identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

L1

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 22 2007

XSO 88 515 2072

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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, terminated the applicant's temporary resident status, and the case is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The Director, California Service Center, terminated the applicant's temporary resident status because the applicant had been convicted of a felony and three or more misdemeanors committed in the United States.

On appeal, counsel asserts that the service center director incorrectly terminated the applicant's temporary resident status.

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 reveals the following offenses:

1. On December 26, 1986, the applicant was convicted of driving under the influence of alcohol in violation of section 23152(a) of the California Vehicle Code, a misdemeanor, and one count of driving without a valid driver's license in violation of section 12500(a) of the California Vehicle Code, a misdemeanor. (Date of Arrest: September 27, 1986; Case No. [redacted]

2. On January 29, 1987, the applicant was convicted on one count of driving under the influence of alcohol in violation of section 23152(a) of the California Vehicle Code, a misdemeanor, and one count of driving without a valid driver's license in violation of section 12500(a) of the California Vehicle Code. (Date of Arrest: December 21, 1986; Case Number [redacted]

3. On April 5, 1988, the applicant was convicted of one count of driving under the influence of alcohol with a blood alcohol content of 0.08% or greater in violation of section 23152(b) of the California Vehicle Code, a misdemeanor, and one count of driving with a suspended or revoked license in violation of section 14601.2(a) of

the California Vehicle Code, a misdemeanor. (Date of Arrest: April 3, 1988; Case Number [redacted]

On September 3, 1993, the Director of the Western Service Center denied the application because the applicant had been convicted of three misdemeanors in the United States.

On September 27, 1993, the applicant filed an appeal from the denial decision. On appeal, the applicant submitted documents from the Municipal Court of California, Santa Clara County Judicial District, indicating that the convictions detailed in Nos. 1, 2, and 3 above were all dismissed (expunged) by the court pursuant to section 1203.4 of the California Penal Code on January 20, 1994, because the applicant had fulfilled the conditions of his probation for the entire period thereof. The applicant also submitted a document from the same court indicating that a previous conviction on the charge of driving with a suspended or revoked license in violation of section 14601.2(a) of the California Vehicle Code, a misdemeanor, had also been dismissed pursuant to section 1203.4 of the California Penal Code because the applicant had fulfilled the conditions of probation for the entire period thereof. (Date of conviction: April 8, 1992; Case number [redacted] It does not appear that the service center director was aware of this conviction as of September 3, 1993, the issuance date of the denial decision.

The service center director found that the expungement documents submitted on appeal were sufficient to overcome the basis for denial of the application and granted the applicant temporary resident status on November 16, 1998.

On June 14, 1999, the applicant filed Form I-698, Application to Adjust Status from Temporary to Permanent Resident. The director noted the following additional convictions:

4. On October 4, 1989, the applicant was convicted in the Municipal Court of Santa Clara, State of California, of one count of felony drunk driving with prior DUI convictions in violation of section 23152(b) of the California Vehicle Code. The applicant was sentenced to serve one year in the county jail with imposition of the sentence suspended, placed on probation for a period of three years, and ordered to pay a restitution fine. (Case Number [redacted]

5. On November 26, 1994, the applicant was convicted in the San Jose Municipal Court, County of Santa Clara, State of California, of one count of driving under the influence of alcohol in violation of section 23152(a) of the California Vehicle Code, a misdemeanor, and one count of driving with a suspended license in violation of section 14601.1(a) of the California Vehicle Code, a misdemeanor. (Case No. [redacted]

6. On June 30, 1997, the applicant was convicted in the San Jose Municipal Court, County of Santa Clara, State of California, of one count of driving under the influence of alcohol with a blood alcohol content of 0.08% or greater in violation of

section 23152(b) of the California Vehicle Code, a misdemeanor, and one count of driving with a suspended license in violation of section 14601.1(a) of the California Vehicle Code, a misdemeanor. (Case Number [redacted]

7. On September 22 1998, the applicant was convicted in Municipal Court of California, Santa Clara County Judicial District, of one count of driving under the influence of alcohol with a prior conviction on the same charge in violation of section 23175.5(a) of the California Vehicle Code, a felony, and one count of driving with a suspended or revoked license in violation of section 14601.2(a) of the California Vehicle Code, a misdemeanor. The applicant was ordered to serve one year and four months in state prison, placed on parole for three years, and ordered to pay a $200 restitution fine and a $140.50 criminal justice administration fee. He was also convicted of convicted of driving with a suspended or revoked license in violation of section 14601.2(a) of the California Vehicle Code, a misdemeanor. He was sentenced to serve 6 days in the county jail and his drivers license was revoked. (Date of Arrest: May 25, 1998; Case Number [redacted] MT).

