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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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FILE: [Redacted]  
XTO 88 135 02056

Office: LOS ANGELES

Date: **JAN 25 2010**

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.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status pursuant to section 245A of the Immigration and Nationality Act 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). The director denied the application for temporary residence on criminal grounds because the applicant had not submitted certified court dispositions for all his arrests and convictions. The director's denial does not identify the number and type of criminal convictions. The director concluded that the applicant was not eligible to adjust to temporary resident status pursuant to section 245A of the Immigration and Nationality Act (Act).

The applicant represents himself on appeal. The applicant states that he has submitted such court documents as are presently available. The applicant also admits to one conviction in 1976 and two convictions in 2002. The applicant requests that his application for temporary residence be granted on humanitarian grounds.

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

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otherwise admissible to the United States. In this case, the applicant has failed to meet this burden because of his 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 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).

The AAO has reviewed all of the documents and evidence in the file in their entirety, as well as the applicant's assertions on appeal. The record contains a letter dated March 11, 2008 from the Superior Court of California, Southwest District that identifies three separate criminal docket [REDACTED], and [REDACTED]. The letter identifies the applicant and states that the above records have been destroyed pursuant to the state record retention schedule. The AAO notes additionally that on Question no. 40 on the Form I-687, regarding whether the applicant had ever been arrested, convicted, or confined in jail, the applicant wrote "drunk driving 3 times in & out." This admission is also listed on the interview notes where the applicant stated that he was arrested and convicted on three occasions for DUI.

The record contains a printout photocopy of [REDACTED] listed above. On February 20, 1987, the applicant pleaded guilty to one count of violating section 23152(b) of the California Vehicle Code – more than .08% blood alcohol level. Additional charges of DUI and driving with a suspended license were dismissed.

The record also contains court documents that identify an arrest and conviction in 2002. On October 3, 2002, the applicant pleaded guilty to one count of violating section 23152(b) of the California Vehicle Code – more than .08% blood alcohol level. [REDACTED] Additional charges of DUI and hit and run with property damage were dismissed.

Finally, the record contains documentary evidence of a third DUI type conviction. On October 18, 1976, the applicant was convicted for one count of violating section 23152(a) of the California Vehicle Code – DUI. [REDACTED]. The court granted the applicant's petition to dismiss the 1976 conviction pursuant to California's rehabilitation statute, section 1203.4 of the California Penal Code on April 3, 2008.

On July 28, 2008, the court granted the applicant's petition to dismiss the March 20, 1987 misdemeanor conviction pursuant to California's rehabilitation statute, section 1203.4 of the California Penal Code. [REDACTED]

Having reviewed all of the documents discussed above, the AAO concludes that the applicant has six distinct [REDACTED] and [REDACTED]. The applicant admitted to three convictions for DUI, and the record suggests that there may be more than three misdemeanor convictions for alcohol related driving offenses.

As noted *supra*, the burden remains with the applicant to establish by a preponderance of credible, probative evidence that he 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. 8 C.F.R. § 245a.2(d)(5).

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). In this case, the applicant has failed to meet his burden of proof because he cannot demonstrate that he is eligible for temporary resident status on account of his criminal convictions.

The record indicates that several of the convictions have been expunged pursuant to section 1203.4 of the California Penal Code, otherwise known as California's rehabilitation statute. A dismissal for anything other than constitutional reasons would have no effect on the applicant's immigration status. State rehabilitative 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. 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. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Thus, any dismissal or

expungement of the applicant's convictions serves no purpose in immigration proceedings, unless the trial court ruled that the *original criminal proceedings* were so constitutionally flawed as to render the ultimate conviction a violation of due process of law. The applicant has offered no evidence to suggest that the underlying trial court proceedings were constitutionally flawed. The convictions remain valid for immigration purposes.

The applicant stands convicted of at least three misdemeanor offenses. He is therefore ineligible for temporary resident status pursuant to section 245A.a(4)(B), 8 U.S.C. §1255a(4)(B) on criminal grounds. 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.