

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



41

FILE: [REDACTED] Office: NEWARK
MSC-07-018-11503

Date: APR 22 2009

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under
Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



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 remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey, terminated the applicant's temporary resident status and denied his application to adjust status from temporary to permanent resident. The denial of adjustment of status is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had failed to establish that he satisfied the "basic citizenship skills" required under section 245A(b)(1)(D) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(b)(1)(D).

On appeal, counsel asserts that pursuant to 8 C.F.R. § 245a.3(b)(4), the applicant is exempt from the basic citizenship skills requirement. Counsel states that at the time the applicant filed his adjustment of status application he was 54 years old and had been residing in the United States for approximately 32 years. Counsel notes that the fact that the applicant was granted temporary residence implies that he already established that he has continuously resided in the United States since 1982.

Under section 245A(b)(1)(D) of the Act ("Basic Citizenship Skills"), an applicant for permanent resident status must demonstrate that he or she:

- (I) meets the requirements of section 312(a) of the Act (8 U.S.C. 1423(a)) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or
- (II) is satisfactorily pursuing a course of study (recognized by the Attorney General [now the Secretary of Homeland Security (Secretary)]) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

The regulation at 8 C.F.R. § 245a.3(b) states in pertinent part that:

Any alien who has been lawfully admitted for temporary resident status under section 245A(a) of the Act, such status not having been terminated, may apply for adjustment of status of that of an alien lawfully admitted for permanent residence if the alien . . .

(4)(i)(A) Can demonstrate that the alien meets the requirements of section 312 of the Immigration and Nationality Act, as amended (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States) . . .

(ii) The requirements of paragraph (b)(4)(i) of this section must be met by each applicant. However, these requirements shall be waived without formal application for persons who, as of the date of application or the date of eligibility for permanent residence under this part, whichever date is later, are:

(C) Over 50 years of age who have resided in the United States for at least 20 years and submit evidence establishing the 20-year qualification requirement. Such evidence must

be submitted pursuant to the requirements contained in Section 245a.2(d)(3) of this chapter

The record of proceedings shows that the applicant indicated on his temporary residence application (signed May 2, 1988) that he has resided in the United States since January 1974. The applicant furnished with his temporary residence application evidence of his residence in the United States during this time period. The record also contains applicant's original Social Security statement, dated December 13, 2002, which shows his continuous employment in the United States since 1987. In addition, the applicant indicated on his application to adjust status from temporary to permanent resident, filed October 18, 2006, that he has not departed the United States since he was granted temporary residence on September 23, 2003. The foregoing documentation demonstrates that the applicant had resided in the United States for at least 20 years as of the date he filed an application to adjust status. Furthermore, the record contains the applicant's passport, which shows his date of birth as March 15, 1952. The applicant therefore was 54 years old when he filed his adjustment application. Given the applicant's age and residence in the United States, he qualifies for the waiver to the Basic Citizenship Skills requirement as delineated under 8 C.F.R. § 245a.3(b)(4)(ii)(C).

Although the applicant has overcome the basis for the director's denial of his adjustment of status application, the AAO finds in a *de novo* review that the applicant remains ineligible for the benefit sought.¹ On February 24, 2009, the AAO sent a notice to the applicant informing him that the AAO intended to dismiss his appeal based on derogatory information in the record. The AAO determined that the applicant was ineligible for permanent resident status because his record revealed that he had been convicted of at least four misdemeanor offenses. The AAO provided the applicant a period of 30 days to respond to the notice of intent to dismiss. As of the date of this decision, the applicant has not responded to the notice. Therefore, the AAO will consider the record to be complete for purposes of rendering a decision on the appeal.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment from temporary resident to permanent resident status under section 245A of the Act. 8 C.F.R. § 245a.3(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

¹ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the field office 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); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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).

“Conviction” is defined under section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) as a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where 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 the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Court dispositions in the applicant’s record reveal that he was convicted of the following two misdemeanors:

- On July 16, 1981, the applicant was convicted of *Driving Under the Influence* in violation of section 23102(a) of the California Vehicle Code and sentenced to 36 months probation. [REDACTED]. The term of imprisonment for the first violation of section 23102(a) of the California Vehicle Code is not more than six months. Cal. Veh. Code § 23102(c).
- On November 30, 2005, the applicant was convicted of *Driving While Intoxicated* in violation of chapter 4, section 50 of the New Jersey Motor Vehicles and Traffic Regulations and ordered to pay a fine ([REDACTED]). The term of imprisonment for the first violation of this statute is not more than 30 days. N.J. Stat. Ann. § 39:4-50(a)(1) (West 2005).²

Additionally, a Federal Bureau of Investigation (FBI) report based upon the applicant’s fingerprints and arrest reports contained in his record reveal the following three arrests:

- On February 20, 1978, the applicant was arrested by the Los Angeles Police Department and charged with one count of felony *Drinking While Driving on a Highway* [REDACTED] in violation of section 23101(a) of the California Vehicle Code. The term of imprisonment for the first violation of section 23101(a) of the California Vehicle Code is not more than one year. Cal. Veh. Code § 23101(c).
- On December 5, 1975, the applicant was arrested by the Los Angeles Police Department [REDACTED] and charged with *Shoplifting* in violation of section 484 of the California Penal Code for theft in the value of \$1.34. The term of imprisonment for *Petty Theft* is not more than six months. Cal. Penal Code § 490.
- On December 9, 1979, the applicant was arrested in California and charged with *Driving Under the Influence* in violation of section 23102(a) of the California Vehicle Code. The term of imprisonment for the first violation of section 23102(a) of the California Vehicle Code is not more than six months. Cal. Veh. Code § 23102(c).

² On appeal, counsel asserts that this conviction is neither a felony nor a misdemeanor because it is not defined as a crime in the New Jersey Statutes. However, whether an offense of is defined as a crime under New Jersey law is not relevant in a determination of whether such an offense is considered a misdemeanor pursuant to 8 C.F.R. § 245a.1(o).

The applicant was given the opportunity to submit certified court dispositions related to these arrests in rebuttal to the AAO's notice of intent to dismiss. However, the applicant failed to submit such documentation, and has not otherwise responded to the notice.³ The AAO notes that the burden of proof is on the applicant to provide affirmative evidence that he is eligible for the benefit sought. The AAO finds that the applicant has not provided such evidence in these proceedings.

In conclusion, the applicant has not met his burden of proof in establishing his eligibility for permanent resident status pursuant to section 245A(b)(1)(C) of the Act, 8 U.S.C. § 1255a(b)(1)(C). The record reveals that the applicant has been charged with five misdemeanor offenses. There is no documentation in the record to show that he has not been convicted of these offenses. The AAO therefore finds that the applicant is ineligible for adjustment to permanent resident status.⁴ See 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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

³ On appeal, counsel asserts that the applicant pled guilty to his December 5, 1975 arrest for *Shoplifting* and February 20, 1978 arrest for *Drinking While Driving on a Highway*. Counsel states that the applicant paid fines for both of these offenses and he concedes that they are misdemeanors. Therefore, the applicant has been convicted of at least four misdemeanor offenses.

⁴ The AAO notes that the applicant's criminal offenses render him ineligible for temporary resident status, and affirms the termination of the applicant's temporary resident status on this basis. See 8 C.F.R. § 245a.2(u)(1)(i),(iii).