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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: HOUSTON

Date:

NOV 28 2006

IN RE:

Applicant:



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:

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 Director, Southern Regional Processing Facility, terminated the applicant's temporary resident status on August 29, 1990. The director withdrew his previous decision and reopened the proceedings for review on January 10, 1991. On the basis of a new interpretation, the District Director, Houston, Texas subsequently terminated the applicant's temporary resident. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director initially terminated the applicant's temporary resident status because the applicant had been convicted of a felony in the United States.

On appeal, counsel argued that the applicant had been granted deferred adjudication and there was no finding of guilt.

In a subsequent decision dated August 25, 2005, the district director terminated the applicant's temporary resident status because the applicant had been convicted of a felony in the United States.

On appeal, the applicant argues that the law is being applied retroactively. The applicant asserts that he was not convicted of a felony and that he has only two misdemeanor convictions.

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 record reflects the following offenses in the state of Texas:

1. On March 27, 1989 the applicant was arrested and subsequent convicted on October 18, 1989, in the 230<sup>th</sup> District Court in Harris County. The applicant pled no contest to violating Texas Penal Code, Article 42.12, involuntary manslaughter, a felony. The adjudication of guilt was deferred, and the applicant was placed on probation for eight years. [REDACTED]

Section 322(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), specifically states that the amendment of the definition of conviction "shall apply to convictions and sentences entered before, on, or after the date of enactment of this Act. As the Supreme Court stated in *Landgraf v. US Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the principle of applying the law in effect at the time of the decision does not conflict with the "presumption against retroactivity when the statute in question is unambiguous." Concerning the definition of conviction, the unambiguous language of section 322(c) leaves no doubt that Congress intended for the amendment in section 322(a) to be applied retroactively. *Moose v. INS*, 171 F.3d 994, 1007 (5<sup>th</sup> Cir. 1999).

The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act.

The court disposition submitted reflects that the applicant was found guilty of the offense and the judge ordered some form of punishment to the charge above. Therefore, the applicant has been "convicted" of this offense for immigration purposes.

On April, 27, 2005, the director issued a notice requesting that the applicant submits court certified indictments, dispositions and judgments of all arrests. The applicant, in response, submitted a Certificate of Disposition for the Harris County District Clerk in Houston, Texas, which reflected the following:

2. On April 3, 1994, the applicant was arrested for driving while intoxicated, a misdemeanor. On June 24, 1994, the applicant was convicted of this offense, ordered to pay a fine and sentenced to serve 90 days in jail. Case no. [REDACTED]
3. On February 16, 2001, the applicant was arrested for driving while license is suspended, a misdemeanor. On May 2, 2001, the applicant was convicted of this offense. The applicant was ordered to pay a fine and sentenced to serve three days in jail. Case no. [REDACTED]

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.