



U.S. Citizenship
and Immigration
Services

41

[REDACTED]

FILE: [REDACTED]
XSI 88 211 02057

Office: CALIFORNIA SERVICE CENTER

Date: **DEC 02 2009**

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. 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 Section 245A of the Immigration and Nationality Act (Act), was denied by the director, Western Service 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 on January 13, 1988. The director denied the application, finding that the applicant had failed to establish his eligibility for temporary resident status due to his criminal history. The director issued a Notice of Intent to Deny (NOID), requesting final court dispositions for all of the applicant's arrests. The applicant failed to respond to the NOID, and the director denied the application.

The applicant is represented by counsel on appeal. Counsel asserts that he is seeking orders dismissing the applicant's five misdemeanor convictions and requests a copy of the record of proceedings (ROP). The request for a copy of the ROP was processed by the Western Service Center [REDACTED]. The applicant maintains that he is otherwise admissible to the United States and eligible for temporary resident status.

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).

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. 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. In this case, the applicant cannot meet this burden of proof because of his criminal record.¹

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

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 reviewed all of the documents and evidence in the file in their entirety. The record contains court documents, arrest records, and court dispositions for a series of misdemeanor convictions and one felony conviction of both the California Penal (PC) and Vehicle Codes (VC). These records include:

1. a conviction for felony burglary (section 459 PC) on February 15, 1979. Docket no. [REDACTED]
2. a conviction on August 27, 1982 for one count of obstructing/resisting arrest (section 148 PC) and one count of failure to make a court ordered appearance (section 1320(a) PC). Docket no. [REDACTED]. Both offenses are misdemeanor convictions.
3. two convictions on March 21, 1980 and September 10, 1981 for one count each of violating section 23102(a) of the VC. Docket. Nos. [REDACTED]. Both are listed as misdemeanor convictions on court documents, but the record contains no

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).

description of the underlying offense, nor does our search of the California statutes explain this section.

4. a conviction on December 22, 1982 for one count of driving with an excessive blood alcohol level (section 23152(b) VC). Docket no. [REDACTED]
5. a conviction on January 28, 1988 for reckless driving (section 23103 VC). Docket no. [REDACTED]
6. a conviction at some point in 1981 for possession of under one ounce of marihuana. There are no court records in the file regarding this specific incident, except that the applicant admits to his arrest on July 8, 1980 for this offense (section 11357(b) California Health and Safety Code), and subsequent arrest on a bench warrant on September 7, 1981 in his personal declaration. Additionally, counsel refers to this arrest and conviction as Docket no. [REDACTED] in the brief submitted in support of the appeal.

Having reviewed all of the documents discussed above, the AAO concludes that the applicant has one felony conviction and more than three misdemeanor convictions. As noted *supra*, the burden remains with the applicant to establish by a preponderance of credible, probative evidence that he 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. 8 C.F.R. § 245a.2(d)(5).

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 cannot demonstrate that he is admissible to the United States on account of his criminal convictions.

On appeal, the applicant states that he is eligible for temporary resident status because all of the offenses except for the drug possession conviction have been dismissed under section 1203.4 of the California Penal Code. The applicant has filed an application for a waiver of excludability for the drug conviction (Form I-690). The AAO concludes that all of the convictions remain valid for immigration purposes. A dismissal of a criminal conviction for anything other than constitutional reasons would have no effect on the applicant's immigration status. 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. Section 1203.4 of the California Penal Code is an example of a state rehabilitative statute that works to "dismiss" a conviction upon the successful conclusion of a term of probation and rehabilitation.

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. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Thus, any

dismissal or expungement of the applicant's convictions serves no purpose in immigration proceedings, unless the trial court ruled that the original criminal proceedings were so constitutionally flawed as to render the ultimate conviction a violation of due process of law.

The applicant stands convicted of more than three misdemeanor offenses and one felony offense. 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, nor is a waiver of excludability available for drug convictions, except a limited waiver for possession of 30 grams or less of marihuana. 8 U.S.C. § 1255(d)(2)(B)(ii)(II). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis. 8 U.S.C. § 1255a(a)(4)(B). The decision of the director is affirmed.

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