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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
and Immigration
Services

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FILE:

MSC 05 131 10012

Office: SAN ANTONIO

Date: **MAR 11 2010**

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 remanded for further action, you will be contacted.

Elizabeth McCormack

Perry Rhew
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, San Antonio, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of three misdemeanors in the United States.

On appeal, counsel asserted that the applicant's convictions occurred well outside of the statutory period for filing for legalization. Counsel stated, "[h]ad the government properly received his [the applicant] original application in the 1980's, he [the applicant] would have been admissible at that time." Counsel indicated that a brief would be submitted within 30 days. However, more than two years later, no additional correspondence has been presented by either counsel or the applicant.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(c)(1).

"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 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 contains the following court dispositions which reveal the applicant's criminal history in the state of Texas:

1. On October 30, 1994, the applicant was arrested by the San Antonio Police Department for assault – bodily injury, a violation of section 22.01(a)(1) PC, a Class A misdemeanor. On February 3, 1995, the applicant pled guilty to the offense. The entry of judgment was deferred and the applicant was placed on probation for nine months and ordered to pay a fine, perform 80 hours of community service and attend alcohol counseling. On November 17, 1995, the applicant was discharged from probation and the deferred adjudication of guilt was dismissed. [REDACTED]
2. On March 29, 1999, the applicant was arrested in Bexar County, Texas for displaying a fictitious insurance document, a violation of 37.10(a) PC, a Class A misdemeanor. On April 19, 1999, the applicant pled *nolo contendere* to the offense. The entry of judgment was deferred and the applicant was placed on probation for six months and

ordered to pay a fine. Upon successful completion of the applicant's probation, the court ordered the case terminated on October 21, 1999.

3. On or about April 3, 2005, the applicant was arrested in Bexar County, Texas for driving while intoxicated, a violation of 49.04 PC, a Class B misdemeanor. On or about March 10, 2005, the applicant was convicted of this misdemeanor offense.

The regulation, 8 C.F.R. § 245a.2(c)(1), and the statute, section 245A(a)(4)(B) of the Act, do not contain any time restriction for criminal activities. Clearly, the applicant must meet the eligibility requirements at the time the application is filed, as well as at the time the application is adjudicated.

Section 322(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), specifically states that the amendment of the definition of conviction "shall apply to convictions and sentences entered before, on, or after the date of enactment of this Act. As the Supreme Court stated in *Landgraf v. US Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the principle of applying the law in effect at the time of the decision does not conflict with the "presumption against retroactivity when the statute in question is unambiguous." Concerning the definition of conviction, the unambiguous language of section 322(c) leaves no doubt that Congress intended for the amendment in section 322(a) to be applied retroactively. *Moose v. INS*, 171 F.3d 994, 1007 (5th Cir. 1999).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, 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 Act.

The applicant pled guilty and *nolo contendere* to the charges above, and the judge ordered some form of punishment for each charge. Therefore, the applicant has been "convicted" of these offenses for immigration purposes.

The applicant is ineligible for temporary resident status because of his three misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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). The applicant has failed to meet this burden.

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