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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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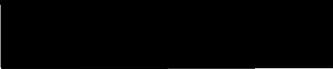


U.S. Citizenship
and Immigration
Services



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FILE:



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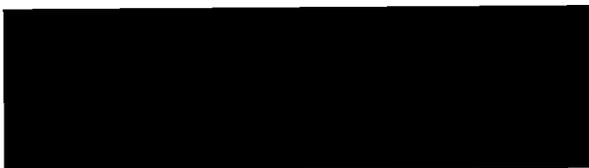
Applicant:



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, Arlington, Virginia 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.

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).

It is noted that the applicant’s Freedom of Information Act request was processed on October 30, 2009 (NRC2009034524).

At the time the applicant filed his Form I-687 application, he provided the court documentation from the Pittsylvania County General District Court of Virginia, which reflected that on April 13, 2000, the applicant was arrested for violating section 18.2-51/18.2-26, malicious wounding, a Class 5 felony. On November 13, 2000, the charge was reduced to assault and battery, a Class 1 misdemeanor, and the applicant was convicted of this offense. The applicant was sentenced to serve 30 days in jail and ordered to pay a fine. [REDACTED]

The director, in denying the application, noted that the applicant had pled guilty and was convicted of two other misdemeanors, thereby rendering him ineligible for the benefit sought.

On appeal, counsel argues that the director did not raise the criminal grounds in either notice issued on May 2, 2007, and July 2, 2008. Counsel asserts that the applicant should have been afforded the opportunity to demonstrate the inapplicability of 8 C.F.R. § 245a.1(o) pursuant to a Request for Evidence specifically addressing this issue. Counsel asserts that the applicant should have been provided with the opportunity to establish that not all of the convictions qualified as misdemeanors.

The AAO notes that two of the applicant’s criminal offenses were obtained from a Federal Bureau of Investigation (FBI) report. The instructions regarding the usage of the FBI report,

and the provisions of 28 C.F.R. § 50.12, state, in part, if the information on the record is used to disqualify an applicant, the official making the determination of suitability for licensing or employment shall provide the applicant the opportunity to complete, or challenge the accuracy of, the information contained in the FBI identification record. The deciding official should not deny the license or employment based on the information in the record until the applicant has been afforded a reasonable time to correct or complete the information, or has declined to do so.

On March 19, 2010, the AAO issued a notice to the applicant, which requested that he provide certified court documentation regarding his arrests on: 1) August 1, 1984 for assault and battery; 2) January 20, 1985 for malicious wounding; and 3) October 10, 2000 for assault and battery.

The applicant was also informed that the courts routinely destroy old records as a matter of administrative procedure; this act does not affect an underlying charge or conviction. Further, when a record is purged it does not mean that the charge was dismissed or that a conviction was vacated on its merits. The burden is on the applicant to provide affirmative evidence that each charge has been dismissed or was in error.

Counsel, in response, asserts that due to the age of the offenses, the applicant is unable to obtain the original criminal dispositions. Counsel submits documentation from the Department of State Police, Central Criminal Records Exchange, which reveals that on: 1) February 7, 1985, the applicant pled guilty to a misdemeanor charge of assault, a violation of Virginia Code section 18.2-57; 2) July 13, 2000, the applicant pled guilty to a misdemeanor charge of assault and battery (this relates to the April 13, 2000 arrest), a violation of Virginia Code section. 18.2-57; and 3) November 27, 2000, the applicant pled guilty to a misdemeanor charge of assault and battery, a violation of Virginia Code section 18.2-57.¹

Although the applicant did not provide court documentation for his August 1, 1984 arrest for assault and battery, it is noted that the FBI report indicates that on August 31, 1984, the charge was "Retraxit no cost" (dismissed with prejudice).

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.

¹ These charges are punishable by 12 months maximum jail time and are misdemeanors as defined at 8 C.F.R. § 245a.1(o).