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

(b)(6)

DATE: APR 0 3 2014 OFFICE: SAN DIEGO

IN RE: Applicant:

PETITION: 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 PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
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 District Director, San Diego, California. The applicant subsequently appealed the director's decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal pointing to the applicant's ineligibility based on a statutory ground that had not been previously addressed in the director's decision. The AAO subsequently reopened the proceeding, *sua sponte*, and withdrew its earlier decision, which was issued on August 14, 2013. The AAO issued a Notice of Intent to Deny/Request for Additional Evidence (NOID), allowing the applicant thirty days in which to respond to the AAO's most recent notice of adverse findings. The applicant's appeal before the AAO remains in effect. 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), and a Form I-687 Supplement, CSS/Newman Class Membership Worksheet on January 5, 2005. The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Accordingly, the director denied the application, finding that the applicant had not met his burden of proof and was therefore ineligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant appealed the director's decision, asserting that he had established his continuous residence for the requisite period.

The AAO conducted an appellate review on a *de novo* basis and concluded that the applicant was ineligible for temporary resident status based on his two convictions of crimes involving moral turpitude, which render him inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Consequently, the AAO dismissed the appeal in a decision dated August 14, 2013, based on the applicant's inadmissibility and declined to issue a finding as to whether the applicant submitted sufficient evidence to establish by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

Notwithstanding the decision to dismiss the appeal based on the applicant's inadmissibility, the AAO issued a notice dated January 30, 2014, informing the applicant of its decision to reopen the proceedings *sua sponte* and to withdraw the August 14, 2013 decision in order to allow the applicant an opportunity to address the AAO's adverse findings. A copy of the notice was sent to the applicant's latest address of record and to the applicant's attorney of record. To date, however, the record has not been supplemented with any additional evidence or information pertaining to the grounds cited for the intended dismissal of the appeal. Therefore, the record will be considered complete as presently constituted.

I. Eligibility Criteria and Evidentiary Burden

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).

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 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, 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).

II. Crimes Involving Moral Turpitude

The first issue to be considered in this proceeding is whether the applicant furnished sufficient credible evidence establishing that he has no disqualifying criminal convictions and is otherwise admissible to the United States.

In the January 30, 2014 notice, the AAO determined that the applicant failed to meet this burden.

As previously explained in the AAO's prior notice, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for temporary resident status under the provisions of the Act . Section 212(a)(2)(A)(i)(I) of the Act, as amended, 8 U.S.C. § 1182(a)(2)(A)(i)(I). But, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. *See section 212(a)(2)(A)(ii) of the Act,* 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if "'the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months.'" *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003). For the purpose of the petty offense exception, "'the maximum penalty possible' . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).

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).

Section 212(a)(2)(A) of the Act provides, in pertinent part:

> (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

To determine if a crime involves moral turpitude, the Ninth Circuit Court of Appeals employs the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). *See Nicanor-Romero v. Mukasey*, 523 F.3d 999, 1004 (9th Cir. 2008), *overruled on other grounds by Marmolejo-Campos v. Holder*, 558 F.3d 903, 911 (9th Cir. 2009). The purpose of the categorical approach is to determine whether the full range of conduct encompassed by the statute constitutes a crime of moral turpitude. *Cuevas–Gaspar v. Gonzalez*, 430 F.3d 1013, 1017 (9th Cir. 2005), *abrogation on other grounds recognized by Holder v. Martinez-Gutierrez*, 132 S.Ct. 2011, 2020-21 (2012). If the statute "criminalizes both conduct that does involve moral turpitude and other conduct that does not, the modified categorical approach is applied." *Marmolejo-Campos*, 558 F.3d at 912 (citing *Fernando-Ruiz v. Gonzalez*, 466 F.3d 1121, 1163 (9th Cir. 2006)); *see also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). However, there must be "a realistic probability, not a theoretical possibility, that the statute would be applied to reach conduct that did not involve moral turpitude."

