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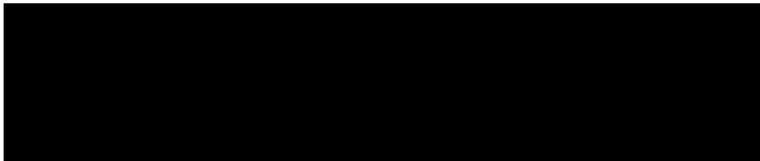
Office: CALIFORNIA SERVICE CENTER

Date:

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:



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 termination of temporary resident status 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 directors terminated the applicant's temporary resident status because the applicant had failed to submit the requested court disposition.

On appeal, counsel requested a copy of the record of proceedings, which was complied with by the director on January 5, 1993. Counsel asserted that the applicant arrests on February 11, 1976, September 6, 1977 and April 5, 1981 did not lead to convictions and a provided an additional copy of a California Department Justice printout as evidence. Counsel also provided an expungement order for the applicant's September 19, 1975 conviction of disturbing the peace.

Neither the applicant nor counsel has addressed the subsequent decision nor provided any evidence to overcome the director's findings.

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).

"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).

The FBI record dated December 14, 1988 revealed the following offenses in the state of California:

1. On August 28, 1975, the applicant was arrested by the Sheriff's Office in Los Angeles for battery on a peace officer, a violation of section 148 PC. The applicant was subsequently charged with disturbing the peace, a violation of section 415 PC. On September 19, 1975, the applicant was convicted of this offense. The applicant was sentenced to serve six days in jail and placed on probation for one year. The remaining charge was dismissed. On December 23, 1991, the conviction was expunged in accordance with section 1203.4 PC.
2. On February 11, 1976, the applicant was arrested by the Sheriff's Office in Los Angeles, for robbery, a violation of section 211 PC.
3. On September 6, 1977, the applicant was arrested by the Los Angeles, Police Department for pandering, a violation of 266(i) PC.

On June 17, 1991, the director issued a Notice of Intent to Terminate, advising the applicant of his conviction in item number one above and of his arrests in numbers two and three above. The applicant was also advised that

he had indicated on his Form I-687 application to have been arrested and incarcerated for two days in 1980. The applicant was requested to submit the court dispositions for each arrest, excluding number one above. The applicant, however, failed to respond to the notice and on August 26, 1991, the director terminated the applicant's status as a temporary resident.

It is noted that the record reflects that the applicant did in fact submit a response prior to the issuance of director's Notice of Termination. Accordingly on February 9, 2000, the LAU remanded the matter upon finding that the director had not considered the evidence submitted by the applicant.

In response to the Notice of Intent to Terminate, the applicant submitted a California Department of Justice printout dated August 5, 1991, which revealed the applicant's criminal history via a fingerprint check. The printout reflected the court action mentioned in number one above as well as the following:

4. On February 11, 1976, the applicant was detained for robbery, a violation of section 211 PC. On February 12, 1976, the applicant was released due to further investigation.
5. On September 6, 1977, the applicant was detained for pandering, a violation of section 266(i) PC. On September 8, 1977 the applicant was released due to lack of probable cause.
6. On April 5, 1981, the applicant was detained by the Los Angeles Police Department for battery on person, a violation of section 242 PC. On April 5, 1981, the applicant was released due to lack of probable cause.

It is noted that through a recent FBI record check dated November 26, 2003, it was revealed that on August 30, 2003, the applicant was arrested by the Los Angeles Police Department for assault with a firearm on a person.

The director withdrew the previous decision and reopened the proceedings for review. On April 27, 2004, the director issued a Notice of Intent to Terminate, advising the applicant to submit the court disposition for his August 30, 2003 arrest. The director also 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 notice, it is noted that the Board of Immigration Appeals (BIA) 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 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 expungement.

The notice was sent to the applicant's address of record; however, it was returned by the post office as undeliverable. No new address has been provided by the applicant. On July 6, 2004, the director terminated the applicant's status as a temporary resident.

It is noted that the record contains the court disposition from the Los Angeles County Superior Court for the applicant's August 30, 2003 arrest. The disposition indicated that on September 30, 2003 the applicant was charged with felony discharge of a firearm in public, a violation of section 246.3 PC. On April 15, 2004, the applicant was convicted of the felony charge.

The applicant has been convicted of a felony 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.