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U.S. Citizenship  
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Services

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FILE:



Office: California Service Center

Date: 11/23/15

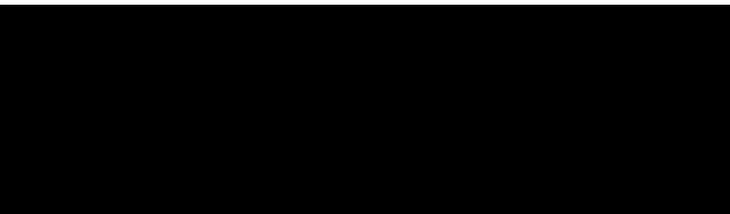
IN RE:

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:

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

The Director, California Service Center denied the application because the applicant had been convicted of three misdemeanors.

On appeal, counsel concedes the fact of the convictions, but contends that some of the applicant's convictions cannot be considered to be misdemeanors because of the punishment incurred.

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 the applicant was convicted of Driving With a Blood Alcohol Content of .08% or Greater on February 3, 1989, October 3, 1994 and April 23, 1996. He was also convicted of Driving Under the Influence on October 3, 1994. These offenses are misdemeanors under the California Vehicle Code. Thus, the applicant was actually convicted of four misdemeanors. Counsel has provided orders, under section 1203.4/1203.4a of the California Penal Code, which set aside and vacated the convictions.

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 which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. Any subsequent action that 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).

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the Board of Immigration Appeals 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.

There is no indication in this matter that the actions of setting aside the applicant's convictions were based on the merits of the case. Therefore, pursuant to the above precedent decisions, no effect is to be given to such actions.

Counsel points out that the applicant was sentenced to only five days imprisonment for the October 3, 1994 convictions. He refers to the definition of misdemeanor stated above, and maintains that these convictions cannot count as misdemeanors due to the short sentence. However, as seen above, a crime will not be considered to be a misdemeanor if it is *punishable* by a maximum term of five days or less. Driving Under the Influence, and Driving With a Blood Alcohol Content of .08% or Greater, are classified as misdemeanors in the California Vehicle Code. They are punishable by imprisonment in the county jail for a maximum of six months, pursuant to section 42002 of the California Vehicle Code, and therefore fall within the above definition of misdemeanor.

Thus, even though the applicant's convictions were set aside, the applicant stands convicted of four misdemeanors. He is therefore ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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