

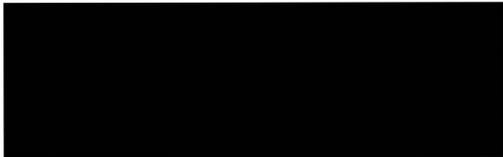
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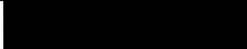


U.S. Citizenship
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FILE:



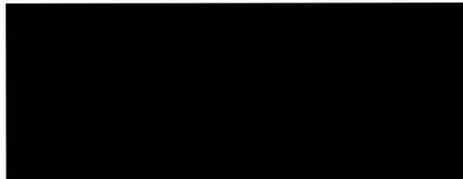
Office: California Service Center

Date: DEC 05 2006

XSF-88-504-5030

INRE:

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert Chief
Administrative Appeals Office

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

The director denied the application because of the applicant's criminal record. On appeal, the applicant states that he has cleared his name on one charge, for which he was found innocent.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for 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 Federal Bureau of Investigation report in the record indicates that the applicant was arrested for *Possession of Concealed Weapon* on October 8, 1981 in Hayward, California, and that he was later convicted on November 16, 1981. The same document shows the applicant was convicted of *Illegal Entry*, 8 U.S.C. § 1325, on February 3, 1986, and deported on February 20, 1986.

In his decision, the director also pointed out the applicant was convicted of *Assault with Injury*, section 243(d) of the California Penal Code, on October 22, 1987. The applicant submitted a Conditions of Probation document from the Alameda County Probation Department showing he was convicted of this charge.

On appeal, the applicant does not challenge the facts of these convictions. He provides photocopies of two documents from the Municipal Court for the Oakland-Piedmont-Emeryville Judicial District, County of Alameda, State of California. These documents relate to relief provided by Section 1203.4 of the Penal Code of the State of California, and reveal that the findings of guilt were set aside and the complaints dismissed. However, the photocopies are of such poor quality that it cannot be ascertained what cases they refer to. Even if the original documents do relate to the two California convictions shown above, it is noted that under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 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).

On appeal, the applicant claims that he cleared his name on one charge for which he was found innocent. He refers to the probation document. However, this document, while showing the imposition of the sentence was suspended, in no way demonstrates that he was found innocent.

The applicant was convicted of at least three misdemeanor offenses and is ineligible for temporary resident status. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden.

In addition, subsequent to the filing of the appeal, the director wrote to the applicant and advised him that he is also ineligible for temporary residence because he had been deported on February 20, 1986.

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 Act, 8 U.S.C. § 1255a(a)(2). An alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(B)(i).

Because of the deportation, the applicant did not reside continuously in the United States as required. Congress provided no relief in the legalization program for failure to maintain continuous residence due to a departure under an order of deportation. Relief is provided in the Act for absences based on factors other than deportation, namely absences due to emergencies and absences approved under the advance parole provisions. Clearly, with respect to maintenance of continuous residence, it was not congressional intent to provide relief for absences under an order of deportation.

General grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having been deported and having returned to the United States without authorization. An alien's inadmissibility under section 212(a) of the Act, which may be waived, is an entirely separate issue from the continuous residence issue discussed above.

In summary, the applicant was out of the United States after January 1, 1982 under an order of deportation. He failed to maintain continuous residence, and there is no waiver available. Therefore, he is ineligible for temporary residence on that basis, as well as the criminality discussed above. He is

inadmissible under section 212(a)(9)(A)(ii)(II) of the Act as an alien who was deported and returned without permission. He has not requested a waiver of this inadmissibility.

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