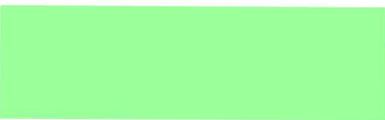


(b)(6)

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



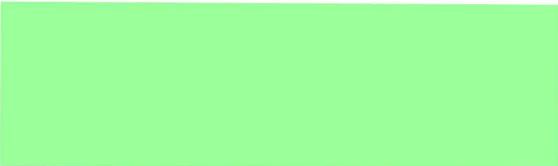
U.S. Citizenship
and Immigration
Services



Date: **NOV 26 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:

Enclosed please find 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
Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687). The Administrative Appeals Office (AAO) issued a notice of certification of the matter to the AAO for review. The director's decision will be affirmed. The application will be 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 June 1985 departure pursuant to a deportation order meant the applicant failed to maintain the required continuous residence. See Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).¹

The applicant filed a Motion to Reopen pursuant to the court's amended June 6, 2007 order in the class action *Proyecto San Pablo v. Department of Homeland Security*, No. CV 89-456-TUC-RCC (D. Arizona). On April 16, 2013, the director granted the applicant's motion, reopened the Form I-687 application, and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The director therefore denied the Form I-687 application. The AAO subsequently issued a notice of certification to provide the applicant with an opportunity to supplement the record.

An applicant for temporary residence 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 245(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). 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 under an order of deportation. Section 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i).

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 periods, 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 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).

An alien who applies for temporary resident status must also establish that he or she is admissible to the United States as an immigrant, and has not been convicted of any felony, or three or more misdemeanors. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B). In addition, an applicant for temporary resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in the Act. Section 245A(a)(4)(A), 8 U.S.C. § 1255a(a)(4)(A).

¹ 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."

“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).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

An issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden due to his criminal conviction record.

On September 13, 2013, the AAO issued a Notice of Intent to Deny (NOID) the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to submit documentation explaining certain criminal charges and convictions in the record. Specifically, the AAO requested that the applicant provide full criminal dispositions regarding the follow matters:

- On September 13, 2012, the applicant was arrested under the name [REDACTED] for violating sections 23152(a) and 23152(b) of the California Vehicle Code (VC). On November 29, 2012, the applicant was convicted of violating section 23152(b)(VC), *DUI/BAC .08 or more*, a misdemeanor, for which a sentence of 150 days was imposed and a term of four years of probation. The remaining charge was dismissed. [REDACTED] Superior Court, Case [REDACTED]
- On or about November 26, 2008, the applicant was convicted of violating section 14601.5(a) of the California Vehicle Code, *Knowingly Driving on a Suspended or Revoked License*, a misdemeanor, for which a sentence of 30 days was imposed and three years of probation. [REDACTED] County Superior Court, Auburn County, Case [REDACTED]
- On August 7, 2008, the applicant was arrested under the name [REDACTED] for violating sections 23152(a) and 23152(b) of the California Vehicle Code (VC) on July 31, 2008. On March 12, 2009 the applicant was convicted of violating 23152(a)(VC), *DUI*, a misdemeanor, for which a sentence of 30 days was imposed and a term of three years of probation. The remaining charge was dismissed. [REDACTED] Superior Court, Case [REDACTED]
- On September 5, 2007, the applicant was arrested under the name [REDACTED] for violating sections 422 and 243(e)(1) of the California Penal Code (PC). On September 7, 2007, the applicant was convicted of violating section 422(PC), *Criminal Threats*, a misdemeanor, for

which a sentence of 60 days was imposed and a term of three years of probation. The remaining charge was dismissed. [REDACTED] Superior Court, Case [REDACTED]

- On January 30, 2006, the applicant was arrested under the name [REDACTED] for violating section 273.5(a) of the California Penal Code (PC). On April 12, 2006 the applicant was convicted of violating section 240(PC), *Assault*, a misdemeanor, for which a sentence of 2 days was imposed and a term of three years of probation. [REDACTED] Superior Court, Case [REDACTED]
- On December 12, 1996 the applicant was arrested under the name [REDACTED] for violating sections 23152(a), 23152(b), 14601.1(a) and 20002(a) of the California Vehicle Code. On July 21, 1997 the applicant was convicted of violating sections 23152(a)(VC) and 20002(a)(VC), *DUI* and *Failure to Stop at the Scene of an Accident Causing Property Damage*, both misdemeanors, for which sentences of 120 days and 15 days were imposed and terms of three and five years of probation. The remaining charges were dismissed. [REDACTED] Superior Court, Case [REDACTED]
- On August 16, 1994, the applicant was arrested under the name [REDACTED] for violating section 23152(a) of the California Vehicle Code, *DUI*. On October 13, 1994 the applicant was convicted of the charge, a misdemeanor, for which a sentence of 30 days was imposed and four years of probation. [REDACTED] Superior Court, Case [REDACTED]
- On July 3, 1990, the applicant was arrested under the name [REDACTED] for a violation of sections 23152(a), 23152(b) and 16028(a) of the California Vehicle Code. On July 3, 1990 the applicant was convicted of violating section 23152(a)(VC), a misdemeanor, for which a sentence of 48 days was imposed and three years of probation, and the remaining charges were dismissed. [REDACTED] Superior Court, Case [REDACTED]

The applicant, through counsel, submitted documentary evidence in response to the NOID. In regard to the applicant being charged with *driving under the influence of alcohol* in [REDACTED] California on September 13, 2012, counsel submitted the relevant records from the [REDACTED] Superior Court, which reflect that on November 29, 2012, the applicant was convicted of *driving under the influence of alcohol, with a blood alcohol level of more than 0.08 percent*, a misdemeanor in violation of section 23152(b) of the California Vehicle Code. (Case [REDACTED] For this offense, the applicant was sentenced to incarceration for 150 days and was placed on probation for a period of four years.

