

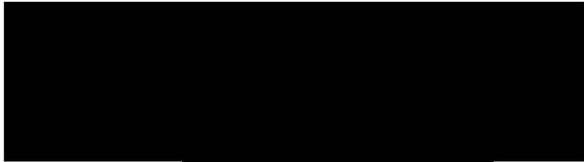
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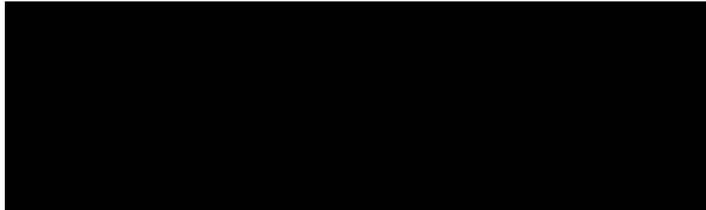
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Office: NATIONAL BENEFITS CENTER

Date: MAR 10 2008

IN RE:

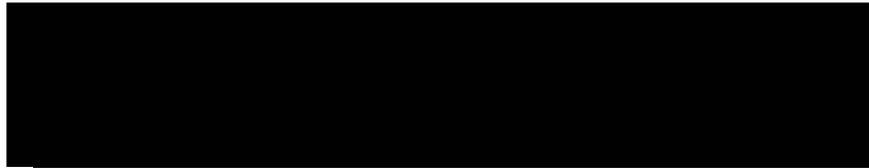
Applicant:



APPLICATION:

Application for Temporary Resident Status under 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, National Benefits Center, 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's record of criminal convictions rendered him statutorily ineligible for temporary resident status.

On appeal, counsel claims that the applicant is currently seeking to expunge the misdemeanor convictions from his record. Counsel also submits a letter addressing each of the applicant's convictions and providing arguments as to why a number of the convictions do not meet the statutory definition for 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.

"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).

In the present matter, the record shows that the applicant was convicted of the following:

1. On November 8, 1992, in the State of Iowa, the applicant was arrested for operating a vehicle while intoxicated, a misdemeanor. On March 19, 1993, the applicant was convicted of this offense. He was placed on probation for one year in lieu of a 60-day jail term. On May 4, 1994, in the Iowa District Court for Woodbury County, the court ordered the applicant to pay additional fines upon determining that the applicant violated the terms of his probation. (Criminal No. [REDACTED])
2. On June 21, 1994, in the State of South Dakota, the applicant was charge with and convicted of the crime of intent to damage in the third degree in violation of SDCL 22-34-1. The applicant was sentenced to 30 days of confinement of which 25 were suspended. The applicant was also placed on probation for six months.
3. On March 13, 1995, in the State of South Dakota, the applicant was convicted of driving under the influence, a misdemeanor in violation of SDCL 32-23-1(1). Although the applicant was sentenced to 30 days in jail, this term was suspended and he was ordered to pay fines totaling over \$600.

4. On May 27, 1998, in the State of South Dakota, the applicant was convicted of simple assault, a misdemeanor. The applicant's 30-day jail sentence was suspended and he was ordered to pay a fine of \$120.
5. On September 10, 1998, in the State of South Dakota, the applicant was convicted of driving under the influence, a misdemeanor. The applicant was sentenced to 45 days in jail, which was suspended, and he was fined \$350.

On December 14, 2005, the director issued a notice of intent to deny (NOID) citing all of the offenses listed above and finding that this adverse information would serve as the basis for finding the applicant statutorily ineligible for temporary resident status.¹

In response, the applicant provided a letter dated January 4, 2006 in which he admitted to having been convicted of the offenses listed in Nos. 3, 4, and 5 above. With regard to the remaining offenses, the applicant claimed that his twin brother used the applicant's name and that the convictions were actually those of his brother. Although the director did not address the applicant's claim, the AAO notes that the information generated by the Federal Bureau of Investigation was based on the applicant's fingerprint samples. The applicant has not provided any documentation to suggest that the adverse information was generated with someone else's fingerprints or that some other identifying factor was used to obtain the adverse criminal history cited above. More importantly, even if the director were to have accepted the applicant's explanation, the applicant would nevertheless be deemed as one who has been convicted of three misdemeanor offenses, which alone are sufficient to render the applicant statutorily ineligible for temporary resident status.

Regardless, in a decision dated May 22, 2006, the director denied the application on the basis of the applicant's multiple misdemeanor convictions.

On appeal, counsel first asserts that the applicant is currently seeking to expunge his convictions. However, the record shows no evidence that any of his criminal convictions have been expunged. Moreover, 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 which 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 subsequent, rehabilitative 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. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

¹ With regard to the offense cited in No. 2 above, the director referred to the offense as intent to damage in the 2nd degree. However, the applicant has submitted the actual court documents, which describe the crime as intent to damage in the 3rd degree. The AAO will therefore rely on the court's classification of the offense.

In addition, in *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

Although these precedent decisions were finalized after the applicant applied for temporary residence, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services officers.

Additionally, in a separate letter dated June 21, 2006, counsel lists each of the applicant's convictions and argues that the applicant did not serve sufficient time for any single offense such that the offense amounts to a misdemeanor. Counsel's argument, however, is without merit, as 8 C.F.R. § 245a.1(p) clearly indicates that the actual time served is irrelevant. The regulation at 8 C.F.R. § 245a.1(o) further clarifies that only a crime that is punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. None of the applicant's offenses fall into the latter category.

In a final attempt to overcome the grounds for denial, counsel submits a letter dated February 15, 2008 accompanied by additional submissions from the beneficiary. The beneficiary continues to assert that several of the offenses listed in the director's decision belonged to his twin brother. However, by the applicant's own admission, three of the above cited misdemeanor offenses were committed by him, not his twin brother. Therefore, the applicant is ineligible for temporary resident status because he has been convicted of at least three misdemeanor offenses. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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