Nicanor-Romero, 523 F.3d at 1004 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To demonstrate a "realistic probability," the applicant must point to his or her own case or other cases in which the state courts in fact did apply the statute to conduct not involving moral turpitude. 523 F.3d at 1004-05. A realistic probably also exists where the statute expressly punishes conduct not involving moral turpitude. *See U.S. v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007).

Once a realistic probability is established, the modified categorical approach is applied, which requires looking to the "limited, specified set of documents" that comprise what is known as the record of conviction – the charging document, a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding and the judgment – to determine if the conviction entailed admission to, or proof of, the elements of a crime involving moral turpitude. *Castillo-Cruz*, 581 F.3d at 1161 (citing *Fernando-Ruiz,* 466 F.3d at 1132-33); *see also Marmolejo-Campos*, 558 F.3d at 912 (citing *Cuevas–Gaspar*, 430 F.3d at 1020). The Ninth Circuit has reaffirmed that courts may not examine evidence outside the record of conviction in determining whether a conviction was for a crime involving moral turpitude. *See Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. May 17, 2013) (rejecting *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008)). Where the burden of proof is on the applicant, as in the present case, the applicant cannot sustain that burden where the record of conviction is inconclusive. *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012).

The record reflects that on December 6, 1999, the applicant was convicted in the Superior Court of California, Orange County, of petty theft, a misdemeanor in violation of section 484 of the California Penal Code.[1] He was consequently sentenced to one day in jail with credit for time served, placed on informal probation for a period of three years, and ordered to pay $600 in fines and complete 40 hours of community service. (Docket

At the time of the applicant's conviction for petty theft, Cal. Penal Code § 484(a) provided, in pertinent part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. . . .

U.S. Courts have held that the crime of theft or larceny, whether grand or petty, involves moral turpitude. *See Matter of Scarpulla*, 15 I&N Dec. 139, 140 (BIA 1974) (stating, "It is well settled that theft or larceny, whether grand or petty, has always been held to involve moral turpitude . . ."); *See also Matter of Pedroza,* 25 I&N Dec. 312, 315-16 (BIA 2010) (misdemeanor petty theft under section 484 of the California Penal Code constitutes a crime involving moral turpitude.); *Morasch v. INS*, 363 F.2d 30, 31 (9th Cir. 1966)(stating, "Obviously, either petty or grand larceny, i.e., stealing another's property, qualifies [as a crime involving moral turpitude].") However, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

The Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484 is a crime categorically involving moral turpitude. 581 F.3d 1154, 1160 (9th Cir. 2009). The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to

[1] The applicant was originally charged on one count of violating section 487.1 Cal. Penal Code – grand theft – property.

deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Consequently, the AAO determined that the applicant's conviction for theft under section 484 of the California Penal Code was categorically a crime involving moral turpitude which rendered the applicant inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act.

In response to a Request for Evidence (RFE), dated May 15, 2013, counsel indicated that the applicant's December 6, 1999 petty theft conviction in violation of section 484 of the California Penal Code had been vacated. In a more recent court filing,[2] counsel asserted that the conviction no longer bars the applicant's admission to the United States, as it was vacated under Cal. Penal Code § 1385 on non-rehabilitative grounds. Counsel cited to *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), in support of the assertion that the applicant's prior conviction no longer served as a basis for inadmissibility. However, the AAO determined that the record does not establish that the guilty plea for this charge was vacated as a result of a "defect in the underlying criminal proceedings," i.e., the applicant had not been advised of the immigration consequences of his plea.[3]

