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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  
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[REDACTED]

FILE: [REDACTED] Office: LOS ANGELES  
MSC 05 309 12231

Date: NOV 04 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 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 on December 5, 2006, because the applicant had several controlled substance convictions, including at least one felony drug conviction in the state of 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 is represented by counsel on appeal. Counsel avers on the Notice of Appeal (Form I-694) that the criminal code of California does not specifically define “felony” and “misdemeanor” crimes and that the applicant’s convictions are ambiguous in that regard. Counsel maintains that the applicant has submitted sufficient documentary evidence to meet the burden of proof to establish that he entered the United States on or before January 1, 1982, that he remained in the country for the requisite period, and is otherwise admissible. Counsel concludes that the applicant is eligible for temporary resident status pursuant to the terms of the settlement agreements.

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. In this case, the applicant has failed to meet this burden because of his felony 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 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 criminal background information from both the FBI, as well as the California State Criminal Records Division. Furthermore, the applicant admitted to a district adjudications officer at the time of his interview on April 16, 2007, that he "had five drug arrests," and "one DUI in 1992." Additionally, the interview notes indicate that the applicant admitted to using and selling drugs at one time. The applicant's admissions are confirmed by the documentary criminal information.

The record contains a letter issued by the State of California, Department of Justice, Bureau of Criminal Identification and Information, dated August 22, 2006. This document reveals:

1. an arrest on May 6, 1986 by the California Sheriff's Office, Riverside, under the name [REDACTED], for one count of violating section 11351 of the California Health and Safety Code – possession of a controlled substance for sale. No Docket no. or final court disposition is identified.
2. an arrest on July 3, 1986 by the California Sheriff's Office, Santa Ana, under the name of [REDACTED] for one count of violating section 11351 of the California Health and Safety Code – possession of a controlled substance for sale. This charge was dismissed by the prosecutor for lack of probable cause on July 8, 1986. No Docket no. or final court disposition is identified. This particular arrest has carries no immigration consequences.
3. an arrest on April 15, 1992 by the Anaheim Police Department under the name of [REDACTED] for one count of violating section 11351 of the California Health and Safety Code – possession of a controlled substance for sale, and one count of violating section 148.9(a) of the California Penal Code – false ID to peace officer. The court dismissed the drug trafficking charge on April 17, 1992. There is no record regarding the final court disposition for the second count of the indictment.
4. an arrest on October 8, 1992 by the Sheriff's Office for Santa Ana one count of violating section 11351 of the California Health and Safety Code – possession of a controlled substance for sale, and for one count of violating section 11359 of the California Health and Safety Code – possession of marihuana for sale. The applicant was convicted for both offenses and both are listed as a felony [REDACTED]. [REDACTED] The applicant was sentenced to 270 days in jail and ordered to serve a term of 36 months probation.

Contrary to counsel's arguments, there is no ambiguity regarding the nature of the applicant's criminal convictions. The applicant has two felony convictions in 1992 for drug trafficking offenses which are clearly identified as felony offenses in the California Criminal Records documents. Other drug charges were dismissed by the court, or remain unresolved on appeal. The applicant has also admitted to an arrest for DUI in 1992, and the record contains no disposition for this charge. In general, a conviction for DUI is classified as a misdemeanor offense.

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). The AAO has reviewed the California Health and Safety Code provisions under which the applicant was convicted. A conviction under section 11351 of the California Health and Safety

Code carries a term of imprisonment in the state penitentiary from two to six years. Thus, this offense meets the definition of a felony offense noted above. A conviction under section 11359 of the California Health and Safety Code carries an indeterminate sentence in the state penitentiary, however, the applicant was charged with a felony violation of this particular section.

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. Furthermore, the applicant is equally inadmissible under section 212(a)(2)(A)(i)(II) and section 212(a)(2)(C) of the Immigration and Nationality Act, as an alien convicted for crimes involving controlled substances and as a controlled substance trafficker.

The applicant is a controlled substance trafficker and stands convicted of two felony convictions. 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.