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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[redacted]

DATE: OCT 13 2011 Office: NATIONAL BENEFITS CENTER FILE: [redacted]

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.

Elizabeth McCormack

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, National Benefits Center. 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 June 1, 2005. On March 24, 2006, the director denied the application noting that the applicant failed to respond to the director's February 7, 2006 notice of intent to deny (NOID). Thus, the director indicated that the application was abandoned.

On October 12, 2010, U.S. Citizenship and Immigration Services (USCIS) informed the applicant that, pursuant to a recent court order, applications for temporary resident status may not be denied based on abandonment. The applicant was informed that she was entitled to file an appeal with the 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 the Form I-687 was in error. However, the AAO identified alternative grounds for denial of the application. Specifically, the AAO noted that the applicant failed to submit any evidence in support of her application.

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.

The issue in this proceeding is whether the applicant (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.

In an attempt to establish continuous unlawful residence since before January 1, 1982 through the end of the relevant period, the applicant provided written statements from [redacted], [redacted], [redacted], [redacted], and [redacted] Their statements are not probative of either the applicant's entrance to the United States or his continuous residence throughout the relevant period. Further, their statements do not indicate how they date their initial meeting with the applicant, how frequently they had contact with the applicant, or how they have personal knowledge of the applicant's presence in the United States.

In his affidavit, [redacted] states that he first arrived in 1980 and that the applicant first arrived in the United States in 1981 and that he and the applicant lived at [redacted] for 3 years. In the Form I-687, the applicant stated that he lived at [redacted] from April 1980 to September 1980 and at [redacted] from September 1980 to January 1984.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent 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. *See Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

The affidavits all contain statements that the affiants have known the applicant for years and that attest to the applicant being physically present in the United States during the required period. These statements fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; 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.

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with the applicant, 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. To be considered probative and credible, witness affidavits must do more than simply state that an affiant 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 the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The record also contains employment letters from [redacted], [redacted] and [redacted]. Although [redacted] and [redacted], discuss the applicant's work ethic in their letters, neither states that the applicant worked for him. Only [redacted] letter provides employment information. In his letter dated January 11, 2005, [redacted] states that the applicant worked for [redacted] pruning almonds from 1981 to 1983. [redacted] submitted copies of Internal Revenue Services (IRS) Form W-2 for the years 1981 and 1983 and personnel records for the applicant for the years 1981 to 1983. Employer letters must meet certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether USCIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The letter and documents from [redacted] includes much of the required information and are evidence of the applicant's residence in the United States from 1981 to 1983.

The record also contains a copy of a paystub for the pay period ending on February 2, 1979 and June 9, 1979. This is some evidence that the applicant was in the United States during those pay periods.

The record of proceeding indicates that the applicant has been arrested at least seven times. 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).

"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 record of proceeding contains evidence that the applicant was arrested by the police department of Chicago and charged with aggravated assault on July 10, 1992; domestic battery on October 13, 1993; battery am on June 16, 1994; battery/domestic am and resisting arrest on July 26, 1995; battery/domestic am and resisting/obstructing peace officer am on October 27, 1996; battery/domestic am on April 18, 1997; and battery/domestic warrant and assault warrant on May 31, 1997.

On May 4, 2011, the AAO issued a notice of intent to deny (NOID) informing the applicant of the deficiencies in the record and providing him with an opportunity to respond. On May 25, 2011, the AAO received the applicant's statement in response to the NOID.

In response to the NOID, counsel argues that the director failed to give adequate weight to the evidence submitted and "fail[ed] to apply the correct legal standard to demonstrate physical presence." Counsel does not explain how the AAO applied an incorrect legal standard. 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).

Counsel also argues that it is "unreasonable for the AAO to ask for conviction records for convictions that don't exist." Counsel submitted a copy of an FBI identification record for the applicant and the record also contains a letter from the Illinois State Police. The letter from the Illinois State Police indicates that no conviction information was identified "based on the fingerprints contained in your request." However, such documents are not always complete. The record also contains a letter from the Riverside County Sheriff dated February 7, 2005. The letter from the Riverside County Sheriff states that "no warrant or process is outstanding in Riverside County against this subject to the best of our knowledge." Although the letter from the Riverside County Sheriff indicates that the applicant does not have any outstanding warrants in Riverside County, California, the arrests noted above and in the AAO's NOID took place in the State of Illinois.

The AAO requested court dispositions in order to complete the record of proceeding. In the NOID, the AAO stated:

> If the appropriate court no longer has records of the final dispositions of your court hearings or if the charges against you were dropped prior to trial, you must provide a certified copy of the court's finding that no court records exist for you. The search for court records must be conducted using your full name and any aliases that you may have used, as well as your date of birth.

If such evidence is unavailable, the applicant must show that the evidence is unavailable, and then submit relevant "secondary evidence." If the applicant cannot submit secondary evidence, he must establish that secondary evidence is unavailable and then submit affidavits from persons that are not party to the application and have direct knowledge of the events and circumstances, such as from the prosecuting attorney, the defense attorney, the arresting officer, the judge, or some other individual (other than derivative family members) who has direct knowledge of the arrest and conviction.

Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original (i.e. no copies), (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available.

The applicant did not attempt to provide the AAO with the court dispositions requested and has not established that he is admissible to the United States. As the record reflects arrests for which no court dispositions have been provided, the applicant did not meet his burden of proof pursuant to 8 C.F.R. § 245a.2(d)(5).

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*. 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.