In regard to the applicant being charged with *driving under the influence of alcohol* in [REDACTED] California on July 31, 2008, counsel submitted the relevant records from the [REDACTED] Superior Court, which reflect that on March 12, 2009, the applicant was convicted of *driving under the influence of alcohol*, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. (Case [REDACTED] For this offense, the applicant was sentenced to incarceration for 30 days and was placed on probation placed on probation for a period of three years.

In regard to the applicant being charged with *driving under the influence of alcohol* in [REDACTED] California in 1996, the record contains information that on or about July 21, 1997, the applicant was convicted in [REDACTED] California of *driving under the influence of alcohol*, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. (Case [REDACTED]) For this offense, the applicant was sentenced to jail and placed on probation. Counsel submitted a certified letter by [REDACTED] Deputy Clerk of the Superior Court of California in and for the [REDACTED]. In her letter, Ms. [REDACTED] certified that a search of relevant records revealed that the applicant was arrested on November 28, 1996 for a violation of the sections 23152(a), 23152(b), 14601.1(a) and 20002 of the California Vehicle Code. Ms. [REDACTED] certified that Municipal level court records pertaining to this arrest were destroyed “after the minimum detention period from adjudication,” as permitted pursuant to Government Code 68152 and 68153 pertaining to “Destruction/Retention of Court records.” Neither counsel nor the applicant disputes the existence or the validity of this criminal conviction.

In regard to the applicant being charged with *driving under the influence of alcohol* in [REDACTED] California on August 16, 1994, counsel submitted the relevant records from the [REDACTED] Municipal Court District, which reflect that on October 13, 1994, the applicant was convicted of *driving under the influence of alcohol*, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. (Case [REDACTED]) For this offense, the applicant was sentenced to incarceration for 10 days and was placed on probation for a period of four years.

In regard to the applicant being charged with *driving under the influence of alcohol* in [REDACTED] California in 1990, the records submitted by counsel from the [REDACTED] Municipal Court District relevant to the applicant’s 1994 conviction reflect that the applicant had a separate violation of section 23152(a) of the California Vehicle Code on or about June 30, 1990 which resulted in a misdemeanor conviction of *driving under the influence of alcohol*. (Case [REDACTED]) The [REDACTED] Municipal Court District records reflect that the applicant’s 1990 conviction which was considered by the court at the time of his prosecution and sentencing in 1994. Counsel submitted a certified letter by [REDACTED] Deputy Clerk of the Superior Court of California in and for the [REDACTED]. In his letter, Mr. [REDACTED] certified that a search of relevant records revealed that that Municipal level court records pertaining to the case were destroyed “after the minimum retention period from adjudication,” as permitted pursuant to Government Code 68152 and 68153 pertaining to “Destruction/Retention of Court records.” Neither counsel nor the applicant disputes the existence or the validity of this criminal conviction.

Section 23152 of the California Vehicle Code provides, in pertinent part, that:

- (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.
- (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Section 19 of the California Penal Code adds that: “every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.” Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant’s five convictions, on or about June 30, 1990, October 13, 1994, July 21, 1997, March 12, 2009 and November 29, 2012, respectively, for driving under the influence in violation of sections 23152(a) and 23152(b) of the California Vehicle Code qualify as misdemeanors.

In regard to the applicant being charged with *knowingly driving on a suspended or revoked license* in California in 2008, counsel submitted the relevant records from the Superior Court, which reflect that on December 2, 2008, the applicant was convicted of *knowingly driving on a suspended or revoked license*, a misdemeanor in violation of section 14601.5(a) of the California Vehicle Code. (Case For this offense, the applicant was placed on probation for a period of three years.

Section 14601.5 of the California Vehicle Code provides in pertinent part, that:

(a) A person shall not drive a motor vehicle at any time when that person’s driving privilege is suspended or revoked pursuant to Section 13353, 13353.1, or 13353.2 [for refusing a chemical test or driving with excessive blood alcohol] and that person has knowledge of the suspension or revocation.

As stated previously, section 19 of the California Penal Code adds that: “every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.” Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant’s December 2, 2008 conviction for *knowingly driving on a suspended or revoked license* in violation of section 14601.5(a) of the California Vehicle Code qualifies as misdemeanor.

In regard to the applicant being charged with *criminal threats* in California in 2007, counsel submitted the relevant records from the Superior Court, which reflect that on September 7, 2007, the applicant was convicted of *criminal threats*, a misdemeanor in violation of section 422 of the California Penal Code. (Case For this offense, the applicant was sentenced to incarceration for 60 days and was placed on probation for a period of three years.

