U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 25449498

Date: DEC. 29, 2022

Appeal of Los Angeles, California Field Office Decision

Form I-687, Application for Status as a Temporary Resident

The Applicant seeks review of a decision terminating his temporary resident status under section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255a. The Immigration Reform and Control Act of 1986 (IRCA)[1] created a legalization program under section 245A of the Act, which allowed noncitizens who entered the United States before January 1, 1982, and who continuously resided and were physically present in the United States during specified time periods to adjust status to temporary residents if, in part they were admissible to the United States and have not been convicted of a felony or three or more misdemeanors in the United States.

The Director of the Los Angeles, California Field Office terminated the Applicant's temporary resident status, concluding that the Applicant was not eligible for such status at the time it was granted because he was convicted of three misdemeanor offenses.

On appeal, the Applicant asserts that he has only two misdemeanor convictions and the Director's decision terminating his temporary resident status was therefore in error.

The Applicant has the burden of demonstrating eligibility for temporary resident status by a preponderance of the evidence. 8 C.F.R. § 245a.2(d)(5).

Upon *de novo* review, we conclude that the Applicant has overcome the sole basis for termination of his temporary resident status. However, as the record of his criminal history remains incomplete, we will return the matter to the Director for further proceedings consistent with our opinion below.

I. LAW

U.S. Citizenship and Immigration Services (USCIS) may terminate status of a noncitizen granted temporary resident status under section 245A(a)(1) of the Act at any time, if it appears that the noncitizen was not in fact eligible for such status, becomes ineligible, or does not timely apply to adjust status from temporary to permanent resident. Section 245A(b)(2) of the Act; 8 C.F.R. § 245a.2(u).

[1] 100 Stat. 3359, Pub. L. 99-603 (Nov. 16, 1986).

Noncitizens who have been convicted of a felony or three or more misdemeanors are ineligible for temporary resident status. Section 245A(a)(4)(B) of the Act; 8 C.F.R. § 245a.2(c)(1).

A conviction exists pursuant to section 245A(a)(4)(B) of the Immigration and Nationality Act where (1) a judge or a jury has found an individual guilty or the has entered a plea of guilty or *nolo contendere*, and (2) the judge has ordered some form of punishment or penalty, including but not limited to a fine or probation. *Matter of M-*, 19 I&N Dec. 861 (Comm'r 1989).

Misdemeanor means, in relevant part a crime punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any, except crimes punishable by imprisonment for a maximum term of five days or less. 8 C.F.R. § 245a.1(o)(1)-(2).

II. ANALYSIS

The only issue on appeal is whether the Applicant was ineligible for adjustment of status to that of a temporary resident under section 245A of the Act on criminal grounds at the time he was granted such status in 2013.

A. Relevant Facts and Procedural History

The record reflects that the Applicant filed the instant Form I-687 in 1987 under section 245A, as originally enacted by IRCA. USCIS initially denied the Form I-687 upon determination that the Applicant's two departures in 1983 under deportation orders disrupted his required continuous residence in the United States. Following the decision of the U.S. District Court for the District of Arizona in *Proyecto San Pablo v. INS*, No. CV 89-456-TUC-WBD (D. Ariz. Feb. 2, 2001),[2] the Director of the Nebraska Service Center reopened the proceedings and again denied the Form I-687 finding that the Applicant failed to maintain continuous residence in the United States, as required. The Director certified the decision to us for review. On certification, we determined that the Applicant made a *prima facie* showing that the proceedings which resulted in his deportation orders were not in compliance with the governing regulations and, as the record did not contain a copy of the tape and/or transcript of the deportation hearings the sole ground for the denial of the Applicant's Form I-687 had been overcome.[3] We further concluded that the Applicant also met his burden of proof to show continuous physical presence and residence in the United States during the requisite periods. In addition, we noted that the Applicant was not barred from adjusting his status to that of a temporary resident on criminal grounds, as the evidence in the record at the time indicated he had only two misdemeanor convictions, both for driving under the influence of alcohol (DUI) in violation of section

[2] *Proyecto San Pablo v. INS* was a class-action lawsuit filed by certain applicants for legalization in the late 1980s whose applications were denied or whose temporary residence was terminated. The court held in that case that former Immigration and Naturalization Service (INS) violated the class members' due process rights by denying them access to their complete deportation or exclusion files, and preventing them from seeking waivers to cure prior deportations or exclusions. Under the terms of the court's order, such applicants could request INS to reopen their cases and render new decisions after providing the applicants with their complete deportation files.

[3] *See Proyecto San Pablo v. DHS*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007) (amended order) (providing, in part that if an applicant makes a *prima facie* showing that the prior deportation order was not in compliance with governing statutes or regulations, USCIS has the burden of coming forward with a copy of the tape and/or transcript of the deportation hearing; if USCIS cannot produce such evidence, the prior deportation order may not be used as evidence to support a denial of legalization benefits.)

