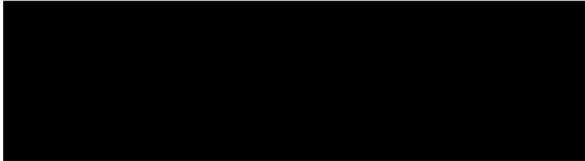




U.S. Citizenship
and Immigration
Services

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invasion of personal privacy



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 12 2007

XNK 88 009 2078

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 Director, California Service Center initially denied the application for temporary resident status in a decision dated October 28, 2003. An appeal was filed with the Administrative Appeals Office (AAO). The director subsequently reopened the matter, withdrew the prior decision, and issued a new decision denying the application. The matter is now before the AAO on appeal. The appeal will be dismissed.

In his most recent adverse decision, the director concluded that the applicant's felony conviction rendered him statutorily ineligible for adjustment of status to that of a temporary resident.

On appeal, counsel asserts that the applicant was not informed that he would face adverse immigration consequences by pleading guilty to a criminal offense and provides documentation showing that he intends to or has already filed a motion to vacate the applicant's prior criminal conviction.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).

An alien is excludable if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act, formerly section 212(a)(9) of the Act.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951); *see also Matter of Logan* 17 I&N 367 (BIA 1980).

In the present matter, the record shows that the applicant was convicted of assault with a deadly weapon with the use of a firearm, a felony in violation of the California Penal Code Section 245(a)(2). The applicant's seven-year prison term was suspended for five years during which the applicant would be placed on probation. The applicant was ordered to pay restitution in the amount of \$200 and to serve 30 days in the

¹ The first and third pages of the motion contain blanks where it is apparent that places and dates were to be indicated. As such, the AAO cannot determine whether the motion had been filed or whether counsel provided a copy of a motion he intended to file on the applicant's behalf.

county jail. (Case No. 94NF0733). The record also shows that on July 17, 2000, the applicant's felony conviction was reduced to a misdemeanor and the case against the applicant was ultimately dismissed upon his completion of his period of probation. There is no evidence, however, to show that counsel's motion to vacate the applicant's plea and subsequent conviction, if filed, was actually granted.

Regardless, 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. Therefore, pursuant to the above precedent decisions, even if counsel were to successfully vacate the applicant's prior conviction by allowing the applicant to withdraw his guilty plea, no effect is to be given to such action.

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.

Accordingly, the applicant is ineligible for adjustment of status to that of a temporary resident because of his felony conviction. Additionally, because the offense for which the applicant was convicted is also a crime involving moral turpitude, the applicant is also excludable under section 212(a)(2)(A)(i)(I) of the Act.

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