



U.S. Citizenship
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Services

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FILE: [REDACTED]
MSC-05-188-12110

Office: NATIONAL BENEFITS CENTER

Date:

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has 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 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 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. The director determined that the applicant has been convicted of either one felony or three or more misdemeanors. The director denied the application, finding that on this basis the applicant is not eligible to adjust to temporary resident status under section 245A of the Act.

On appeal, the applicant asserts that he is eligible for temporary resident status because he has been convicted of only one misdemeanor.

An applicant for temporary resident status must establish that she is admissible to the United States as an immigrant and has not been convicted of any felony or of three or more misdemeanors committed in the United States. Section 245A(a)(4)(A)-(B) of the Act, 8 U.S.C. § 1255a(a)(4)(A)-(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.1.

“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 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).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The record shows that on November 28, 1995, the applicant was charged with *possession of a controlled substance* in violation of section 11377(a) of the California Health and Safety Code.¹ The applicant submitted a court certified copy of the criminal docket, which provides that the applicant pled guilty to the charged offense and, on December 22, 1995, was placed on three years probation and sentenced to 60 days in the county jail. On February 11, 1998, a hearing was

¹ Superior Court of California, San Bernardino County, Case Number [REDACTED]

conducted where the applicant admitted to the violation of his probation. The applicant was sentenced to 75 days in the county jail. Section 11377(a) of the California Health and Safety Code provides that a conviction for possession of a controlled substance shall be punished by imprisonment for not more than one year. Therefore, the applicant's conviction under this statute renders him convicted of one misdemeanor pursuant to 8 C.F.R. § 245a.1(o).

It should be noted that a Federal Bureau of Investigation (FBI) report also reveals that on April 29, 1995, the applicant was arrested and charged with *possession of a controlled substance* in violation of section 11377(a) of the California Health and Safety Code and *petty theft* in violation of section 488 of the California Penal Code. Section 490 of the California Penal Code provides that *petty theft* shall be punished by imprisonment not exceeding six months. The applicant has not provided any relevant court documents related to this arrest and the director did not request such documents, therefore, the final disposition of the charges remains unknown.

Since there is no documentary evidence that the applicant has been convicted of a felony or three or more misdemeanors, the director's finding that he is ineligible for temporary resident status on this basis is withdrawn.

The remaining issue in this proceeding is whether the applicant's conviction for the possession of a controlled substance renders him subject to a ground of inadmissibility. As stated above, pursuant to section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255(a)(4)(A), an applicant for temporary resident status must also establish that he is admissible to the United States as an immigrant.

Under section 212(a)(2)(A)(i)(II) of the Act, an alien is inadmissible for the violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)). 8 U.S.C. § 1182(a)(2)(A)(i)(II). The applicant's record contains a misdemeanor complaint indicating that he was convicted based on his possession of methamphetamine. Methamphetamine has been designated as a controlled substance under Schedule II of the Controlled Substances Act. 21 U.S.C. § 812. Therefore, the applicant's conviction for this offense renders him inadmissible to the United States as a controlled substance violator. Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003). 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).

In conclusion, the applicant's conviction for a violation of a law relating to a controlled substance renders him inadmissible to the United States. Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). Pursuant to section 245A(d)(2)(B)(ii)(1) of the Act, waivers of inadmissibility are precluded for applicants convicted of such crimes. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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