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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

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U.S. Citizenship
and Immigration
Services

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FILE:

MSC-06-095-10998

Office: LOS ANGELES

Date:

SEP 09 2009

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.

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, 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 because the applicant had been convicted of three misdemeanor 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.

The applicant is represented by counsel on appeal. Counsel challenges the director's conclusion that the applicant has three misdemeanor convictions. Counsel argues that the applicant has one arrest where the charges were ultimately dropped, one misdemeanor conviction for battery, and two additional California Vehicle Code misdemeanor convictions for giving false information to a peace officer and driving with a suspended license. Counsel asserts that the two California Vehicle Code convictions were ultimately expunged pursuant to section 1203.4 of the California Penal Code. Counsel argues that the applicant remains 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 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 letters that list a series of arrests and convictions:

1. The applicant pleaded guilty on June 23, 1992 to two distinct sections of the California Vehicle Code, section 31 – *giving false information to a peace officer*; and section 14601.1(a) – *driving with a suspended license*. Both offenses are listed as misdemeanor violations. The court suspended the imposition of sentence and ordered the applicant to serve 24 months of probation, to pay a fine of \$812, and to perform community service. On August 14, 2001, the conviction was vacated subsequent to the successful completion of probation and pursuant to section 1203.4 of the California Penal Code.
2. [REDACTED] The applicant pleaded guilty on April 29, 1996 to one count of violating section 242 of the California Penal Code – *battery*. The court suspended the imposition of sentence and ordered the applicant to serve 36 months of probation, to pay a fine of \$200 to the Domestic Violence Fund, and to attend domestic violence counseling.
3. A letter dated November 18, 2003, from the Riverside County, Office of the District Attorney, stating that no records remain available regarding the applicant's arrest on or about July 31, 2001, on a charge of violating section 243(e)(1) of the California Penal Code – *battery against a spouse*. The AAO notes that this letter was submitted **in support of an application** for permanent residence (Form I-485) filed April 22, 2002 [REDACTED]
4. A letter dated April 7, 2006, stating that the criminal records pertaining to the applicant's arrest and docketed at [REDACTED] have been destroyed in accordance with a ten year retention record and pursuant to state record retention guidelines. An accompanying booking sheet refers to the criminal incident listed in number 3 above. Thus, the AAO concludes that this letter and the letter noted above refer to the same criminal arrest involving a violation of section 243(e)(1) of the California Penal Code (spousal battery).

Contrary to counsel's assertions, it is immaterial for purposes of admissibility that the applicant's two convictions arising from his arrest on June 23, 1992 were ultimately vacated. 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. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).¹ State rehabilitative

¹ 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).

actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The record before the AAO clearly establishes that the applicant has at least three misdemeanor convictions in 1992 and 1996, an additional unexplained arrest in 2001, and a subsequent arrest in 2004 identified in counsel's brief on appeal. Other than counsel's description of an arrest in 2004, no records in the file illuminate this incident. 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 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.
