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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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

FILE:

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.

Thank you,

Ron Rosenberg
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 will be affirmed. The application will be denied.

On December 17, 1987, 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 January 7, 1983 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]

On March 22, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status application.

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:

> A legalization applicant who may be denied on the basis of 8 U.S.C. 1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must make a *prima facie* showing that the prior deportation or exclusion order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. If the applicant makes such a showing, then CIS has the burden of coming forward with a copy of the tape and/or transcript of the prior deportation or exclusion hearing . . . If

[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."

> CIS does not produce such evidence from the prior deportation or exclusion file, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

In her April 19, 2013 legal brief, counsel for the applicant states that the applicant has previously requested a complete copy of his deportation file, including any tape recording and/or transcript of the applicant's deportation hearing. Counsel indicates that although she has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. On April 28, 1993, legacy INS released 63 pages of record material to the applicant pursuant to a FOIA request. Documentation in the record reflects that a subsequent FOIA request filed pursuant to the *Proyecto* amended order was scanned by USCIS on August 8, 2008. Upon review of the record, it is unclear whether the applicant's 2008 FOIA request resulted in record material being released to him. From the documentary evidence in the record, it does not appear that that the applicant received a tape recording and/or transcript of the deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing transcript. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with a copy of his legalization file as it currently exists. As a result of the missing transcript and tape recording, however, the applicant's complete file is unavailable.

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his deportation order was either: the result of proceedings not in compliance with the governing law or regulations; or occurred in violation of due process; or was otherwise unlawful or involved a gross miscarriage of justice.

In this case, the director granted the applicant's motion and reopened the applicant's Form I-687 temporary resident status application. 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 and certified the matter to the AAO for a ruling. In rendering a decision, the director did not address whether the applicant was provided with a complete copy of his deportation file nor did the director discuss whether the applicant submitted *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or resulted in a gross miscarriage of justice, as required by the amended *Proyecto* order.

The standard for establishing a *prima facie* case means the evidence reveals a reasonable likelihood that requirements have been satisfied. *See Fernandez v. Gonzales*, 439 F.3d 592, n.6 (9th Cir. 2006) (*citing Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir.2003) (citations omitted)). A reasonable likelihood means showing a realistic chance that the petitioner can establish the issue in question at a later time. *Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (discussing the *prima facie* standard in the context of motions to reopen).

In applying these standards, the Board of Immigration Appeals (Board) and most Circuits employ a balancing test and weigh all evidence for and against in determining whether a *prima facie* case has been made. *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (discussing the issue in the context of a motion to reopen); *Wang v. BIA*, 437 F.3d 270, 276 (2d Cir. 2006) (same); *Matter of J-W-S-*, 24 I&N Dec. 185, 191-92; *Matter of C-C*, 23 I&N Dec. 899, 902-03 (BIA 2006) (same); *Guo v. Ashcroft*, 386 F.3d 556, 564-66 (3rd Cir. 2004) (same).

Counsel for the applicant contends that the documentary evidence and the circumstances surrounding the applicant's January 7, 1983 departure pursuant to a deportation order shows it was defective and entered in violation of the governing regulations. Counsel asserts that review of the tape recording of the applicant's deportation proceeding is "critical on whether the applicant was properly advised of his rights before he was ordered deported."

In relevant part, under the terms of the *Proyecto* amended order, counsel has requested a copy of the applicant's complete deportation file, including the tape recording and/or transcript of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing, 8 C.F.R. § 242.15, indicated that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer." Counsel has repeatedly requested a tape recording of the applicant's deportation hearing. It is likely that the hearing was recorded, and possible that it was included among other hearings on one tape (as we understand was frequently the case); however, EOIR and USCIS searches have not produced a copy of the recording. On April 28, 1993, legacy INS released 63 pages of record material to the applicant pursuant to a FOIA request. Moreover, documentation in the record reflects that a subsequent FOIA request filed pursuant to the *Proyecto* amended order was scanned by USCIS on August 8, 2008. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Therefore, it appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all available records relating to his deportation proceedings. While the applicant does not appear to be statutorily eligible for legalization without the special rules of construction set out by the court in the *Proyecto* amended order, and the outstanding deportation order appears valid under current ninth circuit case law (and has apparently never been challenged to EOIR or to the Court of Appeals), we are obliged to follow, to the letter, the 2007 amended *Proyecto* order.

We therefore find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations as there is no evidence that the immigration court maintained a tape recording of the applicant's deportation hearing. As a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order the AAO is constrained to find that the applicant has overcome the particular basis of the denial cited by the director.

