

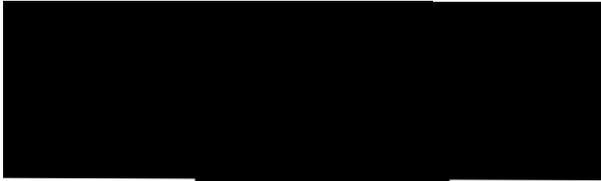
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U.S. Department of Homeland Security  
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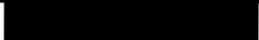
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: SEATTLE

Date:

MSC 06 179 15431

**OCT 31 2008**

IN RE:

Applicant:



APPLICATION:

Application for Adjustment from Temporary to Permanent Resident Status under Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255

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 application for adjustment from temporary to permanent resident status was denied by the Director, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The director denied the application because the applicant failed to submit certified court disposition records for two criminal arrests in 1999 and 2005.

On appeal, counsel argues that the applicant supplied the necessary court records. Counsel asserts that these documents were not given full consideration before denying the application for adjustment from temporary to permanent residence.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(c)(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).

The record reveals the applicant was arrested by the Los Angeles County Police on April 6, 1999, on a charge of *Disorderly Conduct Solicitation Lewd Act*, in violation of §P647A of the California Criminal Code. The applicant was approved for participation in an alternative prosecution program. This program serves as an alternative to criminal prosecution for entry level misdemeanor offenses. Upon acceptance into the program, which includes intensive behavior modification, the filing of criminal charges is delayed for a period of 90 days. If the offender successfully completes the program, the prosecutor agrees not to file criminal charges for the instant offense. The record before the AAO indicates that the applicant successfully completed the terms of the alternative prosecution program, thus, no criminal charges were officially filed. Consequently, the AAO notes that, as regards the 1999 California incident, no conviction exists that would bar the applicant from adjustment from temporary to permanent status.

Nonetheless, the record before the AAO also reflects that the applicant was charged with a felony complaint in the state of Montana. On August 2, 2005, the applicant was charged with *tampering with physical evidence*, in violation of §45-7-207(1)(b), MCA (2003) (Case No. [REDACTED]). The complaint indicates that the applicant made a false report of a missing child, supplemented with a written document repeating the false allegations. The complaint states further that the applicant knew the statements to be false and wrote the statement with the purpose of misleading the Park County Sheriff's Office of Search and Rescue into conducting an all night search of the region.

At some point thereafter, the applicant fled the state of Montana for Washington, as indicated by the issuance of a fugitive warrant in King County, Seattle District Court. However, the fugitive warrant was dismissed without prejudice as the extradition documents were not received within the court's 90-day rule. The felony charge of *tampering with physical evidence* filed in Montana in 2005 remains unresolved, and there is no evidence in the record of a final disposition of the Montana felony charges.

On appeal, counsel for the applicant asserts that the applicant "denies these charges." The director dismissed the application, concluding that the applicant had not established eligibility for permanent resident status because the felony charge remains outstanding. The AAO agrees with the director's reasoning and conclusions. The applicant has failed to establish eligibility for permanent resident status and the appeal is dismissed without prejudice. In the event the applicant is cleared of the Montana felony charges, he may file a second application for adjustment from temporary to permanent resident status.

However, the applicant is forewarned that any order of expungement may not ameliorate the immigration consequences of a felony conviction. 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 by operation of a state rehabilitative statute. Any subsequent action that overturns a state 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.

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