

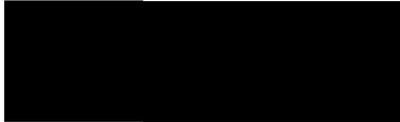
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date: **APR 30 2012**

Office: BOSTON

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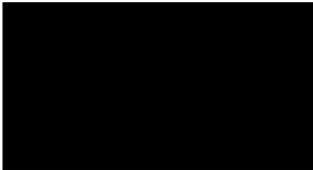


IN RE: Applicant:



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.

IN 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, Boston, Massachusetts, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to temporary resident status pursuant to 8 C.F.R. § 245a.2(c)(1) because he had been convicted of a felony in the United States. See section 245A(a)(4)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(4)(B).

On appeal, counsel asserted that the applicant is not an aggravated felon because while his drug conviction is a felony under Massachusetts state law, such conviction is a misdemeanor under federal law. Counsel contended that the decision reached by the United States Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47, 127 S. Ct. 625, 633 (2006), supported this assertion. Counsel also reiterated the applicant's claim of residence in the United States since prior to January 1, 1982 and stated that the applicant has submitted sufficient evidence to support this claim.

Pursuant to 8 C.F.R. § 245a.2(c)(1), an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status.

"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).

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).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying

criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes.” *Id.* at p. 528.

The Board of Immigration Appeals (BIA) has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien’s immigration status, the court’s action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The first issue to be examined in these proceedings is whether the applicant’s criminal conviction renders him ineligible to adjust to temporary residence under the provisions of the section 245A of the Act.

The record contains court documents and computer printouts that reflect that the applicant was convicted in Brockton District Court at Brockton, Massachusetts on September 16, 2003, for the felony offense of Possession of a Class B Controlled Substance, to wit: Cocaine, in violation of Ch 94C, Sec 34 of the Massachusetts General Laws. Docket Number [REDACTED]

Counsel asserted that the applicant is not an aggravated felon because while his drug conviction is a felony under Massachusetts state law, such conviction is a misdemeanor under federal law. Counsel contended that the decision reached by the United States Supreme Court in *Lopez v. Gonzales*, 549 U.S. 47, 127 S. Ct. 625, 633 (2006), supported this assertion. In *Lopez v. Gonzales*, the Supreme Court determined that a South Dakota conviction for aiding and abetting another person’s possession of cocaine, while a felony under state law could not be an aggravated felony that barred cancellation of removal because under federal law the conviction is treated as a misdemeanor. However, the issue in the instant case is whether the applicant is ineligible for temporary residence as a result of his felony conviction under section 245A(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1), and not whether the applicant’s felony conviction under state law would constitute a misdemeanor conviction under federal law for the purpose of removability under either section 237 of the Act or section 240 of the Act. Therefore, counsel’s assertion is irrelevant.

Clearly, the applicant was convicted of a felony, specifically Possession of a Class B Controlled Substance, to wit: Cocaine, in violation of Ch 94C, Sec 34 of the Massachusetts General Laws. Docket Number [REDACTED], and is ineligible to adjust to temporary resident status under section 245A(a)(4)(B) of the Act and 8 C.F.R. § 245a.2(c)(1). In addition, the record contains a court disposition showing that the applicant pleaded guilty and was convicted on June 18, 2000 of felony violations of the following offenses: unlawful transfer of five or more identity

documents, three counts of aggravated identity theft in violation of 18 U.S.C. § 1028(a)(3) and 18 U.S.C. § 1028(A) in the U.S. District Court, District of Massachusetts, Case No. [REDACTED] and the applicant was sentenced to 36 months in prison.

Although not noted by the director in the denial of the application, the next issue to be determined is whether the applicant is inadmissible as a result of felony conviction for cocaine possession. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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). Section 212(a)(2)(A)(i)(II) of the Act (formerly section 212(a)(23) of the Act).

A waiver of grounds of inadmissibility is not available to an alien found to be inadmissible under specifically enumerated grounds of section 212(a) of the Act including section 212(a)(2)(A)(i)(II) of the Act. Section 210(c)(2)(B)(ii) of the Act, Section 245A(d)(2)(B)(ii) of the Act, 8 C.F.R. § 210.3(d)(3)(iii), and 8 C.F.R. § 245a.2(k)(3)(ii).

The sole exception allowing for the waiver of the ground of inadmissibility for an alien found inadmissible under Section 212(a)(2)(A)(i)(II) of the Act as a result of a conviction involving a controlled substance is that available to an alien convicted of "...a single offense of simple possession of 30 grams or less of marijuana..." Section 210(c)(2)(B)(ii)(III) of the Act, Section 245A(d)(2)(b)(ii)(II) of the Act, 8 C.F.R. § 210.3(d)(3)(iii), and 8 C.F.R. § 245a.2(k)(3)(ii).

As noted previously, the applicant was convicted in Brockton District Court at Brockton, Massachusetts on September 16, 2003, for the felony offense of Possession of a Class B Controlled Substance, to wit: Cocaine, in violation of Ch 94C, Sec 34 of the Massachusetts General Laws. Docket Number [REDACTED] Thus, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act as a result of his conviction for possession of the controlled substance cocaine, and there is no waiver available for this particular ground of inadmissibility.

