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

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: APR 07 2009
MSC 06 082 13334

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 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 if your case was remanded for further action, you will be contacted.

John F. Grissom
Acting 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. 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 because the applicant had not established her continuous residence in the United States and because she been convicted of one count of forgery, a felony offense, in California. The director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

The applicant represents herself on appeal. In lieu of explaining her reasons for appeal on the Notice of Appeal (Form I-694), the applicant attached a copy of a minute order issued by the Superior Court of California, County of San Bernardino, dated January 30, 2007. The order reveals that on October 23, 2001, the applicant's felony conviction was reduced to a misdemeanor conviction, and the case was "dismissed pursuant to section 1203.4 of the [California] Penal Code."

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet her burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, and that she has no disqualifying criminal convictions and is thus otherwise admissible to the United States. Here, the applicant has failed to meet this burden.

The minute order in the file indicates that the applicant was charged with three felony counts of violating section 470B of the California Penal Code – *Possession of Forged Driver's License* on May 5, 1999. The applicant pleaded *nolo contendere* to one count and the remaining counts were dismissed pursuant to a plea agreement. The applicant was sentenced to three years incarceration in the state prison. The applicant's motion to have the felony charge reduced to a misdemeanor was denied by the court on August 25, 1999. Thereafter, the applicant's sentence was vacated and the court imposed a term of imprisonment of 180 days in the county jail and three years of supervised probation. Thereafter, on March 23, 2001, the applicant again requested that the felony conviction be reduced to a misdemeanor and that the charges be dismissed. The applicant's motion was denied, without prejudice to request reconsideration in six months. Ultimately, the applicant's motion was successful and the court granted the petition for reduction of the charge and dismissal of the case on October 23, 2001.

The record before the AAO reveals that the applicant has a felony criminal conviction which remains valid for immigration purposes despite the subsequent reduction of the charge and ultimate dismissal by the trial court. For purposes of qualifying for certain immigration benefits, 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 Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(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).

Furthermore, as this case arises within the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit is applicable. The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.[2] Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural defect in the merits of the case, and the vacated judgment remains valid for immigration purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The AAO notes that the applicant did not identify any arrests or convictions on her application for temporary residence (*See* No. 37, Form I-687). The applicant signed the Form I-687 under penalty of perjury that all of the information contained therein was true and correct (*Id.*, No. 43). The AAO finds that the applicant's false attestation regarding her criminal history is an act of perjury which further undermines her eligibility for temporary resident status under the terms of the settlement agreements.

On appeal, the applicant appears to imply that because her conviction for possessing a forged driver's license was reduced from a felony to a misdemeanor and then dismissed, she remains eligible for temporary resident status. The AAO finds this argument to be without merit.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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.

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[2] See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); *see also de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

In this case, there is no evidence in the record to suggest that the applicant's felony conviction was dismissed as a result of any procedural or constitutional error committed during the trial court proceedings. The court's post-conviction relief granted to the applicant was clearly intended to avoid the immigration consequences of a felony conviction. As noted above, no effect may be given to state court actions which purport to erase the original determination of guilt. *Matter of Roldan, id.* Thus, the applicant's felony conviction remains valid for immigration purposes and serves to disqualify her for temporary residence under the terms of the settlement agreements.

The applicant stands convicted of a felony offense. She is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.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. The decision of the director is affirmed.

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