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).

Furthermore, it is noted that 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 Act; 8 U.S.C. § 1255a(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).

"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).

Here, a review of the record reveals that the applicant has several arrests and criminal convictions. On August 6, 2013, the AAO issued a Notice of Intent to Deny (NOID)/Request for Evidence regarding the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to submit documentation explaining these criminal charges and

convictions. Specifically, the AAO requested that the applicant provide full criminal dispositions regarding the following matters, among others:

- On January 2, 1983, you were arrested under the name for the offense of "driving when privilege is suspended or revoked," a misdemeanor in violation of section 14601(a) of the California Vehicle Code. (Agency identification number D58912). On January 3, 1983 you pled guilty to the charged offense in the Municipal Court for the County of California. For this offense, you were sentenced to two days in jail with credit to time served.

- On February 28, 1988, you were arrested in County, California for disorderly conduct, a misdemeanor in violation of section 647 of the California Penal Code. On April 25, 1988, you pled guilty to the charged offense in the Municipal Court of California, County of Sonoma. For this offense, you were sentenced to time served.

- On May 10, 1993, you were arrested in County, California for driving under the influence of alcohol or drugs, a misdemeanor in violation of section 23152(b) of the California Vehicle Code. On June 3, 1993, you were convicted in the Municipal Court of Sonoma County for the driving under the influence of alcohol and sentenced to 36 months of conditional sentence, was fined $1,428, and referred to driving school.

In response to the NOID, counsel submitted a statement regarding the applicant's arrests, as follows:

> Your letter states that the applicant has three misdemeanor convictions and an arrest for possession of marijuana from Houston, Texas. These arrests/convictions would render Mr. ineligible for adjustment under legalization. However there is no clear evidence that the applicant was convicted of three misdemeanors or that the Houston arrest would render him inadmissible with an unwaivable offense.

Counsel asserts that there is no evidence in the record showing that the applicant stands convicted of three misdemeanors. In support, she submitted a certified letter dated September 3, 2013 by Executive Officer at the Criminal Division of the Superior Court of California, County of In his letter, Mr. certifies that the records of have been checked from June 1984 to the present and that "no disclosable records [] have been found against the individual." However, we note that the applicant's first conviction occurred on January 3, 1983 and that the applicant was convicted under the name "."

Regarding the applicant's January 3, 1983 conviction for "driving when privilege is suspended or revoked," the record includes the Judgment and Sentence of the Municipal Court for the County of State of California (case number . It reflects that on January 3, 1983, the applicant, under the name , pled guilty to one count of "driving when privilege is

suspended or revoked," a misdemeanor in violation of section 14601(a) of the California Vehicle Code. The Judgment and Sentence document further reflects that the applicant was present in court on January 3, 1983, that he was informed of his right to counsel, that he waived his right to representation, and that he pled guilty to the charged offense. For this offense, the applicant was sentenced to two days in jail with credit to time served.

At the time of the applicant's conviction, section 14601(a) of the California Vehicle Code provided, in pertinent part, that:

> (a) No person shall drive a motor vehicle at any time when that person's driving privilege is suspended or revoked for reckless driving in violation of Section 23103, 23104, or 23105, any reason listed in subdivision (a) or (c) of Section 12806 authorizing the department to refuse to issue a license, negligent or incompetent operation of a motor vehicle as prescribed in subdivision (e) of Section 12809, or negligent operation as prescribed in Section 12810.5, if the person so driving has knowledge of the suspension or revocation. Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

Additionally, section 14601(b) of the California Vehicle Code provided that: "A person convicted under this section shall be punished as follows: [u]pon a first conviction, by imprisonment in a county jail for not less than five days or more than six months." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant stands convicted of a misdemeanor.

Regarding the applicant's 1988 conviction for disorderly conduct, counsel states that:

> There is no evidence that there was an April 1988 [sic] for "disorderly conduct [sic] under California penal code 647. Mr. [redacted] does not ever recall having to go to court on this matter . . . After looking through the FOIA documents that our office received in this case, we noted that many court records reflect no conviction for disorderly conduct in 1988. In other court documents the only 1988 conviction coming up under his name is 647(f) for "Prostitution Following Prior Conviction and Positive AIDS Test—Felony." Section 647(f) of the penal code relates to individuals with previous convictions under section 647 and who were administered a blood test that came up positive on for the AIDS virus. In fact Mr. [redacted] has never been "previously convicted under any section of 647 of the California Penal code [sic] nor has he ever been tested and found positive for the AIDS virus.

