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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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Date: **DEC 28 2011**

Office: LAS VEGAS

FILE: 

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. 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 Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), was denied by the director of the Las Vegas office. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On August 16, 2005, the applicant filed an application for status as a temporary resident (Form I-687). The director erroneously denied the I-687 application, finding that the applicant abandoned the application, pursuant to 8 C.F.R. § 103.2(b)(13), by failing to respond to a notice of intent to deny (NOID) the application.¹ Because the director erred in denying the application based on abandonment, on October 12, 2010, the director issued a notice advising the applicant of his right to appeal the decision to the AAO. On November 8, 2011, the AAO withdrew the director's decision. The matter is now before the AAO on appeal.

On November 8, 2011, the AAO issued a NOID regarding the I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested that the applicant provide evidence that he entered the United States before January 1, 1982, and that he continuously resided in the United States in an unlawful status since such date for the duration of the requisite period. In addition, since the record contains materially inconsistent testimony regarding the date of the applicant's initial entry into the United States, he was requested to provide a listing of all of his entries and exits from the United States, since the date of his initial entry and through the end of the requisite statutory period. Further, the applicant was requested to provide a full criminal disposition regarding his January 6, 2000 arrest, and information regarding other notations in his criminal history. In response to the NOID, counsel has provided an additional statement from the applicant, an additional statement from [REDACTED] and an additional statement from a representative of the [REDACTED].²

On appeal, counsel 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 period. Counsel also asserts that the applicant has met his burden of establishing that he is otherwise admissible to the United States, and that he does not have a disqualifying criminal conviction that renders him ineligible to adjust to temporary resident status.³ The AAO has reviewed all of the evidence, and has made a *de novo* decision based

¹ On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. See, *CSS v. Michael Chertoff*, Case 2:86-cv-01343-LKK-JFM.

² In response to the NOID, the applicant has also submitted an additional copy of the December 22, 2010, witness statement of [REDACTED], which was previously submitted into the record. The applicant has also submitted copies of the birth certificates of his three children, all born after the requisite statutory period. Since evidence of residence after May 4, 1988 is not probative of residence during the requisite period, these documents shall not be discussed.

³ On appeal, the applicant also asserts that he relied, to his detriment, on a prior unidentified representative, who may or may not have been an attorney. The applicant states that the representative incorrectly completed the applicant's initial

on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.⁴

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).

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 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).

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. § 245a.2(c)(1).

I-687 application, signed by the applicant in 1990, and a CSS class member worksheet. It is noted that any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has not submitted any of the required documentation to support an appeal based on ineffective assistance of counsel. Therefore, the applicant is found not to have established a claim of ineffective assistance of counsel. In addition, there is no remedy available for an applicant who assumes the risk of authorizing an unlicensed attorney or unaccredited represented to undertake representations on his or her behalf. See 8 C.F.R. § 292.1. In addition, the AAO only considers complaints based upon ineffective assistance against accredited representatives. Cf. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988)(requiring an appellant to meet certain criteria when filing an appeal based on ineffective assistance of counsel).

⁴The 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).

"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).

In addition, section 212(a)(2) of the Immigration and Nationality Act (Act) provides, in pertinent part, that:

(A) *Conviction of certain crimes.*—

(i) In General.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —

. . . (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

Further, an applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, if there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. In order for an applicant to be inadmissible under section 212(a)(2)(C)(i) of the Act, the only requirement is that an immigration officer “knows or has reason to believe” that the applicant is or has been an illicit trafficker in a controlled substance, or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000). In order for an immigration officer to have sufficient “reason to believe” that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C)(i) of the Act, the conclusion must be supported by “reasonable, substantial, and probative evidence.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)). Moreover, an applicant may be deemed inadmissible under section 212(a)(2)(C)(i) of the Act even where there has been no admission and no conviction, so long as there is “reason to believe” that the applicant engaged in the proscribed conduct relating to trafficking in a controlled substance.

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 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 throughout the requisite period. 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 a Wholesale Club membership card. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote the witness statements 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.

The record contains witness statements from [REDACTED] (the applicant's brother). 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 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, or provide a particular location where he was residing during that 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 record contains statements from [REDACTED] as representatives of the [REDACTED], who state that the applicant has been attending Sunday prayer at the temple since 1985. However, the applicant failed to list his membership in the [REDACTED] or any other religious organization on the instant Form I-687 application.⁵ At part 31 of the application where applicants are asked to list their involvement with any religious organizations, the applicant did not list any organizations. In addition, [REDACTED] states that in 1985 the applicant resided at [REDACTED]. However, the testimony of the witness is inconsistent with the applicant's testimony in the instant I-687 application, that he did not begin residing at [REDACTED] until 1986. These inconsistencies are material to the applicant's claim in that they have a direct bearing on his residence in the United States for the duration of the requisite period. As stated above, doubt cast

⁵ In an initial I-687 application, filed in 1990 to establish the applicant's CSS class membership, he listed his association with "Sikh temples", although he does not state the dates of his association, or where the temples were located. In response to the NOID, the applicant states that the reason he did not list his membership in the [REDACTED] in the initial I-687 was because he visited many Sikh temples.

on any aspect of an 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*. 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.