23152(a) of the California Vehicle Code in 1982 and 1985. Accordingly, we ordered approval of his request for temporary resident status under section 245A.[4]

The Applicant was granted temporary resident status in October 2013, and timely filed a Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of [the Act]) in February 2016. During his interview before a USCIS immigration officer in August 2016, the Applicant confirmed that he was convicted of DUI twice, and disclosed an additional arrest for an assault with a deadly weapon. In response to a subsequent request for evidence and a notice of intent to terminate his temporary resident status (NOIT) the Applicant submitted a court disposition for that arrest, and a letter indicating that other arrest records were destroyed in accordance with California law.

B. Criminal History

The record reflects the following criminal history for the Applicant relevant to his eligibility for temporary resident status under section 245A of the Act:

1. In [redacted] 1982 the Applicant was convicted of DUI in violation of section 23152(a) of the California Vehicle Code, and sentenced to probation (term of probation not reported).

2. In [redacted] 1985, the Applicant was convicted of the same offense and placed on probation for a period of three years.

3. In [redacted] 1984, the Applicant was charged with a violation of section 40508 of the California Vehicle Code—promise to appear; fine payment; court order condition; violations; driver's license impoundment (failure to appear or to pay a fine). The record does not include a court disposition for this offense, and the previously submitted 1987 California of Department of Motor Vehicles Information document (DMV document) does not indicate the outcome.

4. In [redacted] 1986, the Applicant was charged in [redacted] California with assault with a deadly weapon (no firearms/great bodily injury). The record does not include information about the specific provision of California law violated, nor does it contain a court disposition for the charge.

5. In [redacted] 1991, the Applicant was arrested in [redacted] California and charged with assault with a deadly weapon in violation of section 425(a)(1) of the California Penal Code. The court disposition reflects that the offense was classified as a misdemeanor. The disposition further shows that the Applicant pled *nolo contendere* to the charge; the court found him guilty and sentenced him, in part to serve 30 days in a county jail.

[4] In a separate decision we sustained the Applicant's appeal of the denial of his Form I-690, Application for Waiver of Grounds of Excludability.

C. Classification of Offenses

1. DUI

At the time the Applicant was convicted of DUI in 1982 and 1985, section 23536(a)[5] of the California Vehicle Code provided in part that a first violation of section 23152 shall be punished by imprisonment in the county jail for not less than 96 hours, but not more than six months, and by a fine.

Because DUI is punishable under California law by imprisonment for more than five days, but less than one year, the offense meets the definition of a misdemeanor under the regulations at 8 C.F.R. § 245a.1(o)(1)-(2).

2. Failure to Appear or to Pay Fine

At the time the Applicant was charged with this offense in 1984, a violation of section 40508 of the California Vehicle Code was classified as a misdemeanor. *See* Cal. Veh. Code § 40000.25 (West 1984) (stating that a violation of section 40508 relating to failure to appear or to pay fine shall constitute a misdemeanor, and not an infraction). Under California law, every offense declared to be a misdemeanor, except in cases where a different punishment is prescribed by state law, is punishable by imprisonment in the county jail not exceeding six months, by fine, or by both. Cal. Pen. Code § 19 (West 1984).

Because the offense is classified as a misdemeanor under California law, punishable by imprisonment of more than five days, but less than one year, it qualifies as a misdemeanor pursuant to the regulations at 8 C.F.R. § 245a.1(o)(1)-(2).

3. Assault with a Deadly Weapon

At the time of the Applicant's conviction of this offense in 1992, section 245(a)(1) of the California Penal Code provided that any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

We note that certain California offenses can be prosecuted as either felonies or misdemeanors. "[A]n offense punishable either by imprisonment in the state prison or by a county jail sentence is said to wobble between the two punishments and hence is frequently called a wobbler offense. . . . Under California law, certain offenses may be classified as either felonies or misdemeanors. These crimes are known as 'wobblers'." *Robert L. v. Superior Court*, 69 P.3d 951, 956, n.9 (Cal. 2003) (internal citations omitted).

[5] Formerly section 23160 of the California Vehicle Code, added by Stats.1981, c. 940, p. 3571, § 32. Amended by Stats.1982, c. 53, p. 174, § 29, eff. Feb. 18, 1982; Stats.1982, c. 331, p. 1632, § 4, eff. June 30, 1982; Stats.1982, c. 1339, § 15, eff. Sept. 24, 1982; Stats.1984, c. 216, § 13.

