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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, D.C. 20529



U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2006**
XSF 88 063 01025

IN RE: Applicant: [REDACTED]

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:
[REDACTED]

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 temporary resident status was denied by the Director, Western Service Center. The matter was remanded by the Legalization Appeals Unit (LAU), now the Administrative Appeals Office (AAO). The Director, California Service Center then terminated the applicant's status, and that action is now before the AAO on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant had been convicted of seven misdemeanors in the United States.

In response, the applicant asserts that he has not been in trouble with the law since his last arrest. The applicant submits a copy of counsel's brief that was submitted in the response to the Notice of Intent to Terminate.

On appeal, from the director's decision to deny the applicant's application for temporary resident status, the applicant argued that his application was denied in error and requested a copy of the adverse evidence used as the basis for the denial. The applicant's former representative provided expungement orders for the applicant's convictions.

The temporary resident status of an alien who has been convicted of a felony or three or more misdemeanors in the United States may be terminated at any time. 8 C.F.R. § 245a.2(u)(1)(iii).

"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 director, in denying the application, on August 12, 1992, concluded that the applicant had been convicted of three misdemeanors and, therefore, was ineligible for the benefit being sought. The case was forwarded to the LAU for review. On August 18, 1993, the LAU remanded the matter for process of the applicant's Freedom of Information Act (FOIA) request. On August 22, 1996, the applicant, through his former counsel, was advised that his case was administratively closed because he failed to comply with the requirements of the FOIA. The case was subsequently forwarded to LAU for review. On September 28, 1998, the LAU remanded the matter, upon finding that the convictions had been set aside and, therefore, would not serve to disqualify the applicant.

It is noted that on November 12, 1998, the applicant, through his former representative, submitted a FOIA request, which was complied with on June 30, 1999.

The record reflects the following offenses in the state of California:

1. On May 14, 1983, the applicant was arrested for driving under the influence, a violation of section 23152(a) VC and driving with .10 percent or more alcohol in the blood, a violation of section 23152(b) VC, both misdemeanors. On October 27, 1983, the applicant was convicted of driving under the influence. The applicant was placed on probation for 18 months and ordered to pay a fine. The remaining charge was dismissed. On April 20, 1993, the conviction was expunged in accordance with section 1203.4 PC [REDACTED]
2. On July 3, 1983, the applicant was arrested for driving under the influence, a violation of section 23152(a) VC, a misdemeanor. On October 27, 1993, the applicant was convicted of this offense

and was placed on probation for three years. On April 20, 1993, the conviction was expunged in accordance with section 1203.4 PC. [REDACTED]

3. On June 20, 1987, the applicant was arrested for driving under the influence with two prior offenses, a violation of section 23152(a) VC and driving with .10 percent or more alcohol in the blood with two prior offenses, a violation of section 23152(b) VC, both misdemeanors. On September 28, 1987, the applicant was convicted of driving with .10 percent or more alcohol in the blood. The remaining charge was dismissed. On April 20, 1993, the conviction was expunged in accordance with section 1203.4 PC. [REDACTED]

On May 11, 2001; the director issued a Notice of Intent to Terminate, advising the applicant of her intent to terminate the applicant's status as a temporary residence because of his three misdemeanor convictions. The applicant was granted 30 days in which to respond. Counsel, in response, submitted a brief arguing that *Matter of Roldan*, Int. Dec. 3377, 1999 LEXIS 7 (BIA 1999) had been vacated by the Ninth Circuit Court of Appeals in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) and, as such, the proposed termination of the applicant's temporary residence was incorrect. Counsel also challenged the Board of Immigration Appeals (BIA) decision in *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988).

The Director, California Service Center, on the basis of a new interpretation, found the convictions were disqualifying and terminated the applicant's status on October 29, 2004. The director, in his decision, noted that the court's decision in *Lujan-Armendariz* only modifies *Matter of Roldan* as it relates to the Federal First Offender Act, and was irrelevant in this case. The director further noted that while the Citizenship and Immigration Services acknowledges the challenge, it is unable to overrule the BIA decision in *Matter of Ozkok*.

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).

In addition, 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.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungements.

The applicant has been convicted of three misdemeanors and, therefore, is ineligible for the benefit being sought. 8 C.F.R. § 245a.2(u)(1)(iii). Within the legalization program, no waiver is available to an alien convicted of a felony or three or more misdemeanors committed in the United States. An alien applying for adjustment of

status has the burden of proving by a preponderance of evidence that he or she 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.