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

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U.S. Citizenship
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Services

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FILE:

XHU-88-040-02115

Office: TEXAS SERVICE CENTER

Date: AUG 27 2009

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:

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 termination of the applicant's temporary resident status by the Director, Texas Service Center, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

On October 24, 2008, the director, Texas Service Center, terminated the applicant's temporary resident status because his record of proceedings reflects that he was convicted of *Public Intoxication, Driving While Intoxicated* and *Carrying a Prohibited Weapon*. The director noted that pursuant to 8 C.F.R. § 245a.2(u)(1)(iii), the temporary resident status of an alien who has been convicted of a felony or three or more misdemeanors in the United States may be terminated at any time.

On appeal, counsel asserts that the applicant's March 8, 1981 conviction for *Public Intoxication* does not constitute a misdemeanor as defined by the applicable regulations; therefore he stands convicted of only two misdemeanors.

The status of an alien lawfully admitted for temporary residence under section 245A of the Act may be terminated at any time upon a determination that the alien has been convicted of any felony or three or more misdemeanors. 8 C.F.R. § 245a.2(u)(iii).

"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 AAO finds that the director erred in terminating the applicant's temporary residence based upon his conviction for *Public Intoxication*. *Public Intoxication* constitutes a Class C misdemeanor under the Texas Penal Code. Tex. Penal Code Ann. § 42.08 (West 1987). A Class C misdemeanor is punishable only by a fine, not confinement. Tex. Penal Code Ann. § 12.23 (West 1987). It is therefore neither a felony nor a misdemeanor under the applicable immigration regulations. See 8 C.F.R. § 245a.1(o); 8 C.F.R. § 245a.1(p). Accordingly, the AAO will withdraw this part of the director's decision.¹

¹ The AAO notes that the record reflects that on October 17, 2003, the applicant was convicted of *No Driver's License* and fined \$292.50 (Nacogdoches Municipal Court, [REDACTED]). This offense constitutes a Class C misdemeanor under the Texas Penal Code. Tex. Transp. Code Ann. § 522.011 (West 2003). As stated above, a Class

During the adjudication of the applicant's appeal, the AAO determined that additional convictions in the applicant's record may render him ineligible for temporary resident status.

The record reflects that the applicant was convicted of the following misdemeanor offenses:

- On May 15, 1984, the applicant was convicted of *Driving While Intoxicated* and sentenced to 72 hours in jail, \$320.00 fine, and suspension of driver's license/privileges (County Court of Nacogdoches, Texas, Case No. [REDACTED]). The maximum term of imprisonment for a conviction of *Driving While Intoxicated* is not more than two years. Tex. Civ. Stat. Ann. art. 67011-1 (West 1987). Since the court disposition in this case indicates that the offense was classified by the state as a misdemeanor, and the applicant was sentenced to only 72 hours in jail, this crime will be treated as a misdemeanor pursuant to 8 C.F.R. § 245a.1(p).
- On May 31, 1984, the applicant was convicted of *Carrying a Prohibited Weapon* and sentenced to 5 days in jail and a \$50.00 fine (County Court of Nacogdoches, Texas, Case No. [REDACTED]). This offense can be sentenced as either a felony of the second degree or a Class A misdemeanor under Texas Penal Code, depending upon the subsection that was violated. Tex. Penal Code Ann. § 46.06 (West 1987). The disposition for this case indicates that the offense was classified by the state as a misdemeanor. The maximum term of imprisonment for a Class A misdemeanor is not more than one year. Tex. Penal Code Ann. § 12.21 (West 1987). Therefore, this conviction constitutes a misdemeanor pursuant to 8 C.F.R. § 245a.1(o).

The record reflects that the applicant was arrested or convicted of the following offenses for which there is incomplete or missing information:

- On June 15, 2007, the applicant was convicted of two counts of *Failure to Appear* and fined \$422.50 for each count (Nacogdoches Municipal Court, Docket Nos. [REDACTED] and [REDACTED]). This offense is punishable as either a Class A misdemeanor, Class C misdemeanor, or a felony of the third degree, depending on the offense for which the applicant's appearance was required. Tex. Penal Code Ann. § 38.10 (West 2007).² The record does not contain court dispositions related to the underlying offenses for which the applicant failed to appear.
- On April 7, 1984 the applicant was arrested by the Nacogdoches Police Department for *Public Intoxication* and *Disorderly Conduct*. As stated previously, *Public Intoxication* constitutes a

C misdemeanor is punishable only by a fine; it is therefore neither a felony nor a misdemeanor for immigration purposes.

The punishment for a Class A misdemeanor is a term of imprisonment not to exceed one year. Tex. Penal Code § 12.21 (West 2007). The punishment for a felony of the third degree is a term of imprisonment not to exceed 10 years. Tex. Penal Code § 12.34 (West 2007).

Class C misdemeanor under the Texas Penal Code. Tex. Penal Code Ann. § 42.08 (West 1987). It is therefore neither a felony nor a misdemeanor under the applicable immigration regulations. However, *Disorderly Conduct* is punishable as a Class C or Class B misdemeanor, depending upon the subsection the offense was committed under.³

On June 2, 2009, the AAO sent a notice to the applicant and his attorney informing them of the intent to dismiss the applicant's appeal because he had not established his eligibility for temporary resident status. Pursuant to the regulation at 8 C.F.R. § 103.2(b)(8), the AAO provided the applicant with an opportunity to submit additional evidence before rendering a final decision. The AAO requested the applicant to submit certified court dispositions for the underlying offenses related to his June 15, 2007 conviction for *Failure to Appear*. The AAO further requested the applicant to provide a certified court disposition related to his April 7, 1984 arrest for *Disorderly Conduct*.

