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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, D.C. 20529-2090



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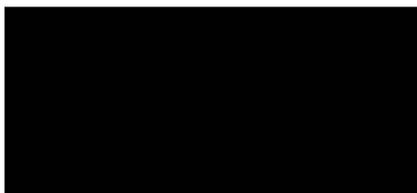
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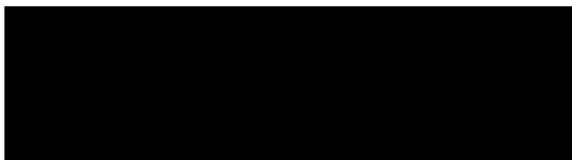
IN RE:

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: This is an 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). The application was initially denied by the Director, Dallas, Texas due to abandonment. A motion to reopen was filed, which was granted. The director withdrew the previous decision and reopened the proceedings. The application was subsequently denied by the Director, Dallas, Texas, 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 three misdemeanors in the United States.

On appeal, counsel asserts that the applicant has been convicted of two misdemeanors as his plea for assault and false name arose out of a single transaction and does not constitute multiple convictions.

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 provides 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).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The FBI report dated June 1, 2006, reflects the applicant’s criminal history in the state of Texas as follows:

1. On September 2, 1984, the applicant was arrested by the Sheriff’s Office in Dallas for driving while intoxicated.
2. On January 25, 1987, the applicant was arrested by the Garland Police Department for driving while intoxicated.
3. On July 7, 1988, the applicant was arrested by the Sheriff’s Office in Dallas for theft.
4. On November 22, 1988, the applicant was arrested by the Plano Police Department for assault and false name upon arrest.

5. On February 3, 1989, the applicant was arrested by the Sheriff's Office in Dallas for retaliation.
6. On February 23, 1990, the applicant was arrested by the Sheriff's Office in McKinney for aggravated assault and two counts of assault.

The FBI report also reflects:

7. On February 19, 1990, the applicant was arrested by the Washington D.C. Police Department for being a fugitive. This arrest appears to relate to number six above.

On June 19, 2007, the director issued a Form I-72, which requested the applicant to submit certified copies of police/ arrest reports and court disposition for all his arrests including the arrests noted above. The applicant, in response, submitted:

- Court disposition from the Dallas County Criminal Court, which reflects that the applicant was convicted on June 29, 1990, for theft, a violation of Texas Penal Code section 31.03, a Class A misdemeanor. The applicant was sentenced to serve 30 days in jail. [REDACTED] This relates to number three above.
- A police report from the Plano Police Department and two court dispositions from Collin County Criminal Court. The police report reflects that on November 22, 1988, the applicant was arrested for assault (family violence), a violation of Texas Penal Code 22.01; and for failure to identify, a violation of Texas Penal Code 38.02. The applicant was also arrested under [REDACTED] for a theft arrest; and under warrant for three separate infractions. The first court disposition reflects that on November 22, 1988, the applicant was arrested and charged with assault, a violation of Texas Penal Code section 22.01. On December 9, 1988, the applicant was convicted of this misdemeanor offense. The applicant was sentence to serve 45 days in jail and ordered to pay a fine. [REDACTED] The second court disposition Court reflects that on November 22, 1988, the applicant was arrested and charged with failure to identify, to an officer while a fugitive from justice. On December 9, 1988, the applicant was convicted of this misdemeanor offense. The applicant was ordered to pay a fine and was sentenced to serve 15 days in jail. [REDACTED] These convictions relate to number four above.
- Court disposition from the Collin County Criminal Court, which reflects that March 22, 1989, the applicant was arrested for assault, a violation of Texas Penal Code section 22.01. On May 16, 1990, the applicant was convicted of this misdemeanor offense and was sentenced to serve one year in jail. [REDACTED]
- A misdemeanor record search from the County Clerk of Dallas County, which reflects that the court indexes had been search and the court was unable to locate any charges filed against the applicant from 1975 through August 21, 2007.

- Documentation from the Superior Court of the District of Columbia Criminal Division, which reflects that the only criminal record found relating to the applicant, was for a charge of violating towing regulation, which was *nolle prosequi* on July 31, 1991.
- Documentation from District Clerk of Collin County, which reflects the court found no cases involving the applicant for felony offense after indictment returned by the Grand Jury. The document indicated that a search for misdemeanors should be directed to County Court at Law Clerk.

On October 27, 2007, the director issued a Notice of Intent to Deny, which advised the applicant of his ineligibility due to his three misdemeanor convictions. The applicant was given the opportunity to submit evidence to rebut the notice. Counsel, in response, indicated that because the incidents of November 22, 1988 arose from the same transaction, it should be treated as a single incident. Counsel asserted that the applicant has only two misdemeanor convictions.

Counsel's assertion is without merit. The fact that the offenses arose from a common scheme does not preclude them from being counted as separate offenses. The applicant was charged with two separate counts and he pled guilty to two separate offenses. *Black's Law Dictionary*, 353 (7th Ed., 1999) defines the term "count" to mean a separate and distinct claim in a complaint or similar pleading. It also indicates that the term "count" is used to signify the part of an indictment charging a distinct offense. Therefore, the applicant has been convicted of two separate and distinct misdemeanor offenses.

The applicant is ineligible for temporary resident status because of his four 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.

Declarations by an applicant that he or she has not had a criminal record are subject to verification of facts by U.S. Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

The applicant has not provided the requested: 1) arrest reports from the Sheriff's Office in Dallas for his September 2, 1984, and February 3, 1989 arrests; and 2) arrest report from the Garland Police Department for his January 25, 1987 arrest. The applicant has the burden to establish, with *affirmative evidence*, that outstanding charges were dismissed or were in error.

The applicant failed to establish he is admissible due to his failure to provide the arrest reports for the arrests in one, two, and five above, necessary for the adjudication of the application.

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.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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