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U.S. Citizenship  
and Immigration  
Services

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FILE:

MSC-06-084-12540

Office: HOUSTON

Date: **AUG 04 2008**

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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, 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, Houston. The decision 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, the applicant claims that he has not been convicted of a felony because he pleaded guilty to the charge against him (aggravated assault) and the court issued a deferred adjudication, placing the applicant on probation for 5 years and fining him \$1000. The applicant asserts that the term "deferred adjudication" is not a conviction for immigration purposes citing the Fifth Circuit case, *Martinez-Montoya v. INS*, 904 F.2d 1018 (5<sup>th</sup> Cir. 1990).

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 issue to be examined 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 the applicant pleaded guilty to a charge of aggravated assault with a deadly weapon, in the Texas District Court for Harris County with a docket number [REDACTED] March 3, 1993. These documents show that the case was deferred and the applicant was sentenced to five years probation and fined \$1000.

The applicant claims that he has not been convicted of a felony because he pleaded guilty to the charge against him and the court issued a deferred adjudication. The record contains a copy of the Judgment and Probation Order reflecting that the applicant entered a plea of guilty to the charge cited in the previous paragraph on March 3, 1993. Citing *Martinez-Montoya v. INS* the applicant argues that deferred adjudication is not considered a conviction under section 245A of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1255a.

However, the applicant does not address the effect of his guilty plea on the definition of conviction. Clearly, he meets the two prong test outlined in Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). First, the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt. Second, the judge ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Specifically, the judge ordered the applicant serve 5 years probation and pay a fine in the amount of \$1000.

Clearly, the applicant has been convicted under the statutory definition of this term provided at section 101(a)(48)(A)(i) of the Act. The record does not contain any evidence demonstrating that the applicant’s conviction was subsequently expunged.

The applicant is ineligible for temporary resident status because of his felony conviction. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States. *See* section 245A(d)(2)(B)(ii) of the Act.

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.

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