

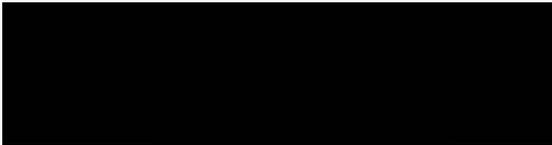


U.S. Citizenship
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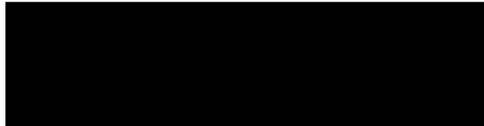
Office: ORLANDO

Date: NOV 05 2009

MSC 06 105 17862

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, Orlando. 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 three felony 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.¹

The applicant is represented by counsel on appeal. Counsel asserts that the applicant's felony convictions have been "set aside" pursuant to section 1203.4 of the California Penal Code. Counsel maintains that the applicant is otherwise eligible for temporary resident status.

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

¹ The AAO withdraws from that part of the director's decision that concludes the applicant is not a class member, and that he is ineligible for temporary resident status because he assisted in transporting an alien across the United States border in 1981. The AAO decision will focus on the applicant's criminal convictions.

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 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).

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.²

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

- 1) A conviction on or about October 26, 1987 for violating section 853.7 of the California Penal Code – *Failure to Appear After Written Notice*. The applicant was sentenced to 5 days in jail and 24 months probation. This offense is considered to be a misdemeanor. A charge of violating section 11357(b) of the California Health and Safety Code – *Possession under One Ounce of Marijuana* was dismissed pursuant to the terms of a plea agreement. The applicant's petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on January 22, 2003.
- 2) A conviction on or about November 23, 1987 for violating section 459 of the California Penal Code – *Burglary*. The applicant was sentenced to 90 days in jail and 24 months probation. This offense is listed on the court documents as a misdemeanor. A second count of burglary was dismissed pursuant to the terms of a plea agreement. The applicant's petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on January 22, 2003.
- 3) A conviction on or about May 13, 1993 for violating section 11357(b) of the California Health and Safety Code – *Possession Under one Ounce of Marijuana*. The applicant was ordered to pay a fine and to serve one day in jail. This offense is also considered to be a misdemeanor. The applicant's petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on January 22, 2003.

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

- 4) [REDACTED] The record in this case consists of a minute order issued by the Superior Court of California, Los Angeles County, but does not include the underlying conviction documents. The applicant was convicted for one count of violating section 11361(a) of the California Health and Safety Code – *Sale or Furnishing Marihuana to a Minor*. This offense is listed as a felony. The applicant’s petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on June 23, 2003.
- 5) [REDACTED] The record in this case consists of a minute order issued by the Superior Court of California, Los Angeles County, but does not include the underlying conviction documents. The applicant was convicted for one count of violating section 11359 of the California Health and Safety Code – *Possession of Marihuana/Hash for Sale*. This offense is listed as a felony. The applicant’s petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on February 20, 2003.
- 6) [REDACTED] The record in this case consists of a minute order issued by the Superior Court of California, Los Angeles County, but does not include the underlying conviction documents. The applicant was convicted for one count of violating section 11359 of the California Health and Safety Code – *Possession of Marihuana/Hash for Sale*. This offense is listed as a felony. The applicant’s petition to dismiss the conviction pursuant to section 1203.4 of the California Penal Code was granted by the trial court on February 20, 2003.

The record before the AAO clearly establishes that the applicant has three misdemeanor convictions and three felony convictions, all of which appear to have been dismissed subsequent to the successful completion of some form of court ordered probation and rehabilitation. The AAO has reviewed the statutes under which the applicant was convicted as well as the section of the California Criminal Code under which the convictions were later vacated. Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying trial court proceedings.

In this case, there is no evidence in the record to suggest that the applicant’s petitions to dismiss his convictions were granted on account of an underlying procedural defect in the merits of the criminal proceedings, and the judgments remain valid 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 applicant stands convicted of three misdemeanor and three felony 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.