



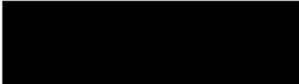
U.S. Citizenship
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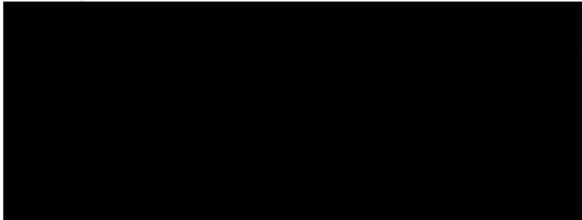


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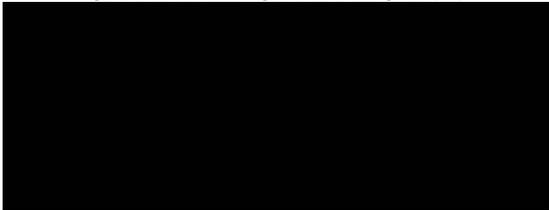
Office: CALIFORNIA SERVICE CENTER

Date: **NOV 27 2006**

INRE: Applicant: 

APPLICATION: Application for Adjustment from Temporary to Permanent Resident pursuant to 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. Any further inquiry must be made to that office.

Robert P. ~~Wiemann~~, Chief
Administrative Appeals Office

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

The director initially denied the application because it was determined that the applicant had been convicted of a felony, and he was therefore ineligible for adjustment from temporary to permanent resident status.

On appeal, counsel argued that the applicant has been denied due process. Counsel asserted that the applicant is entitled to submit evidence in rebuttal to the proposed termination of his temporary resident status before the matter can be denied.

In his subsequent decision, the director denied the application because it was determined that the applicant had been convicted of three misdemeanors, and he was therefore ineligible for adjustment from temporary to permanent resident status.

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. 8e.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).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i) (In of the immigration and Nationality Act (the Act).

The FBI report dated April 30, 2004, revealed the following offenses in the state of California:

1. On May 30, 1977, the applicant was arrested by the Sheriffs Office in Norwalk for burglary. No formal charge was issued and was rejected by the district attorney's office.
2. On August 28, 1978, the applicant was arrested by the Sheriff's Office in Santa Cruz for violating section 484 PC, petty theft.
3. On July 16, 1979, the applicant was arrested by the Corona Police Department for violating section 220 PC, assault to commit rape.
4. On October 22, 1983, the applicant was arrested by the Sheriffs Office in Norwalk for violating section 273 a PC, willful cruelty to a child, a felony. The applicant was subsequently charged with

violating section 23152 (a) VC, driving under the influence and section 23152(b) VC, driving with .10 percent or more alcohol in the blood. The applicant was convicted of driving under the influence, a misdemeanor. The applicant was sentenced to serve five days in jail, ordered to pay a fine and placed on probation for three years. The remaining charge was dismissed.

5. On December 3, 1998, the applicant was arrested by the Sheriff's Office in Norwalk for violating section 11350(a) H&S, possession of narcotic controlled substance. The applicant was convicted of a traffic violation and was sentenced to serve time in jail and was placed on probation.
6. On January 17, 2001, the applicant was arrested by the Pomona Police Department for violating section 23152 (a) VC, driving under the influence and section 23152(b) VC, driving with .08 percent or more alcohol in the blood. The applicant was charged with violating section 148(a)(1) PC, obstructing a public officer. The applicant was convicted of this misdemeanor offense and sentenced to serve time in jail and placed on probation.

On June 29, 2004, the director issued a notice requesting the applicant to submit the final court dispositions for *all* arrests. The applicant, in response, submitted the court disposition for number five above which revealed the following:

7. On December 3, 1998, the applicant was arrested for violating section 11350(a) H&S, possession of narcotic controlled substance, a felony and section 12500(a) VC, driving without a license, a misdemeanor. On December 7, 1998, the applicant pled guilty to both offenses. For the drug conviction, the applicant received deferred entry of judgment for three years. On July 7, 2000, the deferred judgment was terminated and dismissed pursuant to 1000.3 PC. For driving without a license violation, the applicant was sentenced to serve five days in jail and placed on probation for three years. Case no [REDACTED]

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act

In number seven above, the applicant pled guilty to the drug charge and the judge ordered some form of punishment to the charge above. Therefore, the applicant has been "convicted" of this offense for immigration purposes.

