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Office of Administrative Appeals MS 2090  
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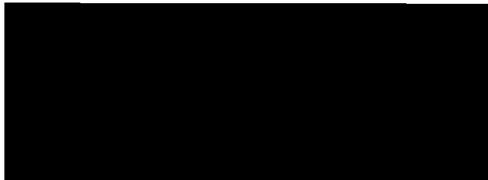
FILE:



Office: ATLANTA

Date: SEP 02 2010

IN RE: Applicant:



APPLICATION: Application for Temporary Resident Status under 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 remanded for further action, you will be contacted.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, 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 Atlanta office. The matter is now before the Administrative Appeals Office (AAO) for adjudication. 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 statutory period.

On appeal counsel for the applicant asserts 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 time period. Counsel asserts that he will submit a brief within 30 days. Counsel has not submitted a brief on appeal. The applicant has not submitted any additional evidence on appeal.<sup>1</sup>

On July 7, 2010, the AAO sent the applicant a follow-up communication informing the applicant that additional documentation was required in order to complete the adjudication of his appeal, and requesting that the applicant provide additional evidence. Specifically, the AAO requested that the applicant provide additional evidence that he entered the United States before January 1, 1982, and that he continuously resided in the United States in an unlawful status for the entire requisite period. Further, regarding the applicant's criminal offenses, the AAO requested the state charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, the judgment, and a full court disposition for each of those criminal offenses, as listed below:

- On June 22, 1995, in Los Angeles the applicant was charged with violating the following sections of the California Penal Code (PC): 273d (PC), *inflict injury upon child*; 236 (PC), *false imprisonment*; 273.5a (PC), *inflict corporal injury spouse cohab*, and 273a(b) (PC) *willful cruelty to child*. The record contains information that the applicant was convicted of a violation of 273.5a (PC), *inflict corporal injury spouse cohab*, and a violation of 273a(b) (PC), *willful cruelty to child*, and that he was sentenced to a term of imprisonment and a term of probation for each violation. (Police Department of Los Angeles, case number [REDACTED])

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<sup>1</sup> The record reveals that the applicant's FOIA request, number [REDACTED] was processed on October 28, 2009.

- On September 19, 2001, the applicant pleaded guilty to a violation of section 16-5-23 of the Official Code of Georgia Annotated (O.C.G.A.), *simple battery*, a misdemeanor. The applicant was sentenced to 6 months in jail. Also on September 19, 2001, the applicant pleaded guilty to a second violation of section 16-5-23 (O.C.G.A.), *simple battery*, a misdemeanor. The applicant was ultimately sentenced to 12 months probation. (Superior Court of Georgia, Gordon County, case number [REDACTED]).

The applicant did not respond to the AAO's request. 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.<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) 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, 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).

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<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).

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). Within the legalization program, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

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).

Additionally, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for temporary resident status. But, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. See 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if “the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.” *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); see also *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003). For the purpose of the petty offense exception, “the maximum penalty possible’ . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed.” *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).

The applicant has not established that he is not ineligible for adjustment of 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 for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5). The applicant failed to submit evidence to establish the criminal dispositions of his arrests. This is another basis to deny the application.

In addition, the record contains information that the applicant has four misdemeanor convictions, for *inflict corporal injury spouse cohab, willful cruelty to child*, and two counts of *simple battery*. The regulation at 8 C.F.R. § 245a.2(c)(1) states that the application for temporary resident status of an alien who has been convicted of three or more misdemeanors may not be approved. As stated above, within the legalization program there is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. The applicant has failed to establish that he is admissible and, therefore, eligible for adjustment to temporary resident status on this additional basis.

Further, the applicant’s convictions for *inflict corporal injury spouse cohab, willful cruelty to child, and battery*, would constitute crimes involving moral turpitude (CIMT’s), which would render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and therefore ineligible for temporary resident status.

Moral turpitude refers generally to conduct that is inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. *Matter of L-V-C-*, 22 I&N Dec. 594, 603 (BIA 1999). Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, so it is the nature of the act itself

and not the statutory prohibition of it which renders a crime one of moral turpitude. Matter of Franklin, 20 I&N Dec. 867, 868 (BIA 1994).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 61 5, 61 7-1 8 (BIA 1992), that:

Moral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. . . .

