

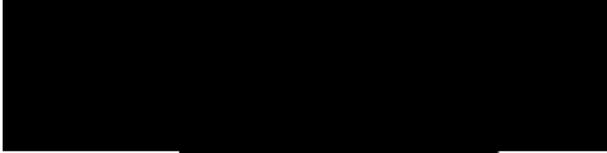
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U.S. Citizenship
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Services

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MAR 07 2007

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

XPW 90 158 01185

IN RE:

Applicant:



APPLICATION:

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

ON BEHALF OF APPLICANT:

Self-represented

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

The director denied the application because the applicant had been convicted of three misdemeanors, and he was therefore ineligible for adjustment from temporary to permanent resident status.

On appeal, the applicant submits a Form H-6 from the California Department of Motor Vehicles (DMV), court documents and expungement orders for some of his convictions.

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 applicant submitted court dispositions and a Form H-6 from the California DMV, which revealed the following misdemeanor offenses in the state of California:

1. On October 3, 1980, the applicant was arrested for violating section 23102(a) VC, drunk driving on highway. On January 2, 1981, the applicant was convicted of this offense. Docket no. [REDACTED]
2. On February 6, 1988, the applicant was arrested for violating section 23152(a) VC, driving under the influence and section 23152(b) VC, driving with .10 percent or more alcohol in the blood. On March 3, 1988, the complaint was amended to include a violation of section 23103 VC, reckless driving. On March 3, 1988, the applicant was convicted of violating section 23103 VC. The remaining offenses were dismissed. Imposition of sentence was suspended and the applicant was placed on probation for three years on condition he served eight days in jail or paid a fine. On March 10, 1993, the applicant's conviction was expunged in accordance with section 1203.4 PC. Docket no Docket no [REDACTED]
3. On December 3, 1988, the applicant was arrested for violating section 23152(a) VC, driving under the influence and section 23152(b) VC, driving with .10 percent or more alcohol in the blood. On January 4, 1989, the applicant was convicted of violating section 23152(b) VC. Imposition of sentence was suspended and the applicant was placed on probation for five years on condition he served 30 days in jail and paid a fine. The remaining offense was dismissed. On March 10, 1993, the applicant's conviction was expunged in accordance with section 1203.4 PC. Docket no. [REDACTED]

The applicant, indicated on his Form I-687 application that he had been arrested for drunk driving in 1979. The final outcome, however, is unknown as the court disposition was not made available to Citizenship and Immigration Services (CIS).

Declarations by an applicant that he or she has not had a criminal record are subject to verification of facts by CIS. The applicant must agree to fully cooperate in the verification process. Failure to assist CIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

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).

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 intent 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 Board of Immigration Appeals (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.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungements.

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.

It is noted that through a recent FBI record check dated May 26, 2006, the following offenses were revealed in the state of California:

- On May 11, 1997, the applicant was arrested by the Glendale Police Department for violating section 273.a PC, willful cruelty to child causing injury or death, a felony; section 23152(a) VC, driving under the influence; and section 23152(b) VC, driving with .08 percent or more alcohol in the blood. The applicant was convicted of an offense, however, it is unknown whether he was convicted on one, two or all three charges.
- On November 11, 2000, the applicant was arrested by the Los Angeles Police Department and subsequently charged with violating section 23152(a) VC, driving under the influence and section 23152(b) VC, driving with .08 percent or more alcohol in the blood. The applicant was convicted of violating section 23152(b) VC, a misdemeanor. The remaining charge was dismissed.

- On October 15, 2001, the applicant was arrested by the Sheriff's Office in Norwalk and subsequently charged with violating section 23152(a) VC, driving under the influence; section 23152(b) VC, driving with .08 percent or more alcohol in the blood; section 14601.5(a) VC, driving while license is suspended and refusing to take a DUI test; and section 14601.2 VC, driving while license is suspended for driving under the influence, all misdemeanors. The applicant was convicted of violating sections 14601.2 VC and 23152(a) VC. The remaining charges were dismissed.
- On March 6, 2002, the applicant was arrested by the Los Angeles Police Department and subsequently charged with violating section 23152(a) VC, driving under the influence; section 23152(b) VC, driving with .08 percent or more alcohol in the blood; section 14601.1 VC, driving while license is suspended; and section 14601.5(a) VC, driving while license is suspended and refusing to take a DUI test, all misdemeanors. The applicant was convicted of all the offenses.

The applicant is ineligible for adjustment to permanent resident status because he has been convicted of at least three misdemeanor convictions. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, 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.