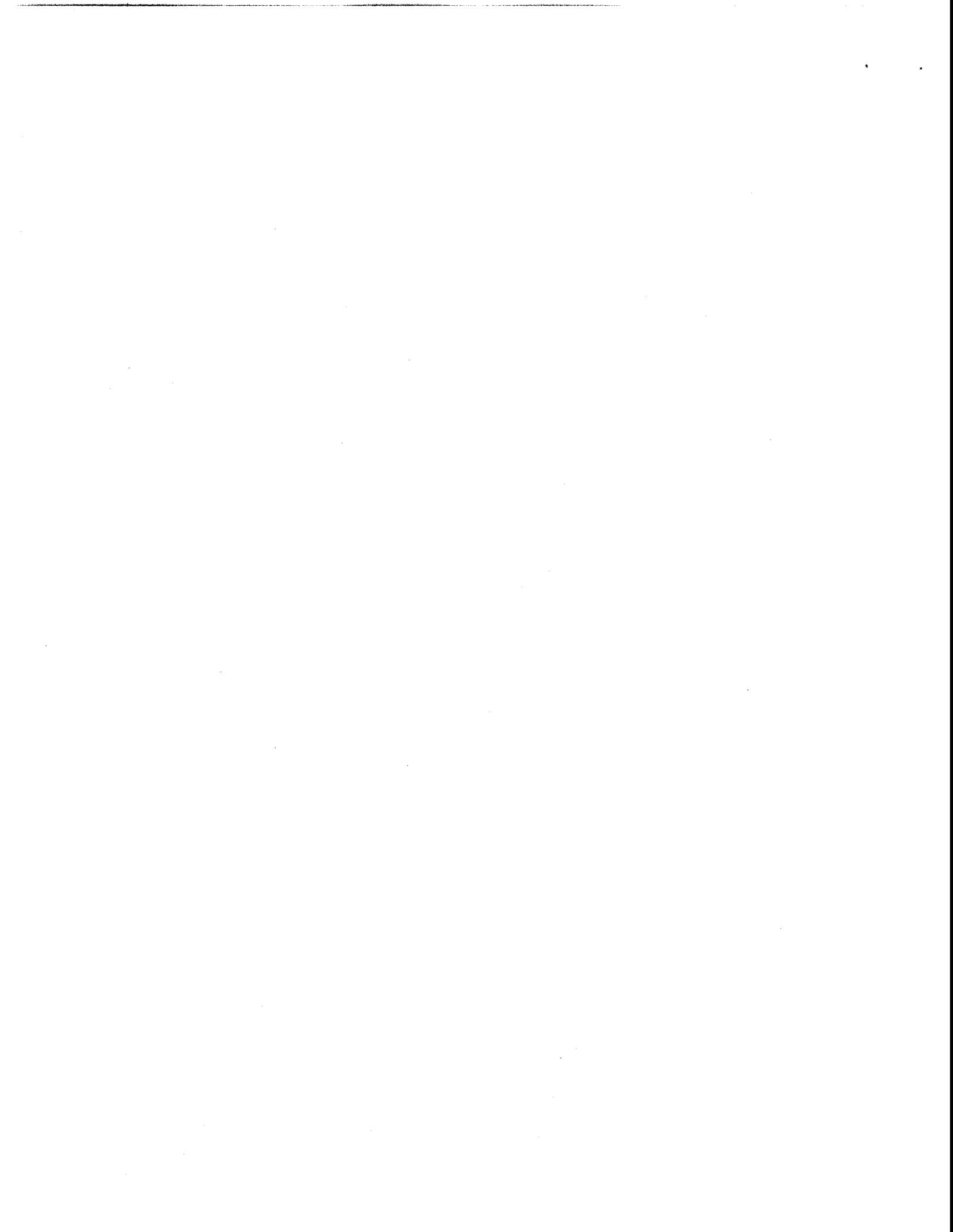
[Redacted]

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 was denied by the director of the Sacramento 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 not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

On appeal, counsel contends that the evidence which the applicant previously submitted establishes by a preponderance of the evidence that he continuously resided in the United States in an unlawful status for the duration of the requisite period.