The AAO instructed that if a certified court disposition for an offense is unavailable, the applicant shall provide a letter from the Courthouse with jurisdiction over the matter stating that the disposition is unavailable. The applicant must then submit relevant "secondary evidence," such as a criminal record containing the final disposition from the Nacogdoches Police Department, or any other court or police records related to his arrest. If secondary evidence is unavailable, the applicant shall provide an official letter from the Police Department stating that it is unavailable, and then submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. Acceptable documentation includes affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual who has direct knowledge of the disposition of the arrest.

The AAO instructed that any letter that is submitted to show that a criminal record is unavailable must be: (1) an original (i.e. no copies), (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available.

On July 2, 2009, the AAO received the applicant's response to the Notice of Intent to Dismiss. The applicant furnished an original certified letter from [REDACTED] Nacogdoches Municipal Court, dated June 30, 2009. [REDACTED]'s letter in pertinent part states, "The two (2) Failure to Appear charges filed against [REDACTED] DOB 8-29-1952 both originated from Class C violations. One case was for a no driver's license violation and the

³ Disorderly Conduct is a Class B misdemeanor if it is committed under subsection (a)(9) or (a)(10) of section 42.01 of the Texas Penal Code. Subsection (a)(9) is when a person intentionally or knowingly discharges a firearm in a public place other than a public road; Subsection (a)(10) is when a person intentionally or knowingly displays a firearm or other deadly weapon in a public place in a manner calculated to alarm. Tex. Penal Code Ann. § 42.01 (West 1987). The punishment for a Class B misdemeanor is a term of imprisonment not to exceed 180 days. Tex. Penal Code Ann. § 12.22 (West 1987).

other was for turning when unsafe.” Accordingly, the applicant’s June 15, 2007 convictions for two counts of *Failure to Appear* are punishable as Class C misdemeanors. See Tex. Penal Code Ann. § 38.10(e) (West 2007). As previously stated, a Class C misdemeanor is punishable only by a fine; it is therefore neither a felony nor a misdemeanor for immigration purposes.

The aforementioned letter from [REDACTED] further states, “According to State and Local Records Management Schedule, it is the practice of this court to expunge all closed disposition cases that are older than [sic] (5) years from the date of the violation.” [REDACTED] letter indicates that a certified court disposition related to the applicant’s April 7, 1984 arrest for *Disorderly Conduct* is unavailable. As proof that secondary evidence is also not available, the applicant furnished an original certified letter from [REDACTED] Records Division, Nacogdoches Police Department, dated June 24, 2009. [REDACTED] letter provides, “This department has checked for local arrest record on [REDACTED] date of birth 8/29/1952, Drivers License [REDACTED] and have found no arrest with our department for April 7, 1984.”

In lieu of secondary evidence, the applicant provided two affidavits from individuals who have direct knowledge of the events related to his April 7, 1984 arrest. The first affidavit is from the applicant’s spouse, [REDACTED], dated July 1, 2009. [REDACTED] affidavit provides in pertinent part:

I hardly remember the events that happened in April of 1984 at our home in Nacogdoches, Texas. One night in April in 1984, I had invited some of our family members to our home for a get-together. The women were cooking and the men were drinking. My husband had started drinking very early so by the end of the night he was drunk and being very loud. He never had a firearm or never discharged a firearm. A neighbor called the police and [REDACTED] was arrested.

The second affidavit is from the applicant’s sister, [REDACTED], dated July 1, 2009. Ms. [REDACTED] affidavit provides in pertinent part:

I vaguely remember the events that happened in April of 1984 in Nacogdoches, Texas. What I do remember is that one night I was at [REDACTED] house because he was having a family get-together. By the end of the night [REDACTED] was drunk and loud. He never had a firearm or discharged a firearm. A neighbor called the police and [REDACTED] was arrested.

As previously noted, *Disorderly Conduct* is punishable as a Class C or Class B misdemeanor, depending upon the subsection the offense was committed under. *Disorderly Conduct* is a Class B misdemeanor if it is committed under subsection (a)(9) or (a)(10) of section 42.01 of the Texas Penal Code. A violation of subsection (a)(9) is when a person intentionally or knowingly discharges a firearm in a public place other than a public road; a violation of subsection (a)(10) is when a person intentionally or knowingly displays a firearm or other deadly weapon in a public place in a manner calculated to alarm. Tex. Penal Code Ann. § 42.01. Based upon the

foregoing, the AAO finds that the applicant has met his burden of proof in establishing that his April 7, 1984 arrest for *Disorderly Conduct* was not based on a violation of subsection (a)(9) or (a)(10) of section 42.01 of the Texas Penal Code. Therefore, the applicant was arrested for a Class C misdemeanor, which is neither a felony nor a misdemeanor for immigration purposes.

The AAO concludes that the applicant has been convicted of two misdemeanors. He is therefore not ineligible for temporary resident status under section 245A(a)(4) of the Act. The termination of temporary resident status is withdrawn. The AAO suggests that the director reopen the applicant's adjustment of status application for adjudication on its merits.

ORDER: The appeal is sustained.