

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**

L<sub>1</sub>



FILE: MSC 06 077 13950

Office: LOS ANGELES

Date: **NOV 02 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 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 director denied the application for temporary residence (Form I-687) on July 30, 2007. The director stated that the evidence indicated that the applicant had two California state misdemeanor convictions in 2004 for driving without a license and for hit and run with property damage. The director also noted that the applicant had an additional charge in 1999 for which a final court disposition had not been submitted. The director concluded that the applicant failed to establish his eligibility for temporary resident status under the terms of the settlement agreements.

The applicant is represented by counsel on appeal. Counsel argues on the Notice of Appeal (Form I-694) that the applicant has two state misdemeanor convictions in 2004 and one conviction for a vehicle code infraction in 1999. Counsel maintains that the director erred in concluding that the infraction is equivalent in force and effect to a misdemeanor conviction for purposes of qualifying for temporary resident status under the terms of the settlement agreements. Submitted with the Form I-694 is a form letter dated April 18, 2007, issued by the Superior Court of California, Los Angeles County, East District, West Covina Courthouse. This letter states that no outstanding traffic infraction record was found in the indexes that pertain to the applicant.

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).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591.

Additionally, 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).

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

The AAO has reviewed all of the criminal records and evidence in the file. The record before the AAO contains a minute order issued by the Superior Court of California, Los Angeles County, and identifies [REDACTED]. The applicant was arrested by the Hawthorne Police Department on February 27, 2004, and charged with one count of violating section 12500(a) of the California Vehicle Code – *unlicensed driver*. **This charge is marked as a misdemeanor violation.** Thereafter, on April 29, 2004, upon motion of the prosecutor, the court ordered that the complaint be amended to change the misdemeanor designation to an infraction, pursuant to section 17(b)(4) of the California Penal Code. The applicant pleaded guilty to the vehicle code offense as an infraction on that date and was ordered to pay a fine and a penalty.

The record also contains a photocopy of an arraignment docket issued by the California Superior Court, Inglewood Courthouse, issued on January 29, 2004. This document identifies a case with [REDACTED]. The court record indicates that on January 29, 2004, the applicant was charged with one count of violating section 40508(a) of the California Vehicle Code – *failure to appear for a bail hearing*, and one count of violating section 22500(c) of the California Vehicle Code – *leaving a parked vehicle in an unauthorized safety zone*. We have reviewed the statutes under which the applicant was charged, and we note that the *failure to appear* charge is a

misdemeanor offense, whereas the parking violation is considered an infraction. The arraignment record indicates further that on October 20, 2004, the applicant pleaded guilty to the parking violation charge and was ordered to pay a fine and costs. The charge of failure to appear for a bail hearing was dismissed by the court. A copy of the traffic summons, [REDACTED] accompanies the arraignment record, as does the complaint issued by the Municipal Court of Inglewood regarding the applicant's failure to attend the bail hearing.

Having reviewed all of the court records submitted by the applicant, the AAO concludes that none of these incidents preclude his eligibility for temporary resident status. The unlicensed driver charge incurred in 2004, [REDACTED] was reduced by the court from a misdemeanor offense to an infraction. The court's authority to do so is authorized by California statute, and the court's designation of the *type* of offense is given full force and effect in immigration proceedings. Because the reclassification was done pursuant to section 17(b) of the California Penal Code, the court's decision is entitled to full faith and credit for purposes of establishing eligibility for adjustment of status. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9<sup>th</sup> Cir. 2003); *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

Additionally, the traffic violation that occurred in January, 2004, and to which the applicant pleaded guilty in October, 2004 is an infraction and does not preclude adjustment of status. The misdemeanor charge associated with this incident, failure to appear for a bail hearing, was dismissed, and thus has no immigration effect.

Nonetheless, the record also includes an FBI criminal background information document that reveals that the applicant was arrested on or about November 18, 1999 by an unidentified police department in Arizona and charged with one count of having a defective windshield, one count of failure to produce evidence of auto insurance, and one count of driving without a license. The document does not identify docket numbers, the statutes under which the applicant was charged, or the final court disposition for the charges. The AAO notes that other state jurisdictions generally consider vehicle code violations such as driving without a license and failure to produce evidence of auto insurance to be misdemeanor offenses.

On appeal, the applicant states that the state of California carries no record of an arrest record for the applicant for 1999. It appears from the FBI report that these incidents occurred in Arizona, thus, a California criminal record search is not relevant.

As noted above, the burden is on the applicant to demonstrate 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 applicant has not provided final court dispositions for the criminal charges incurred in 1999, several of which appear to be misdemeanor offenses. Therefore, the appeal must be dismissed because the applicant has not met his burden of proof to demonstrate admissibility. *See* section 245A(b)(1)(C) of the Immigration and Nationality Act; 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5).

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