U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date OCT 25 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Resident Status under 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. 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The termination of temporary resident status by the Director, California Service Center is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's status because the applicant had been convicted of at least three misdemeanors.

On appeal, the applicant states his belief that the misdemeanors should no longer render him ineligible for status because they were expunged. He cites a court case that was decided subsequent to the precedent decision relied on by the director.

The applicant appears to be represented; however, no Form G-28, Notice of Entry of Appearance of Attorney or Representative, has been submitted. Therefore, this decision will be furnished to the applicant only.

The temporary resident status of an alien may be terminated if the alien is convicted of any felony, or three or more misdemeanors. 8 C.F.R. § 245a.2(u)(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 reveals the applicant was convicted of Driving Under the Influence of Alcohol on October 1, 1981, November 3, 1981 and November 17, 1983 in California. The applicant has not contested the fact of these convictions. Two of the three convictions were later set aside, upon the petitions of the applicant.

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. Any subsequent action which 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).

On appeal, the applicant demonstrates an understanding of the findings in *Roldan, supra*, but maintains that they should not apply to his situation because his convictions greatly predated that precedent decision and

the underlying Illegal Immigration Reform and Immigrant Responsibility Act of 1996. He points out that, earlier, prior to *Roldan*, many other legalization applicants benefited from expungements. However, 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).

The applicant points out that the United States Court of Appeals for the Ninth Circuit partially reversed the holding of *Roldan* in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The circuit court found that an alien whose first-time simple drug possession offense was expunged by a state rehabilitative statute could not be deported if first offender treatment would have been accorded under the federal first offender statute had the alien been prosecuted in federal court. Importantly, the same circuit court nevertheless later ruled in *Murillo-Espinosa v. INS* , 261 F.3d 771 (9th Cir. 2001) that a state court action setting aside a theft conviction under a rehabilitative scheme did not eliminate the immigration consequences of that offense.

The Board of Immigration Appeals revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings. The BIA found that it would be inappropriate to give the circuit court's ruling in *Lujan-Armendariz v. INS, supra* nationwide application. Thus, we conclude that only matters of first-time simple drug possession falling within the jurisdiction of the 9th Circuit Court of Appeals are bound by *Lujan-Armendariz v. INS*.

The applicant concedes that the holding of *Lujan-Armendariz v.* INSspecifically dealt with first-offense simple possession convictions. He nonetheless maintains that the reasoning should be extended to an argument that expungements of other types of convictions should be honored. However, in the subsequent case of *Salazar-Regino, supra,* the BIA clearly found that that should not be the case. *Salazar-Regiono* is a precedent decision, and, pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services officers. In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, 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.

It is concluded that, pursuant to the definition of conviction at section 101(a)(48) of the Act and the interpretation set forth in precedent decisions, the applicant was convicted three times of a misdemeanor offense. There is no waiver available for ineligibility due to three or more misdemeanor convictions.

The applicant's temporary resident status is terminated because of his three misdemeanor convictions. 8 C.F.R. § 245a.2(u)(iii).

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