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The crime of corporal injury to a spouse has been held to be a CIMT. See *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), in which the BIA, examining section 273.5(a) of the California Penal Code under which the applicant was convicted, held that the willful infliction of corporal injury on a person with whom one has a familial relationship is an act of depravity which is contrary to accepted moral standards and is, therefore, a crime involving moral turpitude; *Matter of Garcia-Hernandez*, 23 I. & N. Dec. 590 (BIA 2003), finding that a California misdemeanor conviction for corporal injury to a spouse was a CIMT; *Grageda v. U.S. Immigration and Naturalization Service*, 12 F.3d 919 (9<sup>th</sup> Cir. 1993)(conviction for spousal abuse under California law was offense of moral turpitude). See also *Matter of Phong Nguyen Tran*, 21 I&N Dec. 291 (BIA 1996).

In addition, the crime of willful cruelty to a child may be held to be a CIMT. The Board of Immigration Appeals has recognized that assault and battery offenses may appropriately be classified as crimes of moral turpitude if they necessarily involved aggravating factors that significantly increased their culpability. For example, moral turpitude necessarily inheres in assault and battery offenses that are defined by reference to the infliction of bodily harm upon a person whom society views as deserving of special protection, such as a child, a domestic partner, or a peace officer, because the intentional or knowing infliction of injury on such persons reflects a degenerate willingness on the part of the offender to prey on the vulnerable or to disregard his social duty to those who are entitled to his care and protection. *Garcia v. Att'y Gen. of U.S.*, 329 F.3d 1217, 1222 (11th Cir. 2003); *Grageda v. INS*, *supra*; *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969); *Matter of Tran*, 21 I&N Dec. 291 (BIA 1996)(in which the alien was also convicted under section 273.5(a) of the California Penal Code); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). See also *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006); *Matter of Solon*, 24 I&N Dec. 239 (BIA 2007).

Further, although simple battery is generally not a crime involving moral turpitude, it may be rendered such by aggravating circumstances. *See Grageda v. INS, supra* (willful infliction of injury to a spouse is CIMT); *Guerrero de Nodahl v. INS, supra* (willful infliction of injury to a child is a CIMT); *Gonzales v. Barber*, 207 F.2d 398, 400 (9th Cir. 1953), *aff d*, 347 U.S. 637 (1954) (California conviction for assault with deadly weapon is CIMT).

Therefore, the applicant's four misdemeanor convictions constitute crimes involving mortal turpitude (CIMT's), which render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and therefore ineligible for temporary resident status on this additional basis.

A further 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 one document. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. 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.

At the time of completing his I-687 application the applicant listed residences in the United States beginning in 1981 and employment in the United States beginning in 1988. The applicant submitted, as proof of his asserted date of entry into the United States and continuous residence in the United States during the requisite period, statements from witnesses [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 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.

The applicant has submitted an employment verification letter from [REDACTED] stating that the applicant worked for her as a market helper from January 1982 to January 1987.

The employment verification letter of [REDACTED] does 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 witness's employment verification letter fails to comply with the above cited regulation because it lacks considerable detail regarding the applicant's employment. For instance, the witness does not state the applicant's daily duties, the number of hours or days he was employed, or the location at which he 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. Lacking relevant information, the letter regarding the applicant's employment fails to provide sufficient detail to verify the applicant's claim of continuous residence in the United States for the duration of the requisite statutory period. For these reasons, the witness's employment verification letter is of little probative value.

The record contains federal and state tax returns for 1988 and a statement from earnings from Social Security Administration for the year 1988. Although these documents are some evidence in support of the applicant's residence in the United States for some part of 1988, they do not establish his continuous residence in the United States 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, a Form I-485, application for status as a permanent resident under the Legal Immigration Family Equity (LIFE) Act, and the initial I-687 application, filed in 1990 to establish the applicant's CSS class membership. However, 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 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 sufficient to establish 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 is ineligible for permanent residence in the legalization program on this additional basis.

The record also reveals that on or about October 9, 2001, administrative removal proceedings were instituted against the applicant under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, as an alien convicted of an aggravated felony. The status of these proceedings is not known.

Therefore, 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*. In addition, the applicant is ineligible for temporary resident status because he has been convicted of three or more misdemeanors, and because he has been convicted of multiple CIMT's. Therefore, the applicant is not eligible for temporary resident status under section 245A of the Act for these reasons, with each considered as an independent and alternative basis for denial.

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