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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

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DATE: **JAN 09 2012**

OFFICE: LOS ANGELES

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 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, and *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, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant filed a Form I-687 Application for Temporary Resident Status on April 27, 2005. On March 6, 2007, the director denied the application noting that the applicant failed to appear at a scheduled interview with United States Citizenship and Immigration Services (USCIS). Thus, the director indicated that the application was abandoned.

USCIS subsequently informed the applicant that, pursuant to a recent court order, applications for temporary resident status may not be denied based on abandonment. He was informed that he was entitled to file an appeal with AAO which must be adjudicated on the merits.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO found that that the director's basis for denial of your Form I-687 was in error. However, the AAO identified alternative grounds for denial of the application in a notice dated September 20, 2011. Specifically, the AAO noted that the applicant submitted insufficient evidence of continuous residence during the relevant period. The AAO noted that the applicant's criminal history precluded him from eligibility for temporary resident status.

Following *de novo* review, the AAO finds that the applicant has not submitted sufficient evidence to overcome the deficiencies noted in the NOID.

The AAO has conducted a review of the entire record of proceedings. The following criminal history is noted:

- The applicant was charged with violating California Vehicular Code (CVC) § 21453(B) *Failure to Stop at Red Light* and § 12500(A) *Unlawful to Drive Unless Licensed* on March 7, 1991. The file contains a record from the Superior Court of California, County of Santa Barbara Criminal Division Records Department indicating that the above arrest records have been destroyed in accordance with the state mandated retention period. However, the AAO is unable to determine whether these offenses were considered misdemeanor offenses under California state law or whether the applicant was convicted of either offense.
- The record also contains a copy of a Santa Barbara Police Department criminal history background check indicating the following arrests and convictions:
  - October 20, 1986, the applicant was arrested and charged with violating section 273.5 of the California Penal Code, *inflicting corporal injury on a spouse or cohabitant*.

- August 10, 1986 the applicant was arrested and charged with violating California open container laws, a misdemeanor. He was convicted of this misdemeanor offense and fined. Case No. [REDACTED]
- March 24, 1989 the applicant was charged with violating California Penal Code §853 (CPC) Misdemeanor warrant. It is unclear whether the applicant was convicted, but he was assigned to an ADP approved program. Case No. [REDACTED]
- November 17, 1991 the applicant was arrested and charged with violating CVC 23152(a) *Driving Under Influence of Alcohol or Drugs*. Case No. [REDACTED]
- The record also contains the final court disposition indicating that the applicant was convicted on July 22, 2000 of violating CVC § 23152(a) *Driving Under Influence of Alcohol or Drugs*, a misdemeanor. (Case no. [REDACTED])
- Finally, the record contains a copy of a California Department of Justice disposition indicating that the applicant was convicted on October 23, 1986 of violating CPC § 242 *Battery*, a misdemeanor.

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. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a. Accordingly, the applicant's convictions disqualify him from eligibility for temporary resident status.

The applicant was advised in the NOID to provide an explanation and evidence that would permit the AAO to determine whether his conviction for battery was a conviction for a crime involving moral turpitude (CIMT) that would disqualify him for temporary resident status. The AAO noted the following:

Section 212(a)(2)(A) of the Act states, in pertinent parts:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
  - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.
- (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral 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 record reflects that the applicant was convicted in the Superior Court of California, County of Santa Barbara, California on October 23, 1986 of "Battery" in violation of Cal. Penal Code § 242. His conviction records are not part of the record of proceedings, however, a criminal history transcript from the California Department of Justice indicates that he was convicted and placed on summary probation for a period of 12 months.

In this case, the applicant was convicted of battery against his spouse or cohabitant. He has not submitted any evidence that ameliorates the circumstances of his conviction nor has he provided any explanation regarding this arrest except to say that he was only convicted of a misdemeanor. Thus, the AAO is unable to discern whether the applicant has been convicted of a crime involving moral turpitude. The issue is moot, however, because the applicant is ineligible for temporary resident status on other grounds.

As noted in the NOID, the applicant has failed to establish that he continuously resided in the United States during the relevant period. He does not address this issue on appeal, except to assert that

USCIS has not considered all evidence submitted previously, and that he has met his burden of proof.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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 AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) including a review of the entire record of proceedings. The AAO notes that the applicant has not established his continuous residence during the relevant period, nor has he submitted, on appeal, any additional evidence of his continuous residence.

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 245(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)(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 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her 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).

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).

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.* at 80. 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 petitioner 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, 431 (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.

In support of the applicant's continuous residence in the United States, he has submitted the following documents:

- Employment letters from [REDACTED]. These documents fail to comply with the regulation at 8 C.F.R. § 245a.2(d)(3)(i) which states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.
- Pay check stubs from [REDACTED] for various dates in 1987 along with a receipt from [REDACTED] and a copy of a California identification card dated 1984.
- Copies of envelopes with the applicant's name. The applicant was asked to submit originals. He failed to do so. The postmark dates are illegible so they will be given no weight.
- A letter from [REDACTED] indicating that the applicant was his tenant at [REDACTED] from February 1983 until March 1984.
- Affidavits from [REDACTED]. The affidavits submitted are not sufficiently detailed to establish the truth of their assertions. The affiants 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 during the time addressed in the affidavits.

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 entire requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. He has also failed to establish his admissibility to the United States and his eligibility for temporary resident status given his criminal history. 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.