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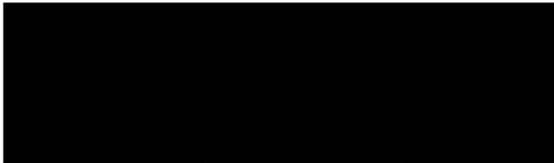
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:

WAC-99-029-51476

Office: LOS ANGELES

Date: SEP 03 2009

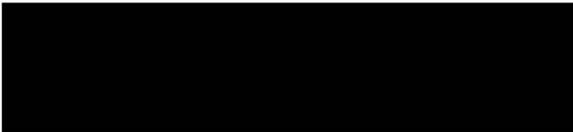
IN RE:

Applicant:



APPLICATION: Application to Adjust Status from Temporary to Permanent 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On November 10, 1998, the applicant filed an application to adjust from temporary to permanent resident status, on Form I-698. On June 24, 2006, the Director, Los Angeles, denied the application. The applicant appealed that decision, and the appeal is now before the Administrative Appeals Office (AAO). On July 2, 2009, the AAO issued a Notice of Intent to Deny (NOID) the appeal, providing the application with 15 days to respond to the issues noted in the NOID. The applicant failed to respond to the NOID. The appeal will be dismissed.

A review of the record of proceedings reveals that on October 15, 1987, the applicant filed a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the Immigration and Nationality Act (Act). On August 14, 1989 the director denied the application because the applicant has been convicted of three misdemeanors, making him ineligible for the benefit sought. He appealed this decision, submitting evidence that each of the misdemeanor convictions had been set aside pursuant to a state rehabilitative statute. On April 19, 1994, the AAO remanded the case to the director for adjudication, asserting that since the misdemeanors had been set aside, they did not cause the applicant to be ineligible for adjustment to temporary resident status. Records indicate that on September 22, 1998, the Form I-687 application was approved. On November 6, 1998, less than two months later, the applicant filed a Form I-698 application to adjust from temporary to permanent resident status.

On June 24, 2006, the director denied this application. The director indicated that the applicant had failed to appear for two interviews and cited 8 C.F.R. 245a.3(e) indicating that “where an applicant fails to appear for two scheduled interviews, his or her application shall be held in abeyance until the end of the 43 month from the date of the application for temporary residence was approved and adjudicated on the basis of the existing record.” The director went on to indicate that the applicant’s application for temporary residence was approved on May 4, 1988. This is erroneous since the applicant’s temporary resident application was approved on September 22, 1998. That portion of the director’s decision will be withdrawn. However, following *de novo* review of the entire record by the AAO, we find that the applicant remains ineligible for adjustment from temporary to permanent resident status for three reasons explained below.

First, the applicant is not eligible for the benefit sought because, despite the director’s error, he failed to appear for two scheduled interviews, on August 4, 2005 and on April 21, 2006. On appeal, the applicant indicates that he did not receive the first appointment notice and that he confused the date of the second appointment. However, since 43 months have lapsed since the September 22, 1998 approval of the Form I-687 the applicant remains ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. 245a.3(e).

Second, the applicant is not eligible to adjust to permanent resident status because he has failed to comply with the English and civics requirements of 8 C.F.R. 245a.3(b)(4)(i).

Any alien who has been lawfully admitted for temporary resident status may apply for adjustment of status if the alien (A) can demonstrate that he or she meets the requirements of section 312 of the Immigration and Nationality Act (Act) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or, (B) can

demonstrate he or she is satisfactorily pursuing a course of study recognized by the Attorney General to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States. *See* 8 C.F.R. § 245a.3(b)(4).

An applicant may demonstrate that the section 312 requirements have been met by speaking and understanding English during the course of the permanent residence interview, **or** by passing a standardized section 312 test given in the English language by the Legalization Assistance Board with the Educational Testing Service or the California State Department of Education with the Comprehensive Adult Student Assessment System. *See* 8 C.F.R. § 245a.3(b)(4)(iii). The applicant has failed to comply with 8 C.F.R. § 245a.3(b)(4). This issue was noted by the director in the Notice of Denial, however, the applicant has failed to address this issue on appeal.

Finally, the AAO finds that the applicant is not eligible to adjust to permanent resident status because he has been convicted of three misdemeanors. 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).

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 Nationality Act (Act).

The record reveals that the applicant was convicted of violating Section 23102(a) of the Vehicular Code of California for Misdemeanor *Drunk Driving* on December 12, 1980; violating Section 23152(b) of the Vehicular Code of California for *Driving Under the Influence/10% blood alcohol content* on June 8, 1983; and for violating Section 23152(a) of the Vehicular Code of California for *Driving Under the Influence* on April 17, 1985.

The record contains photocopies of three orders issued by the Municipal Court of Alhambra County of Los Angeles. These documents indicate that the applicant's conviction for *Drunk Driving* on December 12, 1980, and his two convictions for *Driving Under the Influence* on June 8, 1983 and **April 17, 1985** [REDACTED] were ultimately set aside on November 1, 1989, November 9, 1989 and December 6, 1989 respectively, subsequent to the successful completion of the terms of probation and pursuant to section 1203.4 of the California Penal Code. No other documents are submitted to indicate whether the applicant was sentenced to a term of imprisonment.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. 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 proceedings. In this case, there is no evidence in the record to suggest that either of the applicant's convictions for *drunk driving* or *driving while intoxicated* were expunged because of an underlying procedural defect in the merits of the case, and the set aside convictions remain valid for immigration purposes.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. He has also failed to comply with the English and civics requirements of 8 C.F.R. 245a.3(b)(4)(i), and he has been convicted of three misdemeanors which makes him ineligible for the benefit sought pursuant to 8 C.F.R. § 245a.18(a)(1). The applicant is, therefore, ineligible for adjustment to permanent resident status under section 245A of the Act on each of the grounds noted.

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