The record reflects that on May 9, 2005, in the U.S. District Court, the applicant filed with a motion to dismiss his December 6, 1999 conviction pursuant to section 1385 of the California Penal Code.[4] On May 27, 2005, the Superior Court of California, County of Orange, ordered that the applicant's plea of guilty to a misdemeanor offense of violating section 484 of the California Penal Code on October 3, 1999 be withdrawn, that probation and all terms and conditions of sentencing be vacated, and that the case be dismissed in furtherance of justice pursuant to section 1385 of the California Penal Code.[5] The record contains the minute order as required under Cal. Penal Code § 1385, stating the reasons for the dismissal. In the minute order the court stated that the "[i]nterest of justice to dismiss is based on [the applicant's] post 2001 conduct including voluntary entry into the Nancy Clark Program[6] and history of probation compliance here." *Minute Order of the Superior Court of California, County of Orange*, entered May 27, 2005. Thus, the judge's order to strike the applicant's plea and vacate judgment was predicated upon evidence of the applicant's rehabilitation and fulfillment of conditions of probation.[7]

---

[2] An Amended Complaint for *De Novo* Review of the I-687 Application is pending before the U.S. District Court for the Southern District of California.

[3] The record shows that the court advised the applicant of the potential immigration consequences of a conviction. See page one of court minutes

[4] The applicant initially filed a motion to dismiss pursuant to section 1203.4 of the Cal. Penal Code.

[5] California Penal Code § 1385, paragraph (a), provides that the judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading. The AAO's previous decision incorrectly stated that the case was dismissed pursuant to section 1203.4 of the California Penal Code.

[6] The record reveals that therapy program that treats compulsive shoplifting in an effort to discourage recidivism. *See* (accessed January 14, 2014.) Although potential participants can be ordered to enter the program by judges in Orange County, the record reveals that the applicant voluntarily chose to enter the program.

[7] The motion to dismiss also asserted that the judgment should be dismissed on the grounds that prior counsel did not discuss "the consequences of [the applicant's] plea that (sic) was a crime involving moral turpitude" and "further failed to advise [the applicant] . . . that [the applicant] could have sought to plead to an alternative offense that would have been a crime that is not moral turpitude (sic) in nature." However, the evidence establishes that the judge's order to dismiss the conviction did not reflect the court's finding of a

Under the current 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 that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any action that overturns a state conviction other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. The state court's decision to vacate the applicant's conviction under the aforementioned statute as a result of the successful completion of a term of probation, restitution, or other condition of sentencing does not eliminate the immigration consequences of the criminal conviction. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001). In general, a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

Based on the forgoing, the evidence establishes that the court's order of May 27, 2005 that expunged the applicant's December 6, 1999 misdemeanor conviction under section 1385 of the California Penal Code is ineffective to remove the immigration effect of the underlying conviction. Accordingly, for immigration purposes, the applicant remains convicted of a violation of section 484 of the California Penal Code, petty theft, a CIMT.

Notwithstanding the applicant's conviction of a CIMT, the AAO advised the applicant that he would have been eligible for the "petty offense exception" if the December 6, 1999 petty theft offense had been the applicant's only CIMT conviction. However, the record reflects that the applicant has another conviction, which renders him ineligible for the exception as set forth in section 212(a)(2)(A)(ii)(II) of the Act.

The record shows that on March 23, 2001, the applicant was convicted in the Superior Court of California, County of Los Angeles, of "petty theft with prior sentence," a misdemeanor in violation of section 666 of the California Penal Code. The applicant was sentenced to one day in jail with credit for time served, placed on probation for three years, and ordered to pay a restitution fine to the court and perform community service.

California Penal Code § 666 provides, in pertinent part, that:

> Notwithstanding Section 490, any person described in paragraph (1) who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496, and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

As previously discussed, the offense of petty theft is found in section 484(a) of the California Penal Code. Additionally, as previously discussed, the Ninth Circuit Court of Appeals in *Castillo-Cruz v. Holder* determined that petty theft under Cal. Penal Code § 484(a) is a crime categorically involving moral turpitude.

---

defect in the conviction or in the proceedings underlying the conviction. The court record shows that the court advised the applicant of potential immigration consequences of a conviction.

