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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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Services

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FILE: [REDACTED]
MSC-06-060-11698

Office: HOUSTON

Date:

SEP 02 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:

SELF-REPRESENTED

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.

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, Houston. 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 two federal misdemeanor offenses and one Texas state misdemeanor offense. 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 represents himself on appeal. In a statement submitted on August 26, 2007 in support of his appeal, the applicant claims that he never received the Notice of Intent to Deny (NOID) issued by the director on February 14, 2007. He also states that the sole reason for denying the application for temporary residence was the director's conclusion that he had not met his burden of proof to establish continuous residence for the requisite period. The applicant also asserts that he submitted 11 affidavits from friends and family to support his application and that the affidavits are sufficient to meet the burden of proof to qualify for temporary resident status. The applicant does not address the relevance of the criminal convictions.

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. The applicant has failed to meet this burden because of his three misdemeanor 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 Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(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 court documents and police records that list a series of arrests and convictions:

1. [REDACTED] The applicant was arrested by the Harris County Police Department, Texas, on or about March 5, 2006, and charged with one count of *interference with an emergency telephone call*, in violation of section 42.062(d) of the Texas Penal Code. The bill of information explains that the applicant unlawfully and recklessly destroyed the cell phone of the victim to prevent her from making an emergency call to the Houston police in an effort to prevent an assault. The court documents indicate that this offense is classified as a Class A misdemeanor and that the applicant was sentenced to 3 days in jail and ordered to pay a fine of \$200.¹
2. [REDACTED]. The applicant pleaded guilty on January 6, 2003 to one count of violating 8 U.S.C. § 1325 – *illegal entry without inspection*. The applicant was sentenced by the United States District Court for the District of New Mexico to 9 days incarceration in the custody of the United States Marshal. The record of judgment orders that the applicant is to be deported “immediately upon the defendant’s release from custody.”
3. [REDACTED] The applicant was arrested by the border patrol on or about December 7, 1999, when he attempted to enter the United States by making a false claim to U.S. citizenship at the Port of Entry in Brownsville, Texas. The applicant was charged with one count of violating 8 U.S.C. § 1325(a)(3) – *false claim to citizenship*. The applicant pleaded guilty to the charge and was sentenced to 36 months probation. However, the Record of Deportable Alien (Form I-213) indicates that the applicant admitted that “he has been in and out of the U.S. for the last 6 years,” and that “he had been arrested by the Border Patrol at the Airport in Harlingen, Texas.” The Form I-213 states that the applicant was given expedited removal and ordered deported to Mexico.

The record before the AAO clearly establishes that the applicant has at least three misdemeanor convictions. In this case, there is no evidence in the record to suggest that the applicant’s convictions were overturned on account of an underlying procedural or constitutional defect in the merits of the case. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Therefore, they remain valid convictions for immigration purposes.

The applicant’s contention on appeal that he did not receive the NOID issued by the director on February 14, 2007 is not credible. The AAO notes that the NOID was mailed to the same address as listed on both the Form I-687 and the Notice of Denial, which the applicant does not **allege that he did not receive**. **Additionally, the Notice of Appeal (Form I-694) and Authorization for Parole of an Alien into the United States (Form I-512L) contain the same address as listed on the NOID.** There is no evidence in the record that the applicant moved to a

¹ The AAO has reviewed this particular section of the Texas Penal Code and the range of punishment. A violation of section 42.062 of the Texas Penal Code is listed as a Class A misdemeanor, with a maximum punishment of one year in jail and/or a \$4,000 fine. *See* Section 12.21 Texas Penal Code.

different address or notified the U.S. Citizenship and Immigration Services of a change of address. Furthermore, the director is required to issue a Notice of Intent to Deny (NOID) pursuant to paragraph 7, page 4 of the CSS Settlement Agreement and paragraph 7, page 7 of the Newman Settlement Agreement only as regards the issue of class membership, and not prior to the adjudication of the Form I-687 on the merits. Here, the director adjudicated the Form I 687 application on the merits. Therefore, the director was not required to issue a NOID prior to issuing the final decision in this case.

The applicant stands convicted of at least three misdemeanor 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.