An alien applying for adjustment of status 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. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden. The applicant has failed to establish he is admissible under the provisions of section 245A of the Act. For this additional reason, the application may not be approved.

The next issue to be examined is whether the applicant has provided evidence demonstrating his 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.

An applicant for temporary residence 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 Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2) and 8 C.F.R. § 245a.2(b).

An alien applying for adjustment to temporary resident status must 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 and 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and presence in accordance with the regulation at 8 C.F.R. § 245a.2(b), "until the date of filing" shall mean until the date the alien attempted to file a completed Form I-687 application and fee or was caused not to timely file, consistent with the class member definitions set forth in the CSS/Newman Settlement Agreements. Paragraph 11, page 6 of the CSS Settlement Agreement and paragraph 11, page 10 of the Newman Settlement Agreement.

An alien applying for adjustment of status 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).

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 including affidavits 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.* 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 (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 record shows that the applicant submitted a Form I-687 application and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet, to United States Citizenship and Immigration Services (USCIS) (formerly the Immigration and Naturalization Service or the Service) on January 9, 2006.

In support of his claim of residence in the United States for the requisite period, the applicant submitted declarations of residence and photocopied postmarked envelopes.

During the adjudication of the applicant’s appeal, information came to light that adversely affects the applicant’s overall credibility as well as the credibility of his claim of residence in this country for the requisite period. As has been previously discussed, the applicant submitted supporting documentation including postmarked December 7, 1986 and December 4, 1987. These photocopied envelopes contain Brazilian postage stamps and were represented as having been mailed from Brazil to you at an address the applicant claimed as a residence in this country. A review of the *2010 Scott Standard Postage Stamp Catalogue Volume 1* (Scott Publishing Company 2009), reveals the following regarding the Brazilian postage stamps affixed to these envelopes:

- The photocopied envelope postmarked December 7, 1986, contains a stamp with a value of fifty centavos. This stamp is part of a series of Brazilian stamps commemorating conchs endemic to the Brazilian coast. This stamp contains a stylized illustration of the shell of the conch species, *Voluta ebraea*, and the notation “Brasil 89” in the upper left hand corner. This stamp is listed at page 1089 of Volume 1 of the *2010 Scott Standard Postage Stamp Catalogue* as catalogue number 2205 A1185. The catalogue lists this stamp’s date of issue as September 8, 1989. This photocopied envelope also contains a stamp with a value of four cruzados that commemorates the 500th Anniversary of the Discovery of America (in 1992). The stamp contains a stylized illustration of a pre-Columbian ceramic brazier under a three-footed votive urn and the notation “Brasil 89” in the upper left hand corner. This stamp is listed at page 1089 of Volume 1 of the *2010 Scott Standard Postage Stamp Catalogue* as catalogue number 2209 A1186. The catalogue lists this stamp’s date of issue as October 12, 1989. This photocopied envelope also contains a stamp with a value of one cruzado that commemorates Thanksgiving Day. The stamp contains a stylized illustration of flaming votive candle with the flame depicted as a dove and the notation “Brasil 89” in the lower

left hand corner. This stamp is listed at page 1089 of Volume 1 of the *2010 Scott Standard Postage Stamp Catalogue* as catalogue number 2217 A1191. The catalogue lists this stamp's date of issue as November 23, 1989.

The fact that a photocopied envelope postmarked December 7, 1986 bears postage stamps that were not issued until well after the date of this postmark establishes that the applicant utilized this document in a fraudulent manner and made material misrepresentations in an attempt to establish his residence within the United States for the requisite period. This derogatory information establishes that the applicant made material misrepresentations in asserting his claim of residence in the United States for the period in question and thus casts doubt on his eligibility for adjustment to temporary residence pursuant to the terms of the CSS/Newman Settlement Agreements and section 245A of the Act. By engaging in such an action, the applicant has negated his own credibility, the credibility of his claim of continuous residence in this country for the requisite period, and the credibility of all documentation submitted in support of such claim.

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 visa petition. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In a notice dated January 30, 2012, the AAO informed the applicant and counsel that it was the AAO's intent to dismiss the applicant's appeal based upon the fact that he utilized the postmarked envelope cited above in a fraudulent manner and made material misrepresentations in an attempt to establish his residence within the United States for the requisite period. The applicant and counsel were granted twenty-one days to provide substantial evidence to overcome, fully and persuasively, these findings. However, as of the date of this decision, neither the applicant nor counsel has submitted a response to the notice. Therefore, the record must be considered complete.

The existence of derogatory information that establishes the applicant used the postmarked envelopes cited above in a fraudulent manner and made material misrepresentations seriously undermines the credibility of the applicant's claim of residence in this country for the requisite period, as well as the credibility of the documents submitted in support of such claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

Given the applicant's reliance upon documents with minimal or no probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through the time he attempted to file for temporary resident status as required under section 245A(a)(2) of the Act. Because the applicant has failed to provide independent and objective evidence to overcome, fully and persuasively, our finding that he submitted falsified documents, we affirm our finding of fraud. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis as well.

A finding of fraud is entered into the record, and the matter will be referred to the United States Attorney for possible prosecution as provided in 8 C.F.R. § 245a.2(t)(4).

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