

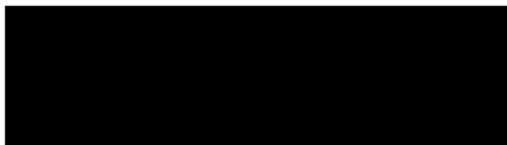
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE:



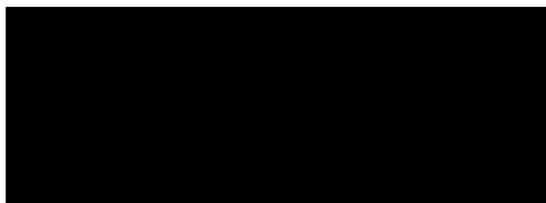
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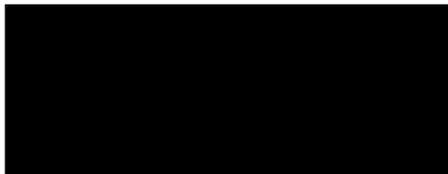
IN RE:

Applicant:



APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the  
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status was terminated by the director, Houston. The decision 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). The application was approved on October 23, 1987. After issuing a notice of intent to terminate (NOIT), the director terminated the application on May 20, 2010 because the applicant was statutorily ineligible on account of his one felony and three misdemeanor convictions. The director concluded that the applicant was not admissible to the United States because of his disqualifying criminal convictions, and was not eligible to adjust to temporary resident status.

On appeal, counsel argues that the applicant's case should have been adjudicated as of the date of filing and that the applicant is entitled to an interview.

The status of an alien lawfully admitted for temporary residence under section 245A(a)(1) of the Act may be terminated at any time if it is determined that the alien was convicted of any felony, or three or more misdemeanors. 8 C.F.R. § 245a.2(u)(1)(ii).

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, "[t]ruth is to be determined not by the quantity of evidence alone but by its

quality.” *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

The issue in this proceeding is whether the applicant has established his eligibility for temporary resident status pursuant to the terms of the settlement agreements. The AAO has reviewed the evidence of record, including the applicant’s criminal record, and concludes that the applicant has not met his burden of proof to establish his eligibility for temporary resident status.

The record before the AAO reveals that the applicant has multiple criminal convictions. 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. 8 C.F.R. § 245a.2(c)(1). “Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

“Misdemeanor” means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The record reflects the applicant has the following convictions:

- A January 7, 1999 conviction for violating section 49.08 of the Texas Penal Code – *Intoxication Manslaughter* – in the District Court of Harris County, Texas (Cause No. 788605). This offense is considered a felony.
- A February 28, 1994 conviction for violating section 521.457 of the Texas Transportation Code – *Driving While License Suspended 6687b(34)(a) VCS* - in the Harris County Criminal Court, Texas (Cause No. 940802401010). This offense is considered a misdemeanor.
- An April 3, 1995 conviction for violating section 521.457 of the Texas Transportation Code – *Driving While License Suspended 6687b(34)(a) VCS* - in the Harris County Criminal Court, Texas (Cause No. 943726201010). This offense is considered a misdemeanor.
- A March 24, 1993 conviction for violating section 521.457 of the Texas Transportation Code – *Driving While License Suspended*- in the Harris County Criminal Court, Texas (Agency Arrest No. 25731). This offense is considered a moving traffic violation.

On appeal counsel argues that at the time of filing on April 23, 1990, the applicant met the residency requirements of Section 245A(b)(1) of the Act and was admissible as he had not been convicted of any crimes. Counsel does not provide any evidence in support of his argument that the applicant's case should be adjudicated based upon the facts as of April 23, 1990. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). An application for admission to the United States is a continuing application, and admissibility is determined on the basis of the facts and the law at the time that the application is finally considered or adjudicated. *See Matter of Alarcon*, 20 I&N Dec. 557, 1992 WL 249104 (BIA).

Counsel also argues that under Section 245A(b)(1) of the Act, approval of the applicant's application is mandatory. Section 245A(1) of the Act does not mandate approval of the application and instead states that the applicant must meet several requirements including admissibility. Section 245A(1)(C)(ii) of the Act specifically states that the applicant must establish that he "has not been convicted of any felony or three or more misdemeanors committed in the United States." 8 C.F.R. § 245a.2(u)(1)(ii).

Finally, counsel argues that the applicant must have an interview in order to demonstrate that he meets the English and civics requirements. However, the applicant has not established that he is eligible for permanent resident status pursuant to 8 C.F.R. § 245a.3(b)(3). Therefore, even if the applicant meets the English and civics requirements, he will continue to be ineligible due to his inadmissibility.

The applicant stands convicted of one felony and two misdemeanors. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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