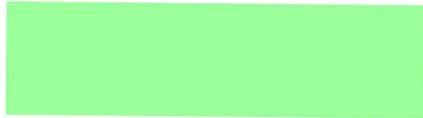


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



Date: **JUL 25 2013** Office: NEBRASKA SERVICE CENTER

FILE:



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:

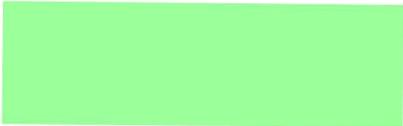


INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office



**DISCUSSION:** The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687). In a separate action, the director certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision to dismiss the Form I-687 application will be affirmed and the application will remain denied..

The applicant filed an Application for Temporary Resident Status pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1225a. The director denied the application, finding the applicant's December 22, 1983 departure pursuant to a deportation order meant the applicant failed to maintain the required continuous residence.<sup>1</sup> See Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).<sup>2</sup>

On March 29, 2013, the Nebraska Service Center Director granted the applicant's motion and reopened the Form I-687 application.<sup>3</sup>

This matter has a complex procedural history. In *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001), the U.S. District Court for the District of Arizona held that the legacy Immigration and Nationalization Service (legacy INS) violated the due process rights of a class of applicants for legalization under the Immigration Reform and Control Act of 1986 (IRCA) when it denied those applicants access to their complete deportation or exclusion files and prevented them from seeking waivers to "cure" prior deportations or exclusions. On March 27, 2001, the court ordered the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) to reopen legalization applications filed by class members and (1) accept waiver applications submitted by class members and adjudicate them in the same manner as waiver applications filed by other legalization applicants were adjudicated; and (2) prior to making a decision on a reopened legalization application, provide the applicant with complete copies of prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court, to enable the applicant to bring a collateral challenge to the deportation order, if appropriate. Subsequently, in *Proyecto San Pablo v. Dept of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007), the court reiterated its March 27, 2001 holding and ruled that, if the entire record cannot be located by the defendants, the following burden of proof will apply:

On May 14, 2013, the AAO issued a Notice of Intent to Deny (NOID) regarding the I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested that the applicant provide full criminal dispositions regarding the following matters:

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<sup>1</sup>The section provides that "an alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside the United States as a result of a departure under an order of deportation."

<sup>2</sup> On or about December 22, 1983, the Immigration Judge ordered the applicant to be deported and issued a warrant of deportation, pursuant to which the applicant was deported from the United States on that date.

<sup>3</sup>Also on that date, the director denied the applicant's Form I-690, application for waiver of grounds of inadmissibility.

The record before the AAO reveals that you were convicted for a violation of section 1325 of Title 8 of the United States Code, illegal entry, on October 24, 1983. The record further indicates you were arrested by the [REDACTED] Police Department on September 22, 1984 and charged with burglary. You were arrested by the [REDACTED] on February 22, 2008 and convicted on July 5, 2008 for a violation of section 23152(B) of the [REDACTED] Vehicle Code, driving under the influence of alcohol or drugs, blood alcohol level of 0.08% or more. You were arrested again by the [REDACTED] and charged with driving while under the influence of alcohol or drugs, and convicted in the [REDACTED] Municipal court on August 14, 2008. You were arrested by the [REDACTED] Police Department on June 15, 2002 and charged with driving while under the influence of alcohol or drugs. You were convicted of violating section 12025(b), carry concealed weapon on person, on or about June 7, 1987.<sup>4</sup>

The applicant, through counsel, submitted documentary evidence in response to the NOID.

An alien applying for adjustment of status to that of temporary resident 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).

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<sup>4</sup> The NOID advised the applicant as follows:

**The criminal charges listed above may disqualify you for temporary resident status.** To complete the processing of your appeal, this office needs a certified copy of the court disposition relating to each of these charges and to any other criminal charges that may have been filed against you, in or outside the United States, for which you have not yet submitted the final court disposition.

Please obtain a court-certified copy of each of the relevant, final court dispositions and forward them to the return address at the top of this letter. Please address the letter to the Administrative Appeals Office, Legalization Branch Chief. Include a copy of this letter on top of your submission.

If the appropriate court no longer has records of the final dispositions of your court hearings or if the charges against you were dropped prior to trial, you must provide a certified copy of the court's finding that no court records exist for you. The search for court records must be conducted using your full name and any aliases that you may have used, as well as your date of birth.

Next, you must request a record of your arrests and the disposition of those arrests from the police department or other agency which arrested you and filed charges against you. Again, the relevant agency must conduct a search using either your fingerprints or your full name and any aliases that you have used in the past as well as your date of birth. If such records are also unavailable, you must provide an official letter of that from the arresting agency.