Counsel claims that the only evidence of a 1988 conviction in the record relates to section 647f of the California Penal Code for the crime of prostitution following prior conviction and positive AIDS test. However, the documentary evidence in the record reveals that counsel has conflated

section 647f of the California Penal Code with paragraph (f) of the section 647 disorderly conduct statute. Here, it is evident that, whereas section 647f relates to an enhanced punishment for prostitution when the defendant has a prior conviction for prostitution under subsection (b) of the disorderly conduct statute *and* after the defendant has been informed of a positive AIDS test, paragraph (f) of section 647 proscribes public intoxication, which is one of the 10 volitional acts that have been categorized as disorderly conduct by the California Legislature. The fact that the applicant submitted documentation indicating that he tested negative for the AIDS virus, and the absence of documentary evidence in the record indicating that the applicant was previously convicted for prostitution as proscribed in subsection (b) of the section 647 disorderly conduct statute, further support the conclusion that the applicant was convicted of disorderly conduct for being publicly intoxicated in violation of section 647, paragraph (f) of the California Penal Code.

The record contains the Criminal Docket of the applicant in the Municipal Court of California, County of The applicant's criminal docket shows that on February 28, 1988, the applicant was arrested and charged with violating section 647, paragraph (f) of the California Penal Code (agency number . A certified letter from the County Sheriff's Office, dated September 3, 2013, corroborates that the applicant was in custody in the Sonoma County Adult Detention Facility on February 28, 1988. The Criminal Docket's Courtroom Minutes reflect that on April 25, 1988, the applicant pled guilty to disorderly conduct in violation of section 647(f) of the California Penal Code. The Courtroom Minutes further reflect that the applicant was advised of the charge against him and of his rights in the proceeding, and that he was handed a copy of the criminal complaint. Upon pleading guilty, the applicant was sentenced to time served.

At the time of the applicant's conviction, section 647 of the California Penal Code provided, in pertinent part, that:

> Except as provided in subdivision (l), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
>
> (f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

Additionally, section 19 of the California Penal Code provides 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 April 25, 1988 disorderly conduct conviction in violation of section 647(f) of the California Penal Code qualifies as a misdemeanor. Furthermore, the record reflects that on June 3, 1993, the applicant was convicted in the Municipal Court for County of "driving under the influence of alcohol or drugs," a misdemeanor in violation of section 23152(b) of the California Vehicle Code. For this offense, the applicant was sentenced to 36 months of conditional sentence, was fined $1,428 and was referred to driving school. At the time of the applicant's convictions, every offense declared to be a misdemeanor was punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both. *See* section 19 of the California Penal Code.

The record includes a judicial order issued by the Judge of the Municipal Court of California, in and for the County of which indicates that on March 29, 1995, the court dismissed the applicant's 1993 conviction for "driving under the influence of alcohol or drugs" pursuant to section 1203.4 of the California Penal Code. However, it is noted that under the current statutory definition of conviction provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528; *see also Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of "conviction" at section 101(a)(48)(A) of the Act, there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceeding and those vacated because of post-conviction events).

By these standards, the AAO notes that the state court's expungement of the applicant's conviction for driving under the influence under section 1203.4 of the California Penal Code does not eliminate the immigration consequences of the applicant's criminal conviction. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In general, the Ninth Circuit has consistently ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006). Thus, the municipal court's March 29, 1995 judicial order that expunged the applicant's driving under the influence conviction under section 1203.4 of the California Penal Code is ineffective to remove the immigration effect of the underlying criminal convictions.

Therefore, for immigration purposes, the applicant stands convicted of driving under the influence and driving when privilege is suspended or revoked, misdemeanors under the California Vehicle Code, and disorderly conduct, a misdemeanor under the California Penal Code. As the applicant has been convicted of three 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.11(d)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.[2]

ORDER: The director's March 22, 2013 decision is affirmed. The Form I-687 application is denied.

[2] The record contains an FBI rap sheet which shows that on June 23, 1985, the applicant was arrested in Houston, Texas under the name for the offense of possession of marijuana in violation of the Texas Health and Safety Code. (Agency case number In response to the NOID, the applicant submitted documentation from the Harris County District Clerk in Houston, Texas indicating that a criminal search was conducted from 1976 to September 8, 1993 and that no criminal charges were found relating to the applicant. As such, this arrest will not be considered.