

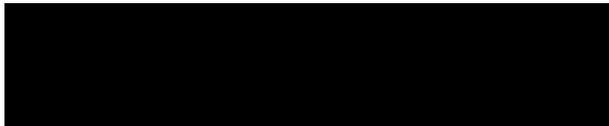


U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUN 29 2005

IN RE:

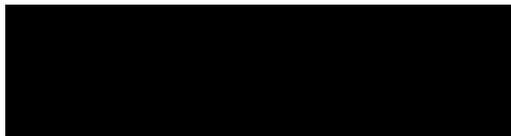
Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. 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 termination of temporary resident status by the Director, California Service Center is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's status because the applicant had been convicted of eleven misdemeanors and, supposedly, a felony.

On appeal, counsel points out that the applicant was not convicted of a felony. She asserts the expungements obtained by the applicant render him eligible for lawful status.

The temporary resident status of an alien may be terminated if the alien is convicted of any felony, or three or more misdemeanors. 8 C.F.R. § 245a.2(u)(iii).

"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).

In the termination notice the director set forth eleven misdemeanor convictions relating to the applicant. The list of convictions need not be duplicated here. On appeal, counsel has not challenged the fact of the misdemeanor convictions, although she has correctly pointed out that the director erred in noting that the applicant had been convicted of a felony. Also, earlier in these proceedings, counsel noted that most of the applicant's convictions had been expunged. She also claimed that the applicant had only one conviction on May 3, 1989, which would mean he would have a total of ten.

Under the 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 which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. Any subsequent action which overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Board of Immigration Appeals revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings. In addition, in *Matter*

of *Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains “convicted” for immigration purposes.

Counsel acknowledges the findings in *Roldan, supra*, but maintains that they should not apply to this situation because the applicant’s convictions greatly predated that precedent decision and the underlying Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Counsel points out that, earlier, prior to *Roldan*, many other legalization applicants benefited from expungements. However, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Furthermore, the applicant’s related request for adjustment to permanent residence was denied on September 29, 1990, and an appeal of that decision was dismissed on September 24, 1996. Temporary residence shall be terminated at the end of the 43rd month beginning after the date the alien is granted such status, unless the alien has applied for adjustment to permanent residence and such application has not been denied. See Section 245A(b)(2)(C) of the Act. The applicant’s temporary resident status was subject to termination ever since September 24, 1996, simply because the application for permanent residence had already been denied, and the appeal dismissed, and it had been more than 43 months since temporary resident status had been granted. It cannot be found that the director unfairly waited until a new interpretation of the applicability of expungements came about before terminating the applicant’s status, as the status was subject to termination anyway because of the “43-month” rule.

It is not clear that the applicant was only convicted of one offense on May 3, 1989, as counsel has asserted. Even if her argument is accepted, pursuant to the definition of conviction at section 101(a)(48) of the Act and the interpretation set forth in precedent decisions, the applicant was convicted of ten misdemeanor offenses. There is no waiver available for ineligibility due to three or more misdemeanor convictions.

The applicant’s temporary resident status is terminated because of his many misdemeanor convictions. 8 C.F.R. § 245a.2(u)(iii).

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