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U.S. Citizenship and Immigration Services
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FILE: [REDACTED]
MSC 05 071 10081

Office: HOUSTON

Date: JUN 04 2009

IN RE: Applicant: [REDACTED]

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:

SELF-REPRESENTED

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. Grissom
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 director, Houston. 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 (together comprising the I-687 Application). The director denied the application for temporary residence because the evidence submitted by the applicant revealed a 1996 Texas state felony conviction. 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 represents himself on appeal. The applicant does not contest the fact that he has a felony conviction. On the Notice of Appeal (Form I-694), the applicant refers to his affidavit submitted on December 28, 2005 in response to the Notice of Intent to Deny (NOID) wherein he asserts eligibility for temporary resident status. The applicant states in his affidavit that his felony conviction should not disqualify him for temporary resident status because his sentence was deferred during his period of probation and that his case “was dismissed on order of the court.”

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)(1).

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)(1) 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).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, and that he has no disqualifying criminal convictions and is thus otherwise admissible to the United States. Here, the applicant has failed to meet this burden because the record reveals that he has a disqualifying felony conviction.

For purposes of qualifying for certain immigration benefits, 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.18(a)(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 (Act), 8 U.S.C. § 1101(a)(48)(A).

The AAO has reviewed all of the evidence in the file, including the documents regarding the applicant's criminal conviction. The record contains court documents that reveal the applicant pleaded guilty on April 30, 1996 to one count of violating Title 8, Chapter 37.10 of the Texas Penal Code – *tampering with governmental record with intent to defraud or harm another* (Case no. 714295). This offense is listed as a second degree felony in the court documents. The applicant was sentenced to four years of probation and ordered to pay a fine. The applicant was discharged from probation on April 29, 2000. On the same date, the sentencing court dismissed the charges against the applicant.

The applicant argues on appeal that his "deferred adjudication pending successful completion of probation" was not considered a "conviction" for immigration purposes on the date of his

sentencing, April 30, 1996. The applicant states that the definition of “conviction” was amended at a later date, and that the earlier definition of “conviction” should apply in his case. Therefore, at the date of sentencing, April 30, 1996, the applicant maintains that he was not technically “convicted” of a felony and as a result, he remains eligible for temporary resident status.

The AAO has reviewed the statutes in question, including the Texas Penal Code under which the applicant was charged, the amendments to the federal definition of “conviction” in the Immigration and Nationality Act (INA), as well as all of the court records in the file. We conclude that the applicant’s argument is without merit, and that the applicant remains convicted of a felony for which no waiver is available.

For immigration purposes, the federal definition of “conviction” may be found at 8 U.S.C. § 101(a)(48):

(A) The term “conviction” means, with respect to an alien, a formal judgment of guilty 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.

The AAO notes that the definition of “conviction” was amended by Section 322(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. 104-208, 110 Stat. 3009. Furthermore, Section 322(c) of IIRAIRA specified that the amended definition of “conviction” would apply to convictions and sentences entered *before, on, or after the date of the enactment of the Act* (September 30, 1996) (emphasis added). As a consequence, the applicant’s “deferred adjudication of guilt” entered on April 30, 1996 is considered a “conviction” for immigration purposes, because Congress specifically stated that the amended definition of “conviction” would apply retroactively.

The applicant stands convicted of a felony offense. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. Furthermore, any dismissal or expungement of the Texas state conviction is ineffective for immigration purposes unless the conviction was dismissed because of a fundamental constitutional error or procedural defect in the underlying trial court proceedings. *See Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). The record contains no evidence of a dismissal on constitutional grounds. Therefore, the applicant is ineligible for temporary resident status under section 245A of the Act on this basis. The decision of the director is affirmed.



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