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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

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FILE: [REDACTED]  
MSC 04 293 10242

Office: LOS ANGELES

Date: JUN 23 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:

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

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 been convicted of more than three misdemeanor offenses 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, who represents himself on appeal, does not challenge the director's conclusions regarding his criminal convictions. The applicant requests temporary resident status for humanitarian reasons. In support, the applicant submitted an affidavit from his son requesting that his father be granted lawful status in the United States. No additional evidence has been submitted on appeal.

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. Here, the applicant has failed to meet this burden because of his multiple misdemeanor 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 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).

The AAO has reviewed all of the documents and evidence in the file in their entirety. Court documents indicate that the applicant has three criminal misdemeanor convictions, including:

- 1) A December 30, 1991 conviction for violating section 11550(B) of the California Health and Safety Code – *Under the Influence of a Controlled Substance*. The applicant was sentenced to 90 days in jail and 24 months probation. [REDACTED] This offense is charged as a misdemeanor in the court documents. The records also reveal that the applicant violated the terms of probation and criminal proceedings were reinstated, resulting in the jail sentence noted above.
- 2) A September 21, 1994 conviction for violating section 11377(A) of the California Health and Safety Code – *Possession of a Controlled Substance*. The applicant was sentenced to 90 days in jail and 36 months probation. This offense is charged as a misdemeanor in the court documents. Once again, the records also reveal that the applicant violated the terms of probation and criminal proceedings were reinstated, resulting in the jail sentence noted above.
- 3) A June 20, 1997 conviction for violating section 11550(B) of the California Health and Safety Code – *Under the Influence of a Controlled Substance*. The applicant was sentenced to 90 days in jail and 36 months probation. [REDACTED] This offense is also listed as a misdemeanor.

Additionally, federal criminal background documents indicate a series of further arrests and convictions, including a 1978 conviction for *driving without a license* (Cal. P.C. section 12500A), a 1979 arrest for *grand theft auto* (Cal. P.C. section 487-3), a 1985 conviction for *assault with a deadly weapon*, and *possession of a switch blade* (Ca. P.C. sections 245A and 653K), and a 1994 conviction for *possession of cocaine base for sale* (this offense is charged as a felony). These documents do not identify court docket numbers, nor do they comprehensively list the statute under which the applicant was charged and/or convicted or the ultimate disposition. These criminal charges remain unexplained on appeal despite the fact that the applicant was requested to submit final court dispositions for these charges in a Request for Evidence (Form I-72) issued on July 25, 2005. The AAO notes that the felony drug conviction would be a disqualifying criminal conviction for temporary resident status in and of itself without reference to any other criminal offenses in the record. 8 C.F.R. § 245a.18(a)(1).

The record before the AAO clearly establishes that the applicant has a minimum of three misdemeanor convictions, none of which have been expunged or dismissed for any reason and remain valid for immigration purposes. 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. State rehabilitative actions that do not vacate a conviction as a result of underlying procedural or constitutional defects in the merits of the case are of no effect in determining whether an alien is considered convicted for immigration purposes.

A dismissal for anything other than on constitutional grounds would have no effect on the applicant's immigration status. 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.<sup>2</sup>

In this case, there is no evidence in the record to suggest that the applicant's convictions were overturned on account of an underlying procedural defect in the merits of the case. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The applicant stands convicted of at least three misdemeanor offenses. He 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 decision of the director is affirmed.**

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

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<sup>2</sup> 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).