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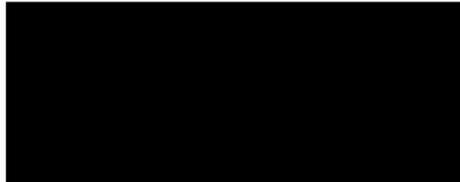
FILE: [REDACTED]  
MSC 05 323 12278

Office: LOS ANGELES

Date:

MAY 18 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 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, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of at least three misdemeanors in the United States.

On appeal counsel argues that the director was required to issue a Notice of Intent to Deny prior to issuing his decision in the applicant's temporary residency claim.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provide relevant definition at 8 C.F.R. 245a.2(c)(1).

"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).

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).

The record contains the following court dispositions which reveal the applicant's criminal history in the state of California:

1. On February 11, 1990, the applicant was arrested and subsequently charged with violating section 647(b) PC, disorderly conduct-prostitution, a misdemeanor. On March 8, 1990, the applicant pled guilty and the applicant was placed on probation for one year and ordered perform 50 hours of community service. [REDACTED]
2. On February 6, 2000, the applicant was arrested and subsequently charged with violating section 23152(a) VC, driving under the influence; section 23152(b)VC, driving with .08 percent or more alcohol in the blood; and section 14601.2(a), driving while license is suspended. On March 15, 2000, a violation of section 12500(a) VC,

driving without a license was added. On March 15, 2000, the applicant pled guilty to violating sections 23152(b) VC and 12500(a) VC, both misdemeanors. For violating section 23152(b) VC, the applicant was ordered to pay a fine, perform community services and placed on probation for three years. For violating section 12500(a) VC, the applicant was ordered to pay a fine. [REDACTED] The applicant also admitted to a prior misdemeanor conviction of violating section 23152(a) VC on November 30, 1995 in [REDACTED]

The record contains a Form H-6 dated July 29, 1992, from the California Department of Motor Vehicles, which reflects that on October 12, 1988, the applicant was convicted of violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood, a misdemeanor. [REDACTED]

Counsel's remarks on appeal regarding the director's improper denial of the application are noted. However, a review of the CSS/Newman Settlement Agreements demonstrates that U.S. Citizenship and Immigration Services (USCIS) is only required to issue a notice of intent to deny to an applicant in those cases where an application is to be denied for class membership. *See* Paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement. As the applicant's Form I-687 application was denied on the basis of his criminal convictions rather than his failure to establish a claim to class membership, such decision is not subject to the review of the Special Master. *See* Paragraph 9 and 11, pages 5 and 6 of the CSS Settlement Agreement and paragraph 9 and 11, pages 7-9 and pages 9-10 of the Newman Settlement Agreement. Therefore, counsel's contention that USCIS failed to follow the proper procedures in denying the applicant's Form I-687 application as specified in the CSS/Newman Settlement Agreements cannot be considered as persuasive.

The applicant is ineligible for temporary resident status because of his five misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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). The applicant has failed to meet this burden.

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