Here, the court disposition shows that the charge of assault with a deadly weapon was prosecuted as a misdemeanor offense, which carries a maximum penalty of imprisonment in a county jail for a term not exceeding one year. As such it qualifies as a misdemeanor under the regulations at 8 C.F.R. § 245a.1(o)(1)-(2).

D. 1982 DUI Offense

The Applicant does not contest that he was convicted of assault with a deadly weapon in 1992 and of DUI in 1985, nor does he dispute that the two convictions are misdemeanor offenses. He asserts, however, that because he was a minor at the time of his 1982 DUI offense he does not have a second DUI "conviction" for immigration purposes pursuant to the precedent decisions of the Board of Immigration Appeals, including *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000) and *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981).

Generally, juvenile delinquency proceedings are not criminal proceedings, acts of juvenile delinquency are not crimes, and findings of juvenile delinquency are not convictions for immigration purposes. *Matter of Devison*, 22 I&N Dec. at 1365 (BIA 2000); *see also Matter of De La Nues*, 18 I&N Dec. at 142 (holding that a foreign offense that would constitute an act of juvenile delinquency under the Federal Juvenile Delinquency Act [(FJDA)] is not a conviction for a crime within the meaning of the Act); *Matter of C-M-*, 5 I&N Dec. 327, 329 (BIA 1953) (finding that changes in the immigration laws did not affect prior administrative holdings that juvenile delinquency is not a crime); *Matter of F-*, 4 I&N Dec. 726, 728 (BIA 1952) (providing that an offense committed before the offender's 18th birthday was an act of juvenile delinquency, not a crime). The "standards established by Congress, as embodied in the [FJDA], govern whether an offense is to be considered an act of delinquency or a crime." *Devison*, 22 I&N Dec. at 1366.

The FJDA defines a juvenile as "a person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday," and "juvenile delinquency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 137 (BIA 1981) (citing 18 U.S.C. § 5031). A juvenile whose alleged offense is perpetrated between his sixteenth and eighteenth birthday is likewise proceeded against as a juvenile delinquent unless he is charged with committing an act which, if committed by an adult, would be a felony punishable by a maximum penalty of 10 years imprisonment or more, life imprisonment or death. *Id.* at 138. Under the FJDA, a juvenile delinquency proceeding results in the adjudication of a status rather than conviction for a crime. 18 U.S.C. §§ 5031-5032.

Applying the above standards in the Applicant's case, we conclude that his 1982 DUI offense does not qualify as a "conviction" for immigration purposes. Specifically, the record shows that the Applicant was 16 years old in [redacted] 1982 when the court found him guilty of DUI and sentenced him to probation. Moreover, the Applicant was charged with a misdemeanor offense punishable by up to six months of imprisonment, and not with an act which, if committed by an adult would be a felony punishable by a maximum penalty of 10 years imprisonment or more, life imprisonment or death. Lastly, the information in the previously submitted DMV document indicates that the Applicant's 1982 DUI proceedings were before the [redacted] Juvenile Court.

This evidence considered in the aggregate supports the Applicant's assertion that his 1982 DUI was an act of juvenile delinquency and does not therefore constitute a misdemeanor conviction for the purposes of section 245A(a)(4)(B) of the Act.

E. Criminal History and Eligibility for Temporary Resident Status Remain Unclear

Nevertheless, the Applicant's criminal history record remains incomplete as it does not include dispositions for his arrests for failure to appear or to pay fine in 1984, and for assault with a deadly weapon in 1986, which appears to be separate from the 1991 arrest for the same offense. As discussed, failure to appear or to pay fine is classified as a misdemeanor under California law, and assault with a deadly weapon is a "wobbler" offense, which may be prosecuted either as a misdemeanor or a felony. Thus, the outcome of those arrests and related charges is relevant to determining whether the Applicant had any misdemeanor or felony convictions (in addition to his DUI and assault with a deadly weapon convictions, which he does not dispute) that might have affected his eligibility for temporary resident status when he was granted such status in 2013.

The Applicant must be given an opportunity to offer evidence in opposition to the grounds alleged for termination of his temporary resident status. 8 C.F.R. § 245a.2(u)(2)(i). Because the Director did not address the 1984 and 1986 arrests in the NOIT, we will return the matter to the Director to give the Applicant an opportunity to submit evidence of the disposition of the charges resulting from those arrests, and to enter a new decision, accordingly.

III. CONCLUSION

The Applicant has shown that his 1982 DUI conviction, which occurred when he was a juvenile does not qualify as a "conviction" for immigration purposes and has therefore overcome the sole basis for the termination of his temporary resident status. However, as the record of the Applicant's criminal history remains incomplete, we will remand the matter to the Director to give the Applicant an opportunity to offer additional evidence to establish that he was not barred from temporary resident status under section 245A of the Act at the time he was granted such status.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.