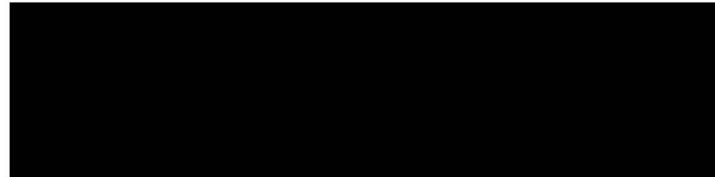


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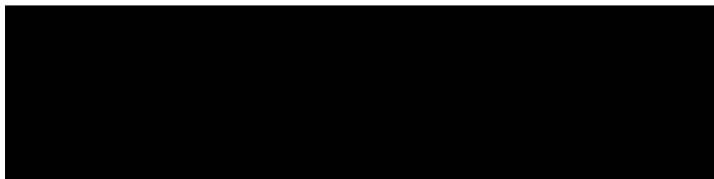
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FILE: [REDACTED] Office: LOS ANGELES Date: JAN 27 2010
MSC 05 045 11372

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:



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.


Perry Rhew
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 Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of three misdemeanor offenses in the state of California: two convictions on July 31, 1992, for theft (section 484 of the California Penal Code), and for failure to attend a court ordered hearing (section 853.7 of the California Penal Code); and one additional conviction on September 27, 2000, for failure to register a vehicle (section 4462.5 of the California Vehicle Code). The director concluded that the applicant was not eligible for temporary resident status pursuant to the terms of the settlement agreements.

The applicant is represented by counsel on appeal. Counsel submitted a brief in support of the appeal. Counsel asserts that the 1992 charges were withdrawn by the court in 1994 when it was determined that the match with the applicant was the result of a case of mistaken identity. Counsel maintains that the charges filed in 1992 were based on an unreliable record match, in that the match was made under the name of [REDACTED] an alias admittedly utilized in the past by the applicant. The applicant contends that a different individual used the name [REDACTED], and because the match was made by name only, and not by the use of fingerprints, the conviction documents for the 1992 charges are unreliable and were ultimately dismissed by the court.

With regard to the failure to appear conviction in 2000 noted by the director, counsel claims that this charge has been dismissed. Counsel admits that the applicant has one conviction for DUI and one conviction for intent to avoid compliance with a registration requirement (section 4462.5 of the California Vehicle Code). Counsel maintains that the applicant "is in the process of trying to clear his name," and that he is otherwise eligible for temporary resident status because he has less than three misdemeanor convictions.

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).

Furthermore, 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 temporary 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 (Act), 8 U.S.C. § 1101(a)(48)(A).

The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

The record contains a letter dated November 12, 2003, from the State of California, Department of Justice, Bureau of Criminal Identification. This letter is addressed to the applicant and reveals that a search was made under four different names: (1) [REDACTED] (2) [REDACTED]

(3) [REDACTED] and (4) [REDACTED] On or about July 31, 1992, [REDACTED]

[REDACTED] (name no. 1 above) was arrested by the Sheriff's Office for Santa Ana County and convicted for one count of violating section 484(a) of the California Penal Code – theft of personal property, and was sentenced to eight days in the county jail and 36 months probation.

[REDACTED]
This criminal record indicates that thereafter on or about January 8, 1994, [REDACTED]
[REDACTED] (name no. 3 above) was arrested by the Sheriff's Office for Santa Ana County as a result of the issuance of a bench warrant for two separate offenses: petty theft, and false identification to a peace officer (section 148.9 CPC). However, a comment to the citation states that [REDACTED] was "found not be [the] subject of warrant [REDACTED]
The applicant and [REDACTED] are one and the same. The AAO agrees with counsel's contention that the petty theft and false identification convictions do not apply to the present applicant.

Additionally, the record indicates that the applicant was charged with failure to attend a court ordered hearing (section 853.7 CPC) and a bench warrant with the number [REDACTED] was issued on February 16, 1994 for his arrest. Thereafter, the court ordered that the warrant be recalled on July 3, 2000 and that the charge be dismissed with no further proceedings. Therefore, this incident is not considered a conviction for immigration purposes.

Next, the record contains a docket report issued by the Superior Court of California, Orange County. This record identifies [REDACTED]. This record reveals that on September 27, 2000, the applicant was charged with one count of violating section 4462.5 of the California Vehicle Code – intent to avoid compliance w/registration requirement. The applicant is identified as [REDACTED]. This offense is listed as a misdemeanor and the applicant pleaded guilty on November 6, 2000. The applicant was ordered to pay a fine and an abstract of the conviction was sent to the Department of Motor Vehicles on November 7, 2000. This offense counts as a criminal conviction for immigration purposes.

¹ The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Additionally, the applicant signed a personal declaration on January 28, 2008 admitting that he was convicted for DUI. The applicant's admission is confirmed by a photocopy of a printout from the California Department of Motor Vehicles dated December 6, 2007, that identifies a conviction on August 7, 1992 for one count of violating section 23152(a) of the California Vehicle Code – DUI. The applicant was sentenced to an unspecified jail term, ordered to pay a fine, sentenced to probation for 36 months, and referred to an alcohol rehabilitation clinic.

[REDACTED] This offense counts as a criminal conviction for immigration purposes.

Furthermore, the AAO has carefully reviewed the list of violations revealed on the printout from the California Department of Motor Vehicles dated December 6, 2007. It appears that the applicant has at least one additional misdemeanor conviction for a violation of section 40508(a) of the California Vehicle Code – failure to appear, to which the applicant pleaded guilty on August 7, 2000, and was ordered to pay a fine of \$436. The AAO has reviewed this section of the California Vehicle Code:

- (a) A person willfully violating his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court or before a person authorized to receive a deposit of bail is guilty of a misdemeanor regardless of the disposition of the charge upon which he or she was originally arrested.

This offense is identified as
misdemeanor conviction for immigration purposes.

Therefore, this offense counts as a

The remaining motor vehicle violations listed on the printout from the California Department of Motor Vehicles involve failure to obey traffic signals, to use a safety belt, to give the right of way in a crosswalk, and to obey a warning notice.

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 temporary resident status. 8 C.F.R. § 245a.2(c)(1). In this case, the applicant has failed to meet his burden of proof because he has at least three misdemeanor convictions. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(a)(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. The decision of the director is affirmed.

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