

**PUBLIC COPY**

U.S. Department of Homeland Security

Citizenship and Immigration Services

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



SEP 26 2003

FILE:

OFFICE: CALIFORNIA SERVICE CENTER

DATE:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

**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 adjustment from temporary to permanent resident status was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to provide requested court dispositions and other requested documents pertinent to the applicant's criminal history.

On appeal, the applicant states that he has no criminal record from 1976 to 1988 and that his May 16, 1991 conviction is being expunged from his record. The applicant also provides additional documentation in support of his claims. According to the applicant, he now qualifies for legalization.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(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 that on May 16, 1991, the applicant was convicted of a violation of section 40508 VC, failure to appear, a misdemeanor. Also, according to the notes of the legalization officer who interviewed the applicant, the applicant indicated that he was arrested for driving under the influence in 1988.

The record also reveals the following misdemeanor offenses in the State of California for which no final disposition is cited:

- 1) On August 22, 1976, the applicant was arrested for driving under the influence of alcohol.
- 2) On January 24, 1977, the applicant was arrested for misdemeanor drunk driving on the highway.

3) On November 20, 1977, the applicant was arrested for misdemeanor drunk driving on the highway.

The director determined that the applicant may be ineligible as a alien who has been convicted of three or more misdemeanors. The director also found that no evidence has been received to indicate that the charges against the applicant are in error or that the applicant was cleared of the charges, and denied the application.

On appeal, the applicant claims that he has no criminal record from the period of 1976 to 1988. The applicant also presents a letter dated March 31, 1988 from the State of California Bureau of Criminal Identification. In the letter it is stated that a search of the applicant's fingerprints failed to reveal the existence of any California criminal history record.

When the applicant applied for temporary residence (legalization) he had his fingerprints taken on April 13, 1988. That fingerprint card was forwarded to the Federal Bureau of Investigation (F.B.I.) and the subsequent response from the F.B.I. showed the three misdemeanor arrests from 1976-77 listed above. It is not known why the California report did not show the arrests. It is possible the California report only shows arrests/convictions within the past 10 years. The applicant has the burden to establish, with **affirmative evidence**, that outstanding charges were dismissed or were in error. The applicant's contention that he has no criminal record prior to 1988 is not affirmative evidence and fails to meet the applicant's burden. The applicant has not submitted any convincing evidence to demonstrate that he was not arrested as shown, or that the arrests did not culminate in convictions.

The applicant acknowledges the May 16, 1991 conviction but claims it would be expunged. Nonetheless, there is nothing in the record to indicate that the conviction was, in fact, expunged. Moreover, 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).

The applicant must agree to fully cooperate in the verification process. Failure to assist the Bureau in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

According to the F.B.I. printout, the applicant was arrested for three misdemeanors in the 1976-77 period. In his own words, he was



arrested in 1988. And, he was convicted in 1991. The applicant has failed to demonstrate the he was not convicted of three or more misdemeanors.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she is admissible to the United States under the provisions of section 210(c) of the Act, 8 U.S.C. 1160, and is otherwise eligible for adjustment of status under this section. 8 C.F.R. § 210.3(b)(1). The applicant has failed to meet this burden.

**ORDER:** The appeal is dismissed. This decision constitutes a final notice of ineligibility.