581 F.3d 1154, 1160 (9th Cir. 2009). The Ninth Circuit reviewed lower court case law on convictions under Cal. Penal Code § 484(a), and determined that a conviction for theft (grand or petty) under the California Penal Code requires the specific intent to deprive the victim of his or her property permanently. *Id.* at 1160 (citations omitted). Consequently, the AAO found that the applicant's conviction for petty theft with a prior under Cal. Penal Code § 666 is a crime involving moral turpitude which renders the applicant inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Act. As the applicant is inadmissible for having been convicted of two crimes involving moral turpitude, he is ineligible for the petty offense exception found in section 212(a)(2)(A)(ii) of the Act.

Despite the order of the Superior Court of California, County of Los Angeles, , to vacate the applicant's guilty plea and dismiss the case pursuant to section 1203.4 of the California Penal Code on May 22, 2012, the AAO again advised the applicant that a state court's expungement of a conviction under the aforementioned statute does not eliminate the immigration consequences of his criminal conviction. *See Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Thus, the court's order of May 22, 2012, that expunged the applicant's misdemeanor "theft with a prior" conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying conviction.

Accordingly, as the applicant remains inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having been convicted of two crimes involving moral turpitude, he is ineligible for temporary resident status. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(4)(A).

III. Continuous Residence

The second issue to be addressed in this proceeding is whether the applicant submitted sufficient evidence to establish by a preponderance of the evidence that he continuously resided in the United States for the duration of the requisite period.

At the time of completing the instant I-687 application, the applicant indicated that he last entered the U.S. without inspection on April 15, 1981, when he was approximately fourteen months old. The applicant listed three residences, all three in California, from 1981 through the end of the requisite statutory period and claimed only one absence during that time period, indicating that the absence took place in August 1987. The specific duration of the absence was not provided.

As proof of his entry into and continuous residence in the United States during the requisite period the applicant submitted witness statements from the following individuals: (the applicant's mother), The AAO observed that while all of the witnesses stated that they had knowledge of the applicant's residence in the United States for all or part of the requisite period, the statements were overly general, lacking detailed information specific to the applicant which would demonstrate that the witnesses have a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period. None of the witnesses, including the applicant's mother, discussed the applicant's places of residence and only one of the witnesses – actually specified the frequency of his visits with the applicant and the occasion for such visits. Although claimed that he taught " piano at his music school in 1985, he provided no information as to the frequency of the lessons or how long the applicant attended the music school. The remaining witnesses did not specify how often they saw the applicant or the types of social gatherings or social events where such meetings took place. The witnesses only stated that they saw the applicant and his family at social functions and at temple. They did not describe the functions with any specificity nor state which temple they attended. Two of the affiants – – who claimed to have met the applicant after the time of his alleged entry to the

United States in 1981 did not explain how they knew of the applicant's claimed unlawful entry. Additionally, while three of the affiants – [redacted], and the applicant's mother – made references to the applicant's "few trips to India," none specified when these trips took place or indicated whether the trips took place in August 1987 as claimed in the applicant's Form I-687. Moreover, the references to the applicant's multiple absences are not consistent with the application, which identified only a single absence. The applicant must 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the record shows that in response to the director's December 2012 notice of intent to deny (NOID), counsel submitted a signed statement from the applicant in which the applicant indicated he had a second absence from the United States for one month in 1989. Further, the record indicates that the applicant may have had additional absences from the United States during the requisite period. The record contains a Form I-94 arrival/departure record which shows the applicant's entry into the United States in Los Angeles on December 17, 1987 on a B-2 visitor's visa and Indian passport number [redacted] and departed the United States on January 12, 1988 from Los Angeles. The Form I-94 shows Hong Kong as the applicant's country of residence and lists a [redacted] as the applicant's place of stay while in the United States.[8] The AAO observed that the applicant's Form I-687 application does not list any absences from the United States in December 1987 or January 1988. Further, it appears that the applicant was outside the United States from January 12, 1988 through the end of the requisite statutory period for a period of 113 days, and is thus ineligible for the immigration benefit sought herein. An applicant may not have been absent for more than 45 days in a single period in order to maintain his continuous residence, unless he establishes that his prolonged absence was due to an emergent reason. 8 C.F.R. § § 245a.2(h).