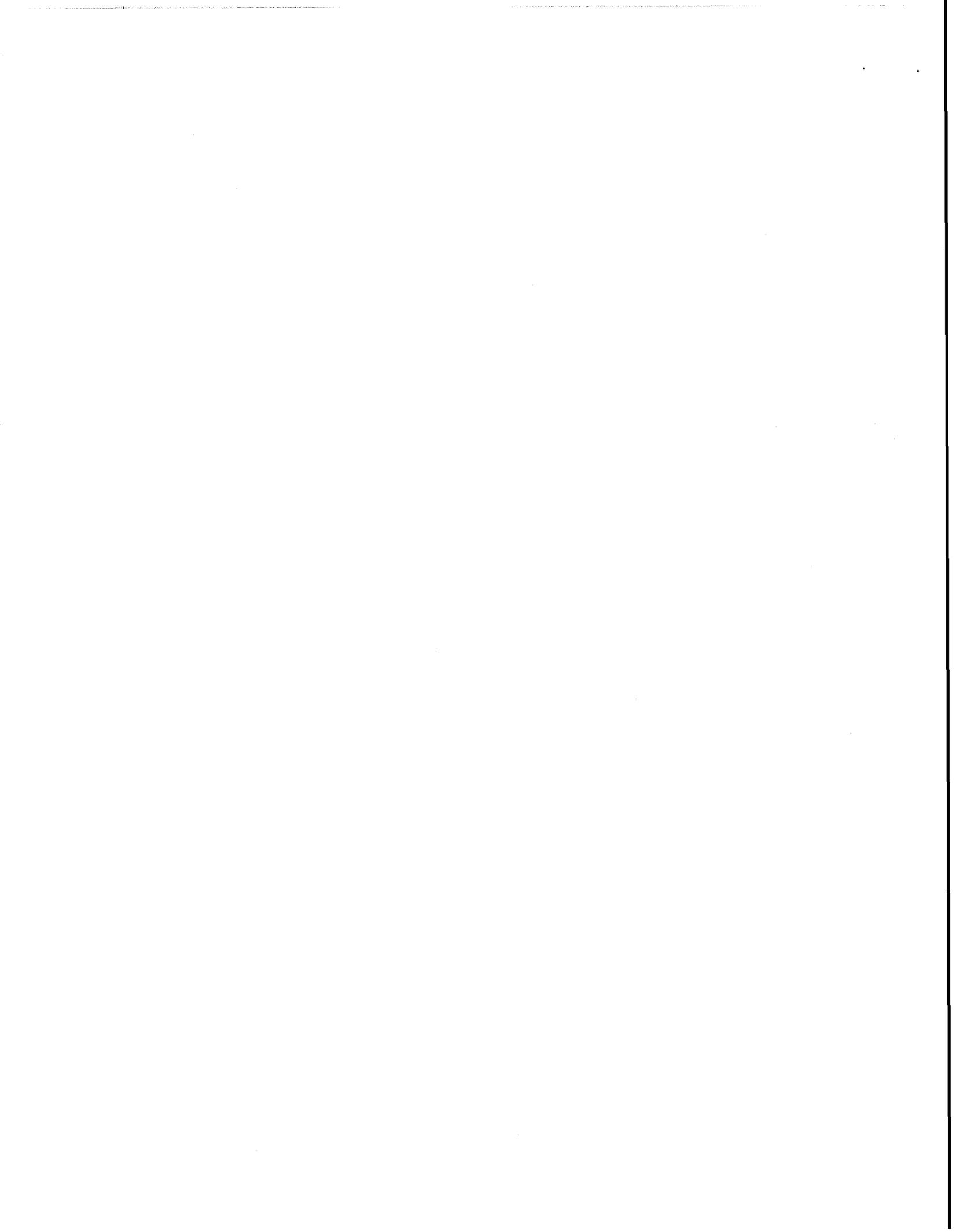
The AAO has considered counsel's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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] 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 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).

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).



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).

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 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 [REDACTED] his father, [REDACTED]

and an unidentified witness, who states that he is ex-councillor of a municipal corporation in [REDACTED]. 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 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 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 also do not state how frequently they had contact 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, the witness statement of [REDACTED] states that he resided with the applicant at 172-16 89th Avenue in New York for five months, although he does not specify the period when he lived with the applicant. The testimony of the witness is inconsistent with the testimony of the applicant in the initial I-687 application, filed in 1990 to establish the applicant's CSS class membership, in which the applicant does not list a residence on 89th Avenue in New York. Due to these inconsistencies, the testimony of the witness has minimal probative value. In addition, witness Harbans Singh and the unidentified witness from [REDACTED] India appear to have resided in India during the requisite statutory period, and would, therefore, not have personal knowledge of the applicant's continuous residence in the United States for the duration the requisite period. Further, [REDACTED] the applicant's father, does not state that he was a resident of the United States during the requisite statutory period. For these reasons, the statements of these witnesses have minimal probative value.

The record contains two employment verification letters from [REDACTED] owner of [REDACTED]. The record also contains an employment



verification letter from [REDACTED] owner [REDACTED]. Further, the record contains an employment verification letter from each of two representatives of Ghotra Waterproofing Company in Brooklyn.

[REDACTED] states that the applicant worked for B.B.S. Home Improvement from 1982 for the duration of the requisite period as a part time concrete mixer and brick repairer.

[REDACTED] states that the applicant worked for Sirpunch Construction Company from 1984 to 1987, although she does not describe the applicant's job duties, or state whether he worked on a full time or part time basis.

[REDACTED]

The employment verification letters from B.B.S. Home Improvement, Sirpunch Construction [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 witnesses do not state the applicant's daily work duties, the number of hours or days he was employed, or the location at which he was employed. Furthermore, the witnesses do not state how they were able to date the applicant's employment. It is unclear whether they referred to their own recollection or any records they may have maintained. For these reasons, the employment verification letters are of little probative value.

Further, the applicant does not list any employment with B.B.S. Home Improvement or Sirpunch Construction Company in the initial I-687 application. Due to this inconsistency, these employment verification letters have minimal probative value.

