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

L1

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: DEC 0 2 2009
MSC 05 354 10488

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.

Perry Rhew
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 on December 5, 2006, because the applicant had five misdemeanor convictions in the state of 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 himself on appeal. The applicant asserts that the director erred in denying the application for temporary residence in that he did not provide the applicant with an opportunity to explain or rebut the criminal convictions when he failed to issue a Notice of Intent to Deny (NOID).

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 his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. In this case, the applicant has failed to meet this burden because of his criminal convictions.

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 temporary resident status. 8 C.F.R. § 245a.2(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 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).

The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1] In this case, the applicant cannot meet this burden of proof because of his criminal record.

---

[1] 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).

It is noted that, on appeal, the applicant mistakenly stated that the director was required to issue a Notice of Intent to Deny (NOID) pursuant to paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement. According to the settlement agreements, the director shall issue a NOID before denying an application for class membership. Here, the director adjudicated the Form I-687 application on the merits. As a result, the director is found not to have denied the application for class membership. Therefore, the director was not required to issue a NOID prior to issuing the final decision in this case. The AAO notes that the applicant failed to submit evidence on appeal concerning his criminal convictions.

The record contains court documents and police records that establish the applicant's arrests and convictions:

1. an arrest on December 21, 1990 by the Los Angeles Police Department for one count of violating section 466 of the California Penal Code – possession of burglary tools. The charge was dismissed for lack of sufficient evidence.

2. The applicant was arrested under the name and charged with one count of violating section 23152(a) of the California Vehicle Code – DUI, for one count of violating section 23152(b) of the California Vehicle Code - .08% blood alcohol level, and for one count of violating section 118 of the California Penal Code – perjury on application for driver's license. Because the applicant admitted to prior offenses, all but the perjury offense are listed as felony violations. On May 21, 1991, the applicant pleaded *nolo contendere* to the perjury and excessive blood alcohol charge. The remaining charge was dismissed pursuant to the terms of a plea agreement. The applicant was sentenced to two years in the state penitentiary.

3. The applicant was arrested on October 15, 1984 and charged with one count of violating section 245(b) of the California Penal Code – assault with a deadly weapon, and with one count of violating section 417(b) of the California Penal Code – drawing a firearm on a peace officer. The applicant pleaded guilty to drawing a firearm on a peace officer and was sentenced to 36 months probation. The remaining count was dismissed in accordance with the terms of a plea agreement.

4. . The applicant was arrested on July 22, 1998, under the name and charged with one count of violating section 20002(a) of the California Vehicle Code – hit and run with property damage, and with one count of violating section 12500(a) of the California Vehicle Code – driving without a license. The record indicates that this incident was settled by a

civil action pursuant to sections 1377/1378 of the California Penal Code and therefore is not considered a criminal conviction for immigration purposes.[2]

5. The applicant was arrested on or about August 6, 1989 and charged with four misdemeanors offenses: DUI, .08% blood alcohol, hit and run, and driving without a license. He was also charged with driving without proof of insurance, which is listed as an infraction on the police report. The applicant pleaded *nolo contendere* to the charge of excessive blood alcohol, and the remaining offenses were dismissed pursuant to a plea agreement. The applicant was sentenced to 90 days in jail.

6. . The applicant was arrested on July 26, 1989 and charged with one count of violating section 273.5(a) of the California Penal Code – inflict corporal injury on spouse, and with one count of violating section 242 of the California Penal Code – battery. The applicant pleaded guilty to the charge of spousal abuse on January 30, 1991 and was sentenced to 24 months probation and 41 days in jail. The remaining charge was dismissed.

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 temporary resident status. 8 C.F.R. § 245a.2(c)(1). In this case, the applicant has failed to meet his burden of proof because he has one felony conviction and four misdemeanor convictions. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(a)(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. The decision of the director is affirmed.

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

---

[2] 1377. When the person injured by an act constituting a misdemeanor has a remedy by a civil action, the offense may be compromised, as provided in Section 1378, except when it is committed as follows: (a) By or upon an officer of justice, while in the execution of the duties of his or her office. (b) Riotously. (c) With an intent to commit a felony. (d) In violation of any court order as described in Section 273.6 or 273.65. (e) By or upon any family or household member, or upon any person when the violation involves any person described in Section 6211 of the Family Code or subdivision (b) of Section 13700 of this code. (f) Upon an elder, in violation of Section 368 of this code or Section 15656 of the Welfare and Institutions Code. (g) Upon a child, as described in Section 647.6 or 11165.6.

1378. If the person injured appears before the court in which the action is pending at any time before trial, and acknowledges that he has received satisfaction for the injury, the court may, in its discretion, on payment of the costs incurred, order all proceedings to be stayed upon the prosecution, and the defendant to be discharged herefrom; but in such case the reasons for the order must be set forth therein, and entered on the minutes. The order is a bar to another prosecution for the same offense.