Since the record contains materially inconsistent testimony regarding the date of the applicant's absences from the United States, the AAO instructed the applicant to provide this office with a listing of all of his entries and exits from the United States, commencing with the date of the initial entry to date. Such evidence was to include copies of all pages of any passports or other documents with which the applicant traveled during the requisite period, if applicable. Although the applicant indicated in an undated statement, which was submitted in response to the director's October 31, 2012 NOID, that he obtained a B-2 visitor visa from New Delhi through a proxy and was not physically present in India during the application process, the applicant's statements alone are not sufficient overcome the director's or the AAO's findings. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The applicant also submitted photographs of himself labeled from 1981 through the end of the requisite period as some evidence of his presence in the U.S. during the requisite period. However, absent verifiable identifying information, the photographs cannot be given evidentiary weight. Similarly, the applicant's photocopied ticket stub for entrance into a Disneyland amusement park also lacks probative value as it is undated and fails to provide any information, such as a name and address, which would serve as a link to the applicant. Therefore neither the photographs nor the ticket stub will be given evidentiary weight.

---

[8] The record also contains a Form I-94 arrival/departure record which indicates that the applicant entered the U.S.at Los Angeles on December 20, 1989 on a B-2 visitor's visa using the same passport. The Form I-94 again indicates the applicant's country of residence as Hong Kong. The Form I-94 indicates his address while in the U.S. as being on [redacted]

Next, with regard to the applicant's record of immunizations, the applicant provided copies of two Immunization Records cards showing that he received vaccines at the California on July 2, 1981 and September 6, 1982. However, in the AAO's prior review of the record, the applicant was notified that September 6, 1982 was a legal holiday.[9] Given the poor quality of the photocopied materials and the anomaly suggesting that immunizations were administered on the date of a legal holiday, the AAO instructed the applicant in its previously issued NOID to provide the original Immunization Record cards for review. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application. 8 C.F.R. § 103.2(b)(14).

In the January 2014 notice, the AAO made additional observations, which also required further input from the applicant. Specifically, the AAO observed that the applicant submitted two Enrollment Verification Forms from the custodian of records at the dated July 30, 2012 and December 13, 2012, respectively, under the name confirming that the applicant did not enroll in public school until after the requisite period. The letter dated December 13, 2012 states that the applicant was home-schooled, "but we no longer have Home Teaching records from grades 1st through 4th. (Records are destroyed 5 years after student has left our school district.)" However, the December 13, 2012 letter from the custodian of records at the does not state how she was able to verify, in the absence of Home Teaching records, that the applicant was home-schooled prior to enrollment. As such, it is unclear whether the records custodian referred to her own recollection or whether her assertions were based on any records the school or school district may have maintained. In an effort to make a determination as to records custodian's means to the claimed information, the AAO instructed the applicant to provide a written explanation from the records custodian clarifying how she or he obtained this information offered in the December 13, 2012 letter.

Although the AAO issued a notice on January 30, 2014 and allowed the applicant additional time in which to resolve the various anomalies listed above and to supplement the record with evidence regarding the applicant's alleged continuous residence in the United States during the requisite period, the record lacks any evidence that the applicant, in fact, acknowledged the AAO's latest notice or that he provided any additional evidence to address the evidentiary deficiencies and issues regarding the applicant's inadmissibility. Again, it is noted that an applicant's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application. 8 C.F.R. § 103.2(b)(14). Furthermore, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). Given the applicant's failure to respond to the AAO's notice, which cited numerous grounds for the intended denial, the AAO concludes that the applicant has failed to overcome the adverse findings and, therefore, based on the reasons discussed in this decision, the AAO finds that the applicant is ineligible to adjust his status to that of a temporary resident and the appeal will be dismissed.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's January 14, 2013 decision is affirmed. The application is denied.

---

[9] See http://www.timeanddate.com/calendar/?year=1982&country=1 [as accessed on 1/9/2013].