More importantly, the letters do 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. These attestations fail to comply with the cited regulation. Varinder Singh does not state the address where the applicant resided during his membership. In addition, the attestations do not establish the origin of the information being attested to; it is unclear whether the witnesses referred to their own recollection or any records they or the foundation may have maintained. For all of the above reasons, these attestations are of little probative value.

The record contains a copy of a Wholesale Club membership card, issued to the applicant in May 1985. This document is some evidence in support of the applicant's residence in the United States for some part of 1985.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, the initial I-687 application filed in 1990 to establish his CSS class membership, and a Form I-485, application to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) Act, filed in 2001. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding the date of his initial entry into the United States, and the dates he resided and worked at particular locations in the United States.

As stated above, at the time of completing the instant I-687 application, the applicant listed residences in the United States during the requisite period as follows: from 1981 to 1984 on [REDACTED]; from 1984 to 1985 on [REDACTED]; from 1986 to 1987 on [REDACTED] and, from 1987 through the end of the requisite period on [REDACTED]. He listed employment in the United States during the requisite period as follows: from 1981 to 1984 in [REDACTED] in 1985 for [REDACTED] from 1986 to 1987 in [REDACTED] and, from 1987 through the end of the requisite period as a farmer.

At the time of completing the initial I-687 application in 1990, the applicant did not list any residences or employment in the United States during the requisite period.

In a class membership worksheet signed by the applicant and filed with the initial I-687 application in 1990, the applicant stated that he first entered the United States in September 1981.

At the time of an interview on October 30, 2003, the applicant signed a statement that he first entered the United States on December 11, 1981.

In a statement dated January 7, 2011, the applicant stated that he first entered the United States in November 1981, and that he resided and worked from 1981 to early 1983 at [REDACTED] California. However, the applicant failed to list this address as a residence or work location during the requisite statutory period, both in the instant I-687 application, and in the I-687 application filed in 1990. In his January 7, 2011 statement, the applicant states that from 1983 to 1985, he resided and worked at a farm on [REDACTED]. However, in the instant I-687 application, the applicant stated that he resided and worked on [REDACTED] from 1981 to 1984. In addition, in the I-687 application filed in 1990, the applicant failed to list this address as a residence during the requisite statutory period. In his January 7, 2011 statement, the applicant stated that he moved to live and work in Wisconsin in 1985. However, in the instant I-687 application, and in a November 22, 2011 statement submitted in response to the NOID, the applicant states that he began residing in Wisconsin in 1984. In addition, in the I-687 application filed in 1990, the applicant failed to list a residence address in Wisconsin during the requisite statutory period.

The applicant states that any discrepancies in the record are due to a lapse in memory or the passage of time. The AAO finds that the applicant has not provided a reasonable explanation for the many inconsistencies in the record set forth above.

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 in the record regarding the date of the applicant's initial entry into the United States, and the dates when the applicant resided and worked at particular locations 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 finds 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.

An additional issue is whether the applicant has met his burden of establishing that he is otherwise admissible to the United States, and that he does not have a disqualifying criminal conviction that renders him ineligible to adjust to temporary resident status. The record reveals the following criminal history:

- On January 6, 2000, under the alias [REDACTED] the applicant was arrested and charged with violations of Nevada Revised Statutes (NRS), as follows: *sale of paraphernalia for manufacturing controlled substance*, and *possession of paraphernalia for manufacturing controlled substance with intent to sell*. The record reveals that at the time of his arrest, approximately 35 boxes of pseudoephedrine, \$3,057., and a postal money order for \$93.80 were seized. [REDACTED] Las Vegas, Nevada, case number [REDACTED]

On or about July 24, 2002, the director requested that the applicant submit a final court disposition for the above arrest. In response, the applicant submitted a letter from the Office of the District Attorney of Clark County dated September 27, 2002, stating that office decided not to file formal charges against the applicant, but reserving the right to file charges at a later time. In response to the NOID, the applicant has submitted an order entered on August 13, 2004, based upon a stipulation entered between counsel for the applicant, as petitioner, and the District Attorney for Clark County, Nevada; the order states that, pursuant to NRS sections 179.245, 179.255 and 453.3365, the applicant's January 6, 2000 arrest record is sealed. The AAO finds that the record supports the applicant's assertion that no formal charges were pursued against him regarding this arrest. Therefore, the AAO finds that the applicant does not have a disqualifying criminal conviction that would serve as an additional basis to deny the application for temporary resident status.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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

⁶ In addition, the NOID noted that a computer generated listing of charges contains the following additional notations: July 6, 1992 *battery and throw deadly missile* and *evld imp/wooden stick*; October 24, 1992 *Robb/Udwick*; January 11, 1995 *T/C Pecos/Sunset*; and March 16, 1997 *T/CSpring Mtn/I-15*. The AAO finds that documents submitted by the applicant in response to the NOID establish that these charges are either non-criminal matters, or pertain to the applicant as a victim, and not the perpetrator, of a criminal violation. Therefore, these charges do not constitute an additional basis for denial of the I-687 application.