[REDACTED]

[REDACTED] The witness states that he has known the applicant since 1986 and that the applicant has been a regular visitor to the temple. However, the applicant failed to list his involvement in the Sikh Cultural Society or any other religious organization on the initial I-687 application. At part 34 of the application, where applicants are asked to list their involvement with any religious organizations, the applicant stated, "none". This is an inconsistency which is material to the applicant's claim in that it has a direct bearing on the applicant's residence in the United States for the duration of the requisite period. As stated above, 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, supra*. This contradiction undermines 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.

More importantly, the witness statement of [REDACTED] does not meet the requirements set forth at 8 C.F.R. § 245a.2(d)(3)(v), which provides requirements for attestations made on behalf of an applicant by churches, unions, or other organizations. Attestations must: (1) identify applicant by name; (2) be signed by an official (whose title is shown); (3) show inclusive dates of membership; (4) state the address where the applicant resided during membership period; (5) include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; (6) establish how the author knows the applicant; and (7) establish the origin of the information being attested to. This attestation fails to comply with the cited regulation. Therefore, this attestation is of little probative value.

The applicant has submitted a copy of a receipt written on a prescription form dated [REDACTED] from [REDACTED]. This receipt is some evidence of the applicant's presence in the United States for some part of 1982.

The record contains a copy of a receipt dated June 6, 1983, from [REDACTED] in Jamaica. This receipt is some evidence of the applicant's presence in the United States for some part of 1983.

The applicant submitted copies of federal tax returns for the years 1982 through 1985. In addition, the applicant submitted a copy of his request for the Internal Revenue Service (IRS) to provide copies of federal tax returns filed by him for the years 1982 through 1988. The file also contains a response from the IRS, stating that it has no information that the applicant filed federal income tax returns for those tax years. Due to this inconsistency, the tax returns have minimal probative value.

The record contains two stamped envelopes with illegible postmark dates.

While the documents listed above indicate that the applicant resided in the United States for some part of the requisite period, considered individually and together with other evidence of record, they do not establish the applicant's continuous residence for the duration of the requisite period.

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, an I-485 application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act, and three Forms I-130, petitions for alien relative, filed on behalf of the applicant by his father, mother and sister, respectively. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his residences and employment in the United States during the requisite statutory period.



In the initial I-687 application, the applicant listed a residence from October 1981 for the duration of the requisite period on Henley Road in Jamaica Estate in New York. The applicant listed employment with Ghotra Constuction Company from December 1981 to July 8, 1987, then from August 1987 for the duration of the requisite period.

In the instant I-687 application, the applicant listed residences in New York as follows: from October 1981 for the duration of the requisite period on [REDACTED] and, from June 1982 to November 1982 on 89th Avenue in Jamaica. The overlapping dates are incongruous. In addition, the applicant listed employment during the requisite period in New York as follows: from December 1981 for the duration of the requisite period at Ghotra Construction; from January 1982 for the duration of the requisite period at BBS Home Improvement Contractors; and, from August 1984 to June 1987 at Sirpunch Construction. There are contradictions as to when and where the applicant resided and worked. On appeal, counsel asserts that BBS and Sirpunch are subcontractors of [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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. The inconsistencies regarding the dates the applicant resided and worked at a particular location in 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 agrees with the director that the evidence submitted by the applicant has not established that he 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 he maintained continuous residence in the United States throughout the statutory period, and thus are not probative. Therefore, the applicant has failed to establish his continuous unlawful residence in the United States for the requisite period, and he is ineligible for temporary resident status on this basis.

The record also reveals that the applicant has the following criminal history record:



- On October 7, 1998, the Auburn Sheriff's Office arrested the applicant and charged him with a violation of the California Penal Code, (PC), section 148.5, *making a false report of a crime*. The applicant was also charged with another violation which was subsequently dismissed, but the record does not contain information regarding the nature of that violation. On October 7, 1998, the applicant pleaded *nolo contendere* to the charge, a misdemeanor. On that date, the applicant was sentenced to 36 months of probation, 45 days in the county jail, ordered to attend "theft classes", and ordered to pay a fine. (Superior Court of California, Placer County, case number R47240). Thereafter, the applicant filed a petition with the trial court to expunge the conviction pursuant to section 1203.4 of the California Penal Code. On October 15, 2001, the court granted the applicant's motion and ordered that the applicant's conviction be set aside and vacated, a plea of not guilty entered, and the matter be dismissed, pursuant to section 1203.4 of the California Penal Code.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

First, the AAO notes that the state court's expungement of the applicant's conviction under section 1203.4 of the California Penal Code does not eliminate the immigration consequences of the applicant's conviction. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In general, the Ninth Circuit has consistently ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).² Thus, the court's order of October 15, 2001, that expunged the applicant's misdemeanor conviction under section 1203.4 of the California Penal Code, is ineffective to remove the immigration effect of the underlying conviction. Therefore, for immigration purposes, the applicant stands convicted of a misdemeanor charge of making a false report of a crime. Two misdemeanor convictions are not disqualifying.

² See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

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.

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