At the time of the applicant’s conviction for *threatening crime with the intent to terrorize*, California Penal Code § 422 provided, in pertinent part:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate

prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

As stated previously, section 19 of the California Penal Code adds that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's September 7, 2007 *criminal threats* conviction in violation of section 422 of the California Penal Code qualifies as misdemeanor.²

In regard to the applicant being charged with *assault* in [REDACTED] California in 2006, counsel submitted the relevant records from the [REDACTED] Superior Court, which reflect that on April 12, 2006, the applicant was convicted of *assault*, a misdemeanor in violation of section 240 of the California Penal Code. (Case [REDACTED]) For this offense, the applicant was sentenced to incarceration for two days and was placed on probation for a period of three years.

Section 240 of the California Penal Code provides in pertinent part, that:

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

As stated previously, section 19 of the California Penal Code adds that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." Therefore, by the standards set forth in the

²² The AAO is not aware of a federal court or administrative decision that addresses whether offenses under California Penal Code § 422 constitute crimes involving moral turpitude. In *Matter of Ajami*, the Board of Immigration Appeals (BIA) addressed whether a stalking offense that involves the making of credible threats against another constitutes a crime involving moral turpitude. 22 I&N Dec. 949 (BIA 1999). The BIA concluded that "the intentional transmission of threats is evidence of a vicious motive or a corrupt mind," and a crime encompassing such conduct involves moral turpitude. 22 I&N Dec. 949, 952. Section 422 of the California Penal Code not only requires the intentional transmission of threats, but also contemplates a degree of threat that causes another person to feel sustained fear. Therefore, it is "evidence of a vicious motive or a corrupt mind" and involves moral turpitude. *See id.* Accordingly, the applicant is also inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. However, the applicant qualifies for the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(ii)(II), as he has been convicted of only one crime involving moral turpitude, the crime was a misdemeanor in California which carries a penalty of no more than 12 months in prison, and the applicant was only sentenced to incarceration for 60 days.

regulation at 8 C.F.R. § 245a.1(o), the applicant's April 12, 2006 assault conviction in violation of section 240 of the California Penal Code qualifies as misdemeanor.

In regard to the applicant being charged with *failure to stop at the scene of an accident causing property damage* in [REDACTED] California in 1996, the record contains information that on July 21, 1997, the applicant was convicted in [REDACTED] California of *failure to stop at the scene of an accident causing property damage*, a misdemeanor in violation of section 20002 (a) of the California Vehicle Code. (Case [REDACTED]) For this offense, the applicant was sentenced to jail and placed on probation. As stated previously, counsel submitted a certified letter by [REDACTED] Deputy Clerk of the Superior Court of California in and for the [REDACTED]. In her letter, Ms. [REDACTED] certified that a search of relevant records revealed that the applicant was arrested on November 28, 1996 for a violation of the sections 23152(a), 23152(b), 14601.1(a) and 20002(a) of the California Vehicle Code. Ms. [REDACTED] certified that Municipal level court records pertaining to this arrest were destroyed "after the minimum detention period from adjudication," as permitted pursuant to Government Code 68152 and 68153 pertaining to "Destruction/Retention of Court records." Neither counsel nor the applicant disputes the existence or the validity of this criminal conviction.

Section 20002(a) of the California Vehicle Code provides in pertinent part, that:

(a) The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, shall immediately stop the vehicle at the nearest location that will not impede traffic or otherwise jeopardize the safety of other motorists.

* * *

(c) Any person failing to comply with all the requirements of this section is guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one thousand dollars (\$1,000), or by both that imprisonment and fine.

Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's June 21, 1997 conviction for failure to stop at the scene of an accident in violation of section 20002(a) of the California Vehicle Code qualifies as misdemeanor.

Therefore, for immigration purposes, the applicant stands convicted of: *knowingly driving on a suspended or revoked license*, a misdemeanor in violation of the California Vehicle Code; *criminal threats*, a misdemeanor under the California Penal Code; *assault*, a misdemeanor under the California Penal Code; *failure to stop at the scene of an accident causing property damage*, a misdemeanor in violation of the California Vehicle Code; and *driving under the influence of alcohol or drugs* in 1990, 1994, 1997, 2009 and, 2012, respectively, misdemeanors in violation of the California Vehicle Code. As the applicant has been convicted of nine misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act. *See also* 8 C.F.R. § 245a.2(c)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States.

While counsel asserts on appeal that “[w]e are willing to stipulate to six of the convictions listed in the Request for Evidence,” counsel further asserts that U.S. Citizenship and Immigration Services (USCIS) should be equitably estopped “from considering the [applicant’s] misdemeanor convictions cited as a basis for disqualification” based upon what counsel asserts is the government’s “affirmative misconduct . . . the unreasonable 26 year delay in the adjudication of this legalization application.” The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner’s equitable estoppel claim.

Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.

ORDER: The director’s April 16, 2013 decision is affirmed. The Form I-687 application is denied.

cc: [REDACTED]