



U.S. Citizenship
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Services

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FILE:



Office: NATIONAL BENEFITS CENTER

Date:

NOV 29 2007

MSC 05 279 14519

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:

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 the matter 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 P. Wiemann, 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, National Benefits Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to temporary resident status pursuant to 8 C.F.R. § 245a.2(c)(1) because she had been convicted of a felony in the United States. See section 245A(a)(4)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(4)(B).

On appeal, the applicant claims that she had not been convicted of a felony because she pleaded guilty to the charge against her and served less than one year in jail. The applicant submits copies of court documents in support of her appeal.

Pursuant to 8 C.F.R. § 245a.2(c)(1), an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status.

"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).

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 Act, 8 U.S.C. § 1101(a)(48)(A).

Under the 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. 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). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The Board of Immigration Appeals (BIA) has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), the BIA clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The issue to be examined is whether the applicant's criminal conviction renders her ineligible to adjust to temporary residence under the provisions of the section 245A of the Act.

The record contains court documents and computer printouts that reflect the applicant pleaded guilty to a felony violation of 18 U.S.C. § 371, Conspiracy to commit offense or to defraud the United States (specifically a conspiracy to violate 18 U.S.C. § 510(b), Purchase, sale, exchange, receipt, delivery, retention, or concealment of Treasury Checks, Bonds, or Securities with the knowledge that such instrument was stolen or bore a falsely made or forged endorsement or signature), in the United States District Court for the Central District of California with docket number [REDACTED] on August 30, 1991 with judgment subsequently entered on September 13, 1991. These documents show that the applicant was sentenced to three months imprisonment with an additional three years of supervised release upon completion of imprisonment.

The applicant claims that she had not been convicted of a felony because she pleaded guilty to the charge against her and served less than one year in jail on appeal. The record contains a copy of the Judgment and Probation Order reflecting that the applicant entered a plea of guilty to the charge cited in the previous paragraph on August 30, 1991. Clearly, the applicant has been convicted under the statutory definition of this term provided at section 101(a)(48)(A)(i) of the Act. The record does not contain any evidence demonstrating that the applicant's conviction was subsequently expunged.

18 U.S.C. § 371, Conspiracy to commit offense or to defraud the United States, reads as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The documents contained in the record reflect that the offense that was the object of the conspiracy for which the applicant had been convicted was a violation of 18 U.S.C. § 510(b), Purchase, sale, exchange, receipt, delivery, retention, or concealment of Treasury checks, bonds, or securities with the knowledge that such instrument was stolen or bore a falsely made or forged endorsement or signature. An individual convicted of a violation of 18 U.S.C. § 510(b) "...shall be fined under this title or imprisoned not more than ten years, or both." 18 U.S.C. § 510(c) allows for a reduction in the classification of the offense to a misdemeanor:

If the face value of the Treasury check or bond or security of the United States or the aggregate face value, if more than one Treasury check or bond or security of the United States, does not exceed \$1,000, in any of the above-mentioned offenses, the penalty shall be a fine under this title or imprisonment for not more than one year.

In this particular case, the applicant and co-conspirators were indicted for violations of both 18 U.S.C. § 371 and 18 U.S.C. § 510(b) for the sale, exchange, and delivery of \$116,117.89 in stolen Treasury checks in the United States District Court for the Central District of California on April 23, 1991. Consequently, the applicant's subsequent conviction for violating 18 U.S.C. § 371 must be considered to be a felony conviction as the underlying offense that was the object of the conspiracy, a violation of 18 U.S.C. § 510(b), is a felony offense.

The applicant is ineligible for temporary resident status because of her felony conviction. 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. *See* section 245A(d)(2)(B)(ii) of the Act.

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.

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