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U.S. Citizenship
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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date: MAY 14 2008

IN RE:

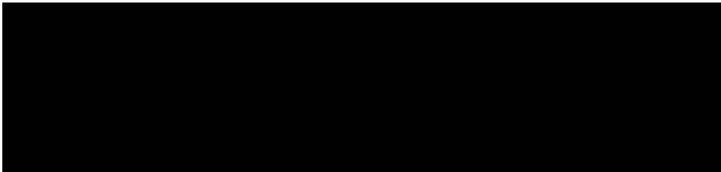
Applicant:



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. 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director noted that the applicant had been absent from the United States for over 45 days, and had failed to establish that an emergent reason had delayed his return. The director therefore concluded that the applicant had not resided continuously in the United States and denied the application.

On appeal, counsel for the applicant asserts that his extended absence from the United States was due to an emergent reason. Counsel states that the applicant had an injury to his mouth, which demanded prompt action. Counsel states that the applicant submitted evidence to show that the dental procedure caused an unexpected delay.

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).

An alien must also establish continuous physical presence in the United States since November 6, 1986. Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). However, such alien shall not be considered to have failed to maintain continuous physical presence by virtue of brief, casual and innocent absences. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B).

An alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

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).

The applicant filed a Form I-687, Application for Status as a Temporary Resident, on December 28, 1987. On the application he claimed that he first entered the United States in December 1976 and that he has continuously resided in the United States since such date. However, the applicant also indicated that he was absent from the United States from June 1985 until October 1985. On February 3, 1988, the applicant appeared before a legalization officer for an interview. During the

applicant's interview, he testified that he was absent from June 1, 1985 until October 30, 1985 for a period of 151 days. The applicant testified that he had an operation on his jaw in the United States. The applicant stated that he went to Mexico for treatment of his tooth and gum because he could not afford the procedure in the United States.

The applicant's absence exceeded the 45-day period allowed for a single absence. Therefore, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, Matter of C-, 19 I&N Dec. 808 (Comm. 1988), holds that emergent means "coming unexpectedly into being."

In support of his claim that a more timely return to the United States was prevented by an emergent reason, the applicant submitted a copy of a letter from [REDACTED]. The English translation of his document provides, in part:

Mr. [REDACTED] received odontological medical attention in the months of June to the end of September of the year 1985. The extension in the period of attention was due to the necessities that the case required. The extraction of various denial pieces that were found to be fractured was necessary, resorting necessarily to the surgery for the extraction. For this motive it retarded considerably the period of cicatrization given the magnitude of the wounds and the profoundness of the same. So we could be able to continue the rehabilitation from the masticatory apparatus . . .

The documentation submitted by the applicant suggests there may have been a valid basis for the applicant's departure from the United States, it also suggests the applicant intended to remain outside of the United States for as long as it took him to complete the purpose of his trip, that is, for an indefinite period. The applicant could have reasonably anticipated that an absence for such a purpose would have likely been an extended one. In the absence of evidence that the applicant intended to return within 45 days, it cannot be concluded that an emergent reason "which came suddenly into being" delayed the applicant's return to the United States beyond the 45-day period.

Finally, a Federal Bureau of Investigation (FBI) report based on the applicant's fingerprints reveals that the applicant has been arrested on two occasions. The report shows that on May 6, 2005, the applicant was arrested and charged with *Use/Under the Influence of a Controlled Substance* in violation of section 11550(a) of the California Health and Safety Code. A conviction for this offense is a term of imprisonment of not less than 90 days or more than one year. Cal. Health & Safety Code Ann. § 11550(a) (West 2002). Pursuant to 8 C.F.R. § 245a.1(o), this crime is defined as a misdemeanor. Since applicant has not provided any relevant court documents related to this arrest, the exact disposition of the charge remains unknown. In the absence of court documents, the applicant has failed to establish his admissibility. For this additional reason, the application may not be approved.

The FBI report indicates that the applicant was arrested again on March 22, 1999.¹ Court records from the Municipal Court of Van Nuys Court House Judicial District, Country of Los Angeles, show that on March 24, 1999, the applicant was charged with two counts of *Annoying or Molesting Child Under 18* in violation of section 647.6(a) of the California Penal Code. A conviction for this offense is a term of imprisonment not exceeding one year. Cal. Penal Code Ann. § 647.6(a) (West 2000). The court records also show that the applicant was charged with two counts of *Sexual Battery* in violation of section 243.4(d) of the California Penal Code. A conviction for this offense is a term of imprisonment not exceeding six months. Cal. Penal Code Ann. § 243.4(d)(1) (West 2000). Accordingly, these crimes are also misdemeanor offenses pursuant to 8 C.F.R. § 245a.1(o). The record indicates that on April 26, 1999, the applicant was found guilty of one count of *Sexual Battery*. The applicant was sentenced to 90 days in county jail and 36 months of probation.

Pursuant to section 245A(a)(4) of the Act, 8 U.S.C. § 1255a(a)(4), an applicant for temporary resident status must establish that he is admissible to the United States as an immigrant. Under section 212(a)(2)(A)(i)(I) of the Act, an alien is inadmissible if he has been convicted of a crime involving moral turpitude. 8 U.S.C. § 1182(a)(2)(A)(i)(I). Crimes involving moral turpitude are generally defined as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. See *Jordan v. De George*, 341 U.S. 223, 71 S.Ct. 703 (1951); *Matter of Serna* 20 I&N Dec. 579, 581 (BIA 1992). A crime involving moral turpitude is based on the offender's evil intent or corruption of the mind. *Matter of Serna* 20 I&N Dec. at 581. The applicant was found guilty of *Sexual Battery* in violation of section 243.4(d) of the California Penal Code. *Sexual Battery* under this section of the California Penal Code is defined as the touching of a person against their will for the specific purpose of sexual arousal, sexual gratification, or sexual abuse. Cal. Penal Code Ann. § 243.4(d)(1) (West 2000). Accordingly, the applicant has been convicted of a crime involving moral turpitude. Based on the current record of proceeding, it appears that the applicant *may* qualify for an exception to inadmissibility for his conviction of this crime under section 212(a)(2)(A)(ii) of the Act, 8 U.S.C. 1182(a)(2)(A)(ii). Therefore, the AAO will not issue a finding of inadmissibility under section 212(a)(2)(A)(I) of the Act, 8 U.S.C. 1182(a)(2)(A)(i)(I) in this proceeding.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from prior to January 1, 1982 through the date of filing, is admissible to the United States under the provisions of section 245A of the Act, 8 U.S.C. § 1255a, 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.

¹ The FBI report indicates that the applicant was arrested on March 22, 1999 charged with *Lewd or Lascivious Acts with a Child Under 14* in violation of section 288(a) of the California Penal Code. Since this charge is not shown in court records related to this arrest, it will not be discussed in this proceeding.