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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
XVN 880943043

Office: LOS ANGELES

Date: FEB 05 2009

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 if your case was remanded for further action, you will be contacted.

John F. Grisson, Acting 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, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. 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. In a decision dated April 10, 1990, the director denied the application for temporary residence because the applicant had been convicted of three misdemeanor offenses in the California. Thus, the director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant is represented by counsel on appeal. Counsel argues that one of the convictions has been vacated and that a second conviction was determined to be an error, in that it referred to someone other than the applicant but who was known by the applicant's last name. Thus, counsel maintains that the applicant has only one misdemeanor conviction and remains eligible for temporary residence status.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.2(c)(1). "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).

"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).

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 Immigration and Naturalization Act, 8 U.S.C. § 1101(a)(48)(A).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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).

The AAO has reviewed the documents in the record. The applicant has a history of arrests and convictions. In a sworn affidavit signed October 4, 1988, the applicant states that he was arrested by the Los Angeles County police on December 30, 1980, and charged with robbery (Docket No. [REDACTED]). The applicant attests that he was detained by the police for 48 hours and then released on account of a lack of sufficient evidence to further detain him. The applicant states that the court records pertaining to his arrest for robbery are no longer available. Other than the applicant's personal attestation, no certified court disposition detailing the final outcome of the robbery charge is evident in the record.

On August 18, 1988, the Western Regional Processing Facility at Laguna Niguel requested additional information from the applicant regarding a series of unpaid tickets incurred in 1977. No response to this request appears in the record presently before the AAO. Because the record does not contain an explanation of the nature of the unpaid tickets, the AAO cannot discern whether these offenses are merely infractions, or disqualifying misdemeanor offenses. 8 C.F.R. § 245a.1(o).

On September 16, 1988, the Western Regional Processing Facility requested the applicant to supply original certified court dispositions for the following arrests and/or convictions: (1) December 22, 1981 - *Failure to Appear* (section 40508A of the California Vehicle Code); (2) December 2, 1984 - *Driving Under the Influence* (DUI) (section 23152A of the California Penal Code); and (3) October 3, 1986 - *Failure to Appear* (section 40508A of the California Vehicle Code). The record before the AAO does not reflect the applicant's response to this request for evidence.

Thereafter, the application for temporary residence (Form I-687) was denied on April 10, 1990. The director noted that the applicant had three disqualifying misdemeanor convictions in California: (1) December 24, 1984 - *Failure to Appear* (section 40508A of the California Vehicle Code), (2) January 22, 1985 - *Driving Under the Influence* (DUI) (section 23152A of the California Penal Code); and (3) March 24, 1987 - *Failure to Appear* (section 40508A of the California Vehicle Code). With the exception of the robbery offense, all other listed offenses are considered misdemeanors under California law.

Counsel for the applicant submitted evidence to confirm that the March 24, 1987 conviction was erroneously attributed to the applicant. Counsel also submitted documents to confirm that the applicant's December 24, 1984 conviction for failure to appear and January 22, 1985 conviction for DUI were vacated upon successful completion of the terms of probation, pursuant to section

1203.4 of the California Penal Code. Thus, counsel maintains that the applicant remains eligible for temporary residence because one conviction does not refer to the applicant and two other convictions have been vacated.

The AAO has reviewed all of the documents in the file and the attendant federal regulations and precedent authority in the Ninth Circuit Court of Appeals, the jurisdiction in which this case arises. We conclude that the applicant's convictions remain valid for immigration purposes and that they are sufficient in number to disqualify him for temporary residence pursuant to the terms of the settlement agreements.

At issue in this proceeding is whether the applicant has established that he resided in the United States throughout the statutory period and whether he met his burden of establishing that he is otherwise admissible to the United States, that he does not have a disqualifying criminal conviction, and that he is eligible to adjust to lawful permanent resident status. Here, the applicant has not met his burden of proof to demonstrate eligibility for temporary resident status on account of his inability to resolve the conflict in the evidence regarding the criminal charges and convictions discussed above. *See* section 245A(b)(1)(C)(ii) of the Act; 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5).

In this case, public records indicate that the applicant has a December 30, 1980 arrest for robbery. Robbery is considered a felony offense and a conviction for robbery immediately disqualifies an applicant for temporary residence. 8 C.F.R. § 245a.2(c)(1). It is not sufficient for the applicant to state in an affidavit that additional evidence regarding the disposition of the robbery charge does not exist or that the court records have been destroyed.

In order to prevail on this issue, the applicant must show that the evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The applicant must then submit relevant "secondary evidence." If the applicant cannot submit secondary evidence, then he or she must establish that secondary evidence is unavailable and must do so on official letterhead. The applicant must then submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, the evidence would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest.

In this case, the applicant has submitted none of the information discussed above. It is incumbent upon the applicant to 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). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application.

Id. at 591. The applicant has provided no credible evidence to resolve the December 1980 arrest for robbery.

Furthermore, the applicant's December 24, 1984 conviction for failure to appear and January 22, 1985 conviction for DUI carry significant immigration consequences despite the vacatur. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.¹ 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. Any subsequent action that overturns a state conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. 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).

Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural or constitutional defect in the trial court proceedings, and the vacated judgments remain valid for immigration purposes.

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

As noted above, to meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so. The applicant has not overcome the evidence regarding at least three misdemeanor convictions, including the December 22, 1981 - *Failure to Appear* (section 40508A of the California Vehicle Code); the two remaining convictions on December 24, 1984 and January 22, 1985, nor has he provided a final disposition regarding the arrest in 1980 for robbery.

¹ See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

Therefore, the applicant has failed to establish by a preponderance of the evidence that he has no disqualifying criminal convictions and is otherwise admissible to the United States, as required under both 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. He is therefore ineligible for adjustment to permanent resident status pursuant to 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