

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 I STREET, N.W.
Washington, D.C. 20536

FILE:

OFFICE: CALIFORNIA SERVICE CENTER

DATE: OCT 16 2003

IN RE: Applicant:

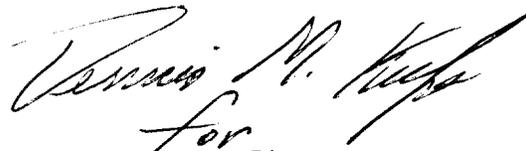
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

PUBLIC COPY

INSTRUCTIONS:

Attached is the decision rendered on your appeal. The file has been returned to the Service Center that processed your case. If your appeal was sustained, or if your case was remanded for further action, the Service Center will contact you. If your appeal was dismissed, 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.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Regional Processing Facility. The matter was reopened and denied again by the Director, California Service Center. It is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The directors denied the application because of the applicant's criminal record.

On appeal, counsel provided expungement records for three of the applicant's five misdemeanor charges.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. 245a.2(c)(1).

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

"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 such alien 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).

The record reveals the following offenses in the State of California:

1. On July 12, 1979, the applicant was convicted of a violation of section 23102(a) VC, driving under the influence, a misdemeanor.
2. On May 21, 1980, the applicant was convicted of a violation of section 23102(a) VC, driving under the influence, a misdemeanor.
3. On August 25, 1988, the applicant was convicted of a violation of section 40508(a) VC, failure to appear, a misdemeanor.
4. On March 20, 1989, the applicant was convicted of a violation of section 12500(a) VC, driving without a license, and a violation of section 40506(a) VC, failure to appear, a misdemeanor.

The facility director denied the application for temporary resident status. The applicant subsequently provided records of expungement

for the November 20, 1984 and October 8, 1987 convictions. As a result, the case was reopened and the center director subsequently denied the application again. Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, Int. Dec. #3377 (BIA 1999); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001). Despite the fact that the convictions were later set aside, the applicant remains convicted, for immigration purposes, of the offenses above.

The applicant is ineligible for temporary resident status because of his five 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.