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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529 - 2090



**U.S. Citizenship  
and Immigration  
Services**



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FILE: [Redacted] Office: SAN FRANCISCO Date: JUN 29 2010

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 on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

*Perry Rhew*

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, San Francisco. 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, finding the applicant was statutorily ineligible on account of his four misdemeanor convictions.

On appeal, the applicant asserts that three of his four misdemeanor convictions have been expunged, so he is eligible for temporary resident status.

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 first issue in this proceeding is whether the applicant has established his eligibility for temporary resident status pursuant to the terms of the settlement agreements. The AAO has reviewed the evidence of record, including the applicant's criminal record, and concludes that the applicant has not met his burden of proof to establish his eligibility for temporary resident status pursuant to the settlement agreements.

The record before the AAO reveals that the applicant has multiple criminal convictions. 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).

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 record reflects the applicant has at least six misdemeanor convictions:

- The Los Angeles Police Department arrested the applicant on October 5, 1987 and charged him with violation of section 2800.1 of the California Vehicle Code (VC), *attempt to evade peace officer*, a misdemeanor; a violation of section 23103 VC, *reckless driving*, a misdemeanor; a violation of section 22349 VC, *exceeding 55 miles per hour*, an infraction; and section 23109(c) VC, *exhibition of speed, engage, aid, abet*, a misdemeanor. On March 3, 1993, the applicant was convicted of violating section 23109(c) VC in the Van Nuys District Court [REDACTED]
- On September 14, 1994, the Los Angeles Police Department arrested the applicant and charged him on four misdemeanor counts: 23152(a), 23152(b), 14601.1(a) and 12500(a) VC. On October 6, 1994, the applicant was convicted of violating sections 23152(b) and 14601.1(a) VC, *driving with a blood alcohol level of more than .08 percent* and *driving with suspended license*, respectively in the Van Nuys District Court [REDACTED]
- On October 25, 1997, the applicant was convicted of violating section 23152(b) VC, *driving with a blood alcohol level of more than .08 percent*, in the Van Nuys Judicial District [REDACTED]
- On May 30, 2000, the applicant was arrested and charged with violating section 23152(a) VC, *driving while intoxicated with two priors* and 23152(b) VC, *driving with a blood alcohol level of more than .08 percent*. He was convicted of violating section 23152(a), a misdemeanor, on June 30, 2000 in the Alameda County Municipal Court [REDACTED]
- The Los Angeles Police Department arrested the applicant on September 10, 1998, and charged him on two counts, a violation of section 273.5(a) of the California Penal Code (PC), *inflicting corporal injury on spouse*, a misdemeanor; and section 594(a) PC, *vandalism*, a

misdemeanor. On September 11, 1998, he was convicted of violating section 273.5(a) PC in the Van Nuys District Court

On appeal, the applicant submits evidence that he obtained expungements of three of his misdemeanor convictions pursuant to section 1203.4 PC. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *see also Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In this case, there is no allegation or evidence that there were any legal defects in the underlying criminal proceedings.

The applicant stands convicted of three or more misdemeanors. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B). No waiver of such ineligibility is available. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Beyond the decision of the director, the applicant failed to establish his continuous residence throughout the requisite period. For this additional reason, the application may not be approved.

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