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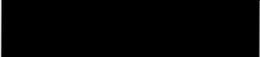


U.S. Citizenship
and Immigration
Services

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FILE:



XRV 88 518 5020

Office: CALIFORNIA SERVICE CENTER

Date: SEP 06 2006

IN RE:

Applicant:



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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. 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, 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.

A handwritten signature in black ink, appearing to read "D. King".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The termination of temporary resident status the Director, Western Service Center, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status pursuant to section 8 C.F.R. § 245a.2(u)(1)(iii) because he had been convicted of three or more misdemeanors in the United States. *See* section 245A(b)(2)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(b)(2)(B). In addition, the director further determined that the applicant had failed to assist the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services of CIS) as required under 8 C.F.R. § 245a.3(g)(5), because he had not provided requested court documents relating to his criminal history.

On appeal, the applicant submits documents relating to his criminal history.

The status of an alien lawfully admitted for temporary residence under section 245A of the Act may be terminated if he or she is convicted of any felony or three or more misdemeanors in the United States. 8 C.F.R. § 245a.2(u)(1)(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).

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, 8 U.S.C. § 1101(a)(48)(A).

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). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The Board of Immigration Appeals (BIA) has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or

substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The first issue to be examined is whether the applicant's criminal convictions render him ineligible to adjust to permanent residence under the provisions of the section 245A of the Act.

The record contains court documents and a California Department of Motor Vehicle computer printouts that reflect the applicant has been convicted of the following misdemeanor offenses:

- A violation of section 594(a), Vandalism, of the California Penal Code with docket number [REDACTED] on August 31, 1979;
- A violation of section 23103, Reckless Driving, of the California Vehicle Code with docket number [REDACTED] on February 1, 1980;
- A violation of section 23152(b), Driving with a Blood Alcohol Content of 0.1 Percent or More by Weight, of the California Vehicle Code with docket number [REDACTED] on April 6, 1982;
- A violation of section 40508(a), Failure to Appear, of the California Vehicle Code as well as another separate vehicular infraction with docket number [REDACTED] on July 13, 1982;
- A violation of section 14601.1(a), Driving with a Suspended or Revoked License, of the California Vehicle Code as well as other separate vehicular infractions with docket number [REDACTED] on March 4, 1986;
- A violation of section 23152(b), Driving with a Blood Alcohol Content of 0.1 Percent or More by Weight, of the California Vehicle Code with docket number [REDACTED] on June 30, 1986; and,

A violation of section 23152(a), Unlawfully Driving a Vehicle While under the Influence of Alcohol and/or Drugs, of the California Vehicle Code with docket number [REDACTED] on July 2, 1987.

Although the director noted that the applicant had been arrested for a violation of section 459, Burglary, of the California Penal Code by the Riverside, California Sheriff's Office on October 8, 1985, he provides a computer printout from the California Department of Justice Bureau of Criminal Identification on appeal. This computer printout reflects that the applicant was convicted for a violation of section 459, Burglary, of the California Penal Code in case number [REDACTED] on June 23, 1986, but fails to indicate whether he was convicted of a felony violation or misdemeanor violation of this particular offense. While a review of section 459 of the California Penal Code

shows that the distinction between the felony violation and misdemeanor violation is dependent upon the facts and circumstances of each individual case, the record contains no evidence to demonstrate the particular circumstances involved in the applicant's arrest and conviction for his violation of section 459, Burglary, of the California Penal Code in case number [REDACTED] on June 23, 1986. Consequently, it is determined that the applicant's conviction for this offense is at least a misdemeanor conviction, and may very well be a felony conviction.

The record contains court documents showing that the applicant has also been convicted of these additional misdemeanor offenses not noted by the director:

- A violation of section 23152(b), Driving with a Blood Alcohol Content of 0.1 Percent or More by Weight, of the California Vehicle Code in case number [REDACTED] on July 9, 1991;
- A violation of section 1203.2(a), Probation Revocation, of the California Penal Code in case number [REDACTED] on July 9, 1991;
- A violation of section 14601.1(a), Driving with a Suspended or Revoked License, of the California Vehicle Code in case number [REDACTED] on July 23, 1991;
- A violation of section 14601.1(a), Driving with a Suspended or Revoked License, of the California Vehicle Code in case number [REDACTED] on September 15, 1993; and,

A violation of section 14601.2(a), Driving with a Suspended or Revoked License Resulting from a Conviction for Driving While Under the Influence of Alcohol and/or Drugs, of the California Vehicle Code as well as other vehicular infractions in case number [REDACTED] on January 7, 1994.

Because the applicant has been convicted of either thirteen misdemeanor violations or one felony violation and twelve misdemeanor violations, his temporary resident status shall remain terminated pursuant to 8 C.F.R. § 245a.2(u)(1)(iii). Within the provisions of section 245A of the Act, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

The next issue to be determined is whether the applicant is ineligible because he failed to provide requested court documents necessary for the adjudication of the application.

Declarations by an applicant that he or she has not had a criminal record are subject to a verification of facts by the Service or its successor CIS. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service or its successor CIS 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 record contains a report from the Federal Bureau of Investigation (F.B.I.) that is dated March 10, 1989, which based upon fingerprint comparison reflects that the applicant was arrested and charged

with burglary by the Azusa, California Police Department on July 11, 1982. The record shows that the Service issued a notice of intent to terminate to the applicant on November 22, 1991, in which the applicant was asked to provide court documents to establish the disposition of the criminal charge brought against him on July 11, 1982. The record shows that as of the date of this decision, the applicant has failed to submit court documents to establish the disposition of the criminal charge brought against him on July 11, 1982.

In addition, the record contains another separate F.B.I. report dated January 15, 2003, which based upon fingerprint comparison shows that the applicant was arrested and charged with driving a vehicle while under the influence of alcohol and/or drugs by the Redwood City, California Sheriff's Office on April 4, 2002. This F.B.I. report also reflects that the applicant was arrested and charged with driving with a blood alcohol content of 0.08 percent or more by weight by the Redwood City, California Sheriff's Office on December 12, 2002. The record does not contain evidence to show the disposition of these separate criminal charges brought against him on April 4, 2002 and December 12, 2002.

It is concluded the applicant has failed to provide documents necessary for the adjudication of the application as required pursuant to 8 C.F.R. § 245a.2(k)(5).

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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. By not providing necessary evidence, he has failed to establish he is admissible under the provisions of section 245A of the Act. For this additional reason, application may not be approved.

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