The issue in this proceeding is whether the applicant has established his eligibility for temporary resident status. Specifically, the applicant must demonstrate that his criminal history does not disqualify him for temporary resident status. In this case, the applicant has failed to meet this burden because the record reflects he has been convicted of three or more misdemeanors.

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 under the provisions of the Immigration and Nationality Act (the Act). Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255(a)(4)(B).

The regulations provide relevant definitions at 8 C.F.R. § 245a. "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).

In response to the NOID the applicant submitted a certified copy of court documents issued by the Municipal Court of ██████████ Courthouse Judicial District, ██████████ filed on June 10, 1997, identified as Docket no. ██████████. The criminal docket reveals that the applicant was charged with one count of violating section 12025(B) of the ██████████ Penal Code (PC), *carrying a concealed weapon*, and one count of violating section 12031(A)(PC), *carrying a loaded firearm in a vehicle or a public place*. The applicant also submitted regarding these charges a form titled "Disposition of Arrest and Court Action." The form reveals that the applicant pleaded *nolo contendere* and was convicted on June 22, 1987, for one count of violating section 12025(B)(PC), listed as a misdemeanor.<sup>5</sup> The court suspended the imposition of a term of incarceration and sentenced the applicant to 12 months of probation.

The applicant also submitted a certified copy of court documents issued by the Superior Court of ██████████ filed on June 19, 2002, identified as Docket no. ██████████. The court records reveal that the applicant pleaded *nolo contendere* and was convicted on July 17, 2002, for one count of violating section 23152(b) of the ██████████ Vehicle Code (VC), *driving with a blood alcohol concentration (BAC) of 0.08% or higher*, listed as a misdemeanor.<sup>6</sup> The court suspended the imposition of a term of incarceration and sentenced the applicant to three years of probation.

The applicant further submitted a certified copy of court documents issued by the Superior Court of ██████████ filed on April 23, 2008, identified as Docket no. ██████████. The court records reveal that the applicant pleaded *nolo contendere* and was convicted on May 15,

<sup>5</sup> Also on June 22, 1987, the charge of having violated section 12031(a)(PC), *carrying a loaded firearm in a vehicle or a public place*, was dismissed in furtherance of justice pursuant to section 1385(PC).

<sup>6</sup> Also on July 17, 2002, a charge of having violated section 23152(a)(VC), *driving under the influence of alcohol and/or drugs*, was dismissed in furtherance of justice pursuant to section 1385(PC).

2008, for one count of violating section 23152(B) of the of the [REDACTED] Vehicle Code (VC), *driving with a blood alcohol concentration (BAC) of 0.08% or higher*, listed as a misdemeanor.<sup>7</sup> The court suspended the imposition of a term of incarceration and sentenced the applicant to five years of probation.

On appeal, counsel also submitted a letter dated May 17, 2013 from the Executive Clerk, Superior Court of [REDACTED] certifying that "no record was found regarding [an] arrest on 9/22/1984 violation 459 PC [burglary]." Counsel also submitted a letter dated May 24, 2013 from a representative of the City of [REDACTED] Police Department, stating that the requested records from September 22, 1984, "have been purged in the ordinary course of police business." As the courts routinely destroy old records as a matter of administrative procedure, this act does not affect an underlying charge or conviction.

The AAO finds that these letters are not sufficient to establish eligibility for temporary residence if other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications or petitions for immigration benefits (temporary resident status in this case) the applicant must show that the requested evidence is unavailable. In the absence of primary evidence, the applicant must then submit relevant "secondary evidence." If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. See 8 C.F.R. § 103.2(b)(2)(i) and (ii). The AAO notes that, despite the request for evidence contained in the NOID, the applicant failed to provide final dispositions for the arrest listed in September 1984 and this deficiency has not been overcome on appeal. Thus, the applicant has not met his burden of proof and his application must be denied on that additional ground.

The applicant has not met his burden of proof in establishing his eligibility for temporary resident status. The record reveals that the applicant has been convicted of at least three misdemeanors. The applicant is, therefore, ineligible for temporary resident status. No waiver of such ineligibility is available.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she is admissible to the United States under the provisions of section 245A of the Act. Based on the evidence of record, the applicant has failed to establish that he is admissible; therefore, he failed to establish he is eligible for adjustment to temporary resident status.

**ORDER:** The director's decision to deny the application is affirmed.

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<sup>7</sup> Also on May 15, 2008, a charge of having violated section 23152(a)(VC), *driving under the influence of alcohol and/or drugs*, was dismissed in furtherance of justice pursuant to section 1385(PC).