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U.S. Citizenship and Immigration Services

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JUL 06 2004

FILE: [redacted] 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:

[redacted]

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 temporary resident status was denied by the Director, Western Regional Processing Facility, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because of the applicant's felony conviction.

On appeal, the counsel states the conviction was classified as a misdemeanor, and has been expunged.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 245a.2(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 court record in this matter, of the Superior Court of the State of California in and for the County of Orange, clearly indicates the applicant pled guilty on February 15, 1979 to the offense of burglary, a felony, as set forth in section 459 of the California Penal Code. Based upon this record, the director denied the application.

Subsequently, counsel attempted to file a motion to reopen. In that document counsel simply stated the conviction was for a misdemeanor. He did not provide any documentation in support of such claim. He did provide evidence that the conviction had been expunged.

In a letter of response dated October 8, 1992, the director noted the felony conviction. He pointed out the applicant had not filed an appeal, and explained that the previous denial decision would stand. In doing so the director improperly referred to the expungement order as "information indicating the section 459 conviction as a misdemeanor...." Counsel had not provided any proof or even indication that the offense was a misdemeanor, other than his unsupported statement.

On appeal counsel states the conviction "was classified as a misdemeanor since the original charge was burglary in the Second Degree contrary to the provision of Penal Code 459 by sentence." He states the court suspended the sentence and granted probation for five years. Counsel indicates section 17 of the

California Penal Code states a felony is a crime which is punishable with death or by imprisonment in the state prison. As stated above, *if the state defines the offense as a misdemeanor* and the sentence actually imposed is one year or less, it would be considered to be a misdemeanor for immigration purposes. Nonetheless, counsel still fails to demonstrate that the state of California classifies the offense as a misdemeanor. The conviction documents clearly refer to the offense as a felony.

It is concluded that the applicant was convicted of a felony. However, he has provided an expungement order, and counsel argues that removes the conviction from consideration.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality 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 quilt or 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).

The *Roldan* holding was modified somewhat in *Lujan-Armendariz v. INS*, No. 96-70431 (9th Cir., Aug. 1, 2000). That modification, however, applies only to first offender, simple possession, drug offenses, expunged under the Federal First Offender Act, or a similar state law, and is irrelevant here. The expungement submitted by the applicant is ineffective for immigration purposes.

The applicant is ineligible for temporary resident status because of his felony conviction. 8 C.F.R. § 245a.2(c)(1). In addition, he is inadmissible under section 212(a)(2)(A)(i)(1) of the Act for having been convicted of a crime involving moral turpitude. Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States. Furthermore, there is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(I). *See* section 245A(d)(2)(B)(ii) of the Act.

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.