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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[REDACTED]

FILE:

XPN-93-133-0022

Office: NEBRASKA SERVICE CENTER

Date: SEP 09 2009

IN RE:

Applicant:

[REDACTED]

APPLICATION: Application to Adjust from Temporary to Permanent Resident Status 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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant filed a Form I-698 Application to Adjust from Temporary to Permanent Resident Status which was subsequently denied by the Director, Nebraska Service Center. The application is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to file the application for adjustment of status from temporary to permanent residence within the 43-month application period. Section 245A(b)(1)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(b)(1)(A).

On appeal, the applicant indicates that he did file his Form I-698 within the required period, however, he sent the application to the wrong United States Citizenship and Immigration Services (USCIS) office. Upon learning of his error, he filed another Form I-698 with USCIS which was received on March 22, 1993, after the 43 month period for filing had expired.

The applicant was granted temporary resident status on January 23, 1989. The 43-month eligibility **period for filing for adjustment expired on August 23, 1992.** The record shows that the Application for Adjustment of Status from Temporary to Permanent Resident (Form I-698) was received, along with the proper fee, by USCIS on March 22, 1993. The director therefore denied the untimely I-698 application.

On appeal, the applicant submits a copy of a United States Post Office Express Mail envelope dated December 7, 1991 addressed to the former INS office in London, Kentucky. There is no indication from the record of proceedings that a properly completed Form I-698 and appropriate fee were contained in the envelope. The burden to file the adjustment application in a timely manner remains with the applicant. *See* 8 C.F.R. § 245a.3(d). Thus, the record of proceedings contains insufficient evidence that the applicant did, in fact, file his Form I-698 within the required period of time and the application was properly denied by the director on this grounds.

Furthermore, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Following a *de novo* review of the record, the AAO finds that the applicant is not eligible for adjustment to permanent resident status because he pled guilty to charges that he was in possession of a controlled substance. Furthermore, the applicant has been convicted of three misdemeanors.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act.

On August 13, 2005 the applicant was arrested in Bensenville, Illinois for violating Illinois Revised Statute (IRS) 720-550-4-C, *Possession more than 10 but not more than 30 grams of cannabis*. [REDACTED] The official disposition of this arrest is contained in the file, and indicates that the applicant pled guilty on May 5, 2006 in the Circuit Court of the Eighteenth Judicial District, DuPage County, Illinois. Additionally, on February 4, 1994, the applicant pled guilty to violating IRS-0565-704-A, *Possession of not more than 2.5 grams of cannabis*. [REDACTED]

Thus, the AAO finds the applicant to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on his admission to having committed crimes involving a controlled substance.

Furthermore, an applicant is ineligible to adjust to permanent resident status if he or she has been convicted of any felony or of three or more misdemeanors committed in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.11(d)(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 record of proceedings indicates the following:

- On January 4, 1994 the applicant was arrested by the Wheaton, Illinois, Police Department for violating IRS-0955-11-502-A, *Transportation or Possession of Open Alcohol by Driver*. [REDACTED]; and violating IRS-0955-6-303-A1, *Driving while license suspended* ([REDACTED]). The applicant pled guilty to both charges on February 4, 1994 and was sentenced to fines and costs assessed, and court supervision.
- On July 20, 1993, the applicant pled guilty to violating IRS 38 12-3A, *Battery*; and IRS 38 31-1A *Resisting* ([REDACTED]) and was sentenced to six months conditional discharge.

Thus, in addition to being inadmissible because he has been convicted of a violation of a law relating to a controlled substance, the applicant is also ineligible for temporary residence because he has been convicted of more than three misdemeanors. There is no statute of limitations concerning the applicability of convictions, and the applicant remains ineligible for adjustment to permanent residence. Therefore, the appeal must be dismissed.

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