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U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **JUL 18 2005**

IN RE:

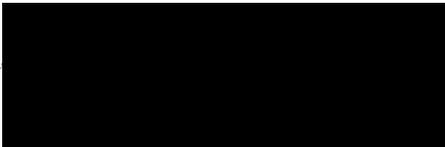
Applicant:



APPLICATION:

Application for Adjustment from Temporary to Permanent 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, Director  
Administrative Appeals Office

**DISCUSSION:** The application for adjustment from temporary to permanent resident status was denied by the Director, Western Service Center. The matter was then remanded by the Legalization Appeals Unit. The application was subsequently denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The Director, California Service Center denied the application because the applicant had been convicted of a felony.

Neither the applicant nor counsel has responded to this latest denial. Earlier in the proceedings, counsel pointed out that the applicant's convictions had been expunged, seemingly rendering him eligible for permanent resident status.

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).

An alien is inadmissible 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).

The record reveals the applicant pled guilty to Sexual Battery, a felony crime involving moral turpitude, on July 19, 1990. On May 18, 1992, the offense was reduced to a misdemeanor, and on June 24, 1993, the guilty plea was set aside and the case was dismissed.

Also on July 19, 1990, the applicant pled guilty to Annoying/Molesting Children, a misdemeanor crime involving moral turpitude. On September 13, 1991, the guilty plea was set aside and the case was dismissed.

The Chief, Legalization Appeals Unit remanded the matter, upon finding that the convictions had been set aside and therefore would not serve to disqualify the applicant. However, the Director, California Service Center, on the basis of a new interpretation, found the convictions were disqualifying and denied the application.

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.

There is no indication in this matter that the actions of setting aside the applicant's convictions, prefaced in the one case by the reduction from felony to misdemeanor, were based on the merits of the case. Therefore, pursuant to the above precedent decisions, no effect is to be given to such actions.

Although these precedent decisions were finalized after the applicant applied for adjustment to permanent 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.

Finally, it is noted that the applicant was sentenced on July 25, 1990 for the above offenses. On August 30, 1990, the Judge of the Superior Court of the State of California for the County of Los Angeles issued a judicial recommendation against deportation. As of that date, section 241(b)(2) of the Act, 8 U.S.C. § 1251(b)(2) allowed for the acceptance of such recommendations in immigration proceedings provided they were issued at the time of first imposing judgement or passing sentence or within 30 days thereafter. See *Matter of Tafoya-Gutierrez*, 13 I&N Dec. 342 (BIA 1969). As the judicial recommendation was not issued within the thirty-day period, it has no effect.

Thus, even though the felony was reduced to a misdemeanor, the applicant's convictions were set aside, and a judicial recommendation against deportation was issued, the applicant stands convicted of felony and misdemeanor crimes involving moral turpitude. He is ineligible for adjustment to permanent resident status because of his felony conviction. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available. He is also inadmissible due to his convictions of crimes involving moral turpitude. Section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. 1182(a)(2)(A)(i)(I). Section 245A(d)(2)(B)(ii)(1) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(ii)(I) precludes waivers of inadmissibility for aliens convicted of crimes involving moral turpitude.

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