On October 19, 2004, the director denied the application because it was determined that the applicant had been convicted of a felony in number four above. On appeal, counsel argued that the Notice of Intent to Terminate and Notice of Decision contradict each other. Counsel asserted that he intends to demonstrate the applicant's eligibility for requested relief, but needed 30 days in which to submit a brief

It is noted that in response to a Notice of Intent to Terminate dated October 19, 2004, counsel asserted:

The felony charge [the applicant] was convicted of is a wobbler under the California Penal Code and is therefore eligible to be reduced to a misdemeanor upon request of the court."

The misdemeanor charge filed on December 7, 1998 for 12500(A) of the Vehicle Code (unlicensed driver) is eligible to be reduced to an infraction upon request of the court.

Counsel asserted that her office was in the process of filing the required documentation before the court(s) and requested an extension of 90 days.

On November 22, 2004, the California Service Center received documentation dated October 27, 2004 from records shift supervisor of the Pomona Police Department regarding number six above. The documentation indicated that the applicant had been arrested on January 17, 2001 and subsequently charged with violating section 148(a)(1) PC, obstructs/delay police officer. On January 23, 2001, the applicant was convicted of this offense. The applicant was sentenced to serve 11 days in jail and placed on probation for one year. Case no. _____

It is noted that at the time of the applicant's arrest, it was revealed that the applicant had an outstanding warrant for violating section 23152(b) VC, driving with .08 percent or more alcohol in the blood.

The director withdrew his previous Notice of Decision of October 19, 2004 and issued a new decision dated December 3, 2004. In his new decision, the director determined that the applicant had been convicted of three misdemeanors and therefore was ineligible to adjust from temporary to permanent resident status. The director advised the applicant that 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. 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).

While not mentioned in the director's decision, it is noted that in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. 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.

Although these precedent decisions were finalized after the applicant applied for temporary residence, 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). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices.

In response, counsel asserts that based on the notice issued by the director, the applicant had been convicted two misdemeanors. Counsel asserts that the notice did not indicate a disposition for the applicant's alleged arrests on August 28, 1978 for petty theft and on July 16, 1979 for assault to commit rape. In addition, the court disposition for the alleged arrest of December 3, 1998 indicates that the applicant was convicted of a traffic violation which implies the charge was an infraction. Counsel requested 90 days in which to submit additional documentation demonstrating that the applicant had not been convicted of three or more misdemeanors. To date, however, no further correspondence has been presented by counsel.

Counsel's claim that the applicant's due process had been violated is unfounded as the applicant was given thirty a day in which to file an appeal and a final decision has not been rendered on the applicant's temporary resident status. Counsel contends that the Notice of Intent to Terminate and Notice of Decision contradict each other, but fails to elaborate on this matter.

Counsel's assertion that the traffic violation conviction in number seven above constitutes an infraction has no merit. The court disposition submitted clearly reflects that the traffic violation conviction, driving without a license, was handled as a misdemeanor and not an infraction.

Based on the information contained in the FBI report regarding number four above along with the court dispositions submitted, the director determined that the applicant had been convicted of three misdemeanors.

The record of proceedings, in this case, does not contain the court's charging documents and final disposition for the applicant's arrest for number four above to establish that he was, in fact, convicted of the offenses listed in the FBI report. The applicant, however, must agree to fully cooperate in the verification process. Failure to assist Citizenship and Immigration Services 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).

The applicant is ineligible for adjustment to permanent resident status because of his felony conviction. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available. The applicant is also ineligible because he failed to provide the court documents necessary for the adjudication of the application in numbers two through four above. Because the applicant was convicted of a crime involving a controlled substance, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act. There is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of thirty grams or less of marijuana. Section 245A(d)(2)(B)(ii)(1) of the Act, 8 V.S.C. § 1255a(d)(2)(B)(ii)(II).

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