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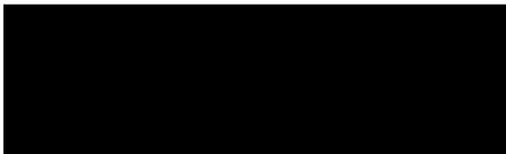
Office: Houston

Date: APR 03 2007

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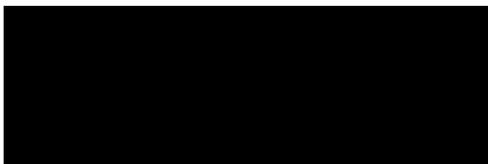
IN RE:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The termination of temporary resident status by the District Director, Houston, 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 four misdemeanors. On appeal, counsel asserts the applicant was not convicted of a felony or three or more misdemeanors.

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 record reveals the applicant was granted temporary resident status on November 16, 1987. The application for adjustment from temporary to permanent resident status was denied because of the applicant's criminal record on April 25, 2005. The application for adjustment of status has been denied, and it has been more than 43 months since the grant of temporary residence. Although the director did not address this issue, temporary residence shall be terminated on this basis as well.

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).

According to a January 20, 1998 letter from the Baytown Police Department, in Harris County, Texas, the applicant was arrested or cited for:

1. Theft (M-B), on February 14, 1987;
2. Disorderly Conduct – Language (M-C), on October 3, 1989;
3. Motor Carrier Violation, No Driver's License, on October 3, 1989;
4. Violation Traffic Control, on October 3, 1989;
5. Driving While Intoxicated, March 4, 1990;
6. No Driver's License, March 4, 1990;
7. Motor Carrier Violation, March 4, 1990;
8. Driving While License Suspended, February 18, 1991;
9. Driving While Intoxicated, December 16, 1991;
10. No Insurance, April 28, 1995;
11. No Driver's License, April 28, 1995;
12. Driving While License Suspended, January 9, 1996.

The individual court certificates for each of the following offenses, and an October 19, 2004 Certificate of Disposition from the Harris County District Clerk, Houston, Texas, indicate the following:

1. On April 24, 1987, in the 1<sup>st</sup> Criminal Court at Law in Harris County, the applicant received a deferred adjudication of guilt after pleading guilty to *Theft*, case # [REDACTED]. On July 12, 1994 his probation was unsatisfactorily terminated.
2. On March 6, 1990, in the 13<sup>th</sup> Criminal Court of Law in Harris County, the applicant was convicted of *Driving While Intoxicated*, case # [REDACTED]. The imposition of sentence was suspended and he was placed on probation. However, he later violated the terms and conditions of his probation, and probation was revoked.
3. On December 20, 1991, also in the 13<sup>th</sup> Criminal Court, he was convicted of *Driving While Intoxicated*, case # [REDACTED].
4. On March 22, 1996, in the 15<sup>th</sup> Criminal Court at Law in Harris County, he was convicted of *Driving While License Suspended*, case # [REDACTED].
5. On February 26, 1991, again in the 13<sup>th</sup> Criminal Court, a charge of *Driving While License Suspended*, case # [REDACTED], was dismissed.

Counsel states the 1991 *Driving While License Suspended* charge was dismissed. That is correct, as stated above. The director did not hold that the applicant had been convicted of that charge.

Counsel alleges the second *Driving While Intoxicated* charge was dismissed, and refers to the court record. The record shows the applicant pled guilty, and the record states:

DWI Second as charged in the Information. But, upon motion of the State Enhancement paragraph was abandoned and dismissed.

The applicant was charged with an "enhanced" DWI, DWI Second, meaning there was believed to be a prior conviction for this offense. However, the enhancement to the charge was dismissed, meaning the conviction was for the ordinary DWI charge. Evidence of this appears on the court record, where the plea is shown as "guilty" and the Findings on Enhancement (Second Offender) block is blank. While the enhancement was dismissed, the conviction was not.

Counsel asserts, without specificity, that at the time of the applicant's plea to the 1987 theft charge, neither immigration law nor Texas state law would have considered the deferred adjudication of guilt a final conviction. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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). In *Roldan* the alien pled guilty, the court withheld adjudication of guilt, and the guilty plea was vacated upon the termination of probation, and yet the alien was still found to have been convicted, whereas probation was not even satisfactorily terminated in the applicant's case.

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. Thus, it is concluded that the applicant was convicted of theft as stated by the director.

Counsel refers to, without fully citing, "St. Cyr" and "St. Cin" (presumably the same case), as standing for the premise that a retroactive application of the law is prohibited. Counsel does not explain what section of law she believes the director retroactively applied. It appears she is referring to section 101(a)(48)(A) of the Act, which was added to the Act in 1996. While the applicant's convictions did take place prior to that, 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).

In summary, the director determined the applicant had been convicted of four misdemeanors. While counsel has contended that two of the charges did not result in convictions, such contention is not correct. The applicant was convicted of four misdemeanor offenses. There is no waiver available for ineligibility due to three or more misdemeanor convictions. The applicant's temporary resident status is, therefore, terminated because of his misdemeanor convictions. 8 C.F.R. § 245a.2(u)(iii).

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