The director denied the adjustment application on November 16, 2004, because the applicant had been convicted of a felony and three or more misdemeanors committed in the United States. On February 4, 2005, the director terminated the applicant's temporary resident status for the same reason. The director reopened the applicant's appeal filed on September 27, 1993, and afforded the applicant thirty days, until March 7, 2005, to file a brief or additional evidence to overcome the basis for termination of his temporary resident status.

On appeal, counsel for the applicant contends that Citizenship and Immigration Services (CIS) "could and should have known of the applicant's 1998 felony conviction when the applicant was granted temporary resident status on November 16, 1998."

Contrary to counsel's contention, CIS was not aware of the applicant's felony conviction when the application for temporary resident status was approved on November 16, 1998. CIS did not become aware of the applicant's felony conviction under section 23173.5(a) of the California Vehicle Code until April 13, 1999, when the applicant was encountered at San Quentin State Prison while serving his sentence of one year and four months resulting from this conviction.

The record contains a copy of the Abstract of Judgment – Commitment Single or Concurrent Count Form dated November 2, 1998, from the Superior Court of California, County of Santa Clara, indicating that the applicant was convicted on September 22, 1998, upon a plea of guilty, to driving under the influence of alcohol with two prior convictions in violation of section 23175.5(a) of the California Vehicle Code. The court sentenced the applicant to serve one year and four months at San Quentin State Prison. The applicant was also convicted of driving on a suspended or revoked license in violation of section 14601.2(a) of the California Vehicle Code, a

misdemeanor. He was ordered to serve 60 days in the county jail and his driver's license was revoked.

Counsel asserts that section of section 23175.5 of the California Vehicle Code is a "wobbler" statute in federal immigration proceedings and is controlled by the decision in *Garcia-Lopez v. Ashcroft*, 334 F3d 840 (9th Cir. 2003). In that case, the court found that imposition of a sentence other than imprisonment in the state prison automatically converts a felony to a misdemeanor. In support of his assertion, counsel submits a copy of section 23175.5(a), which states:

> A person is guilty of a public offense punishable by imprisonment in the state prison or by imprisonment for not more than one year in the county jail and by a fine of not less than three hundred ninety dollars ($390) nor more than one thousand dollars ($1000) if that person is convicted of a violation of Section 23152 or 23153, and the offense occurred within 10 years of any of the following:
>
> (1) A prior conviction of Section 23152 that was punished as a felony under Section 23175 or this section, or both.
>
> (2) A prior violation of Section 223153 that was punished as a felony. . . .

According to section 23175.5(a) PC, any person convicted of driving under the influence of alcohol occurring within 10 years of a prior conviction of section 23152 that was punished as a felony is punishable by imprisonment in the state prison or by imprisonment for not more than one year in the county jail. If the court documents do not specify whether the defendant is being charged with a felony or a misdemeanor, an offense with this type of alternate punishment is considered a "felony" unless the defendant is in fact fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor". See *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). In this case, as previously stated, the applicant was previously convicted on October 4, 1989, of felony driving under the influence of alcohol in violation of section 23152(a) of the California Vehicle Code. The applicant was sentenced to serve our year in the county jail, with imposition of sentence suspended, and ordered to complete three years' probation and pay a fine. (No. 4 above). On September 22, 1998, the applicant was convicted of felony driving under the influence of alcohol within 10 years of a prior conviction on the same charge in violation of section 23175.5(a) of the California Vehicle Code, and was sentenced to serve one year and four months in state prison. (No. 7 above). Therefore, the applicant's 1998 conviction constitutes a felony conviction for immigration purposes.

Counsel asserts that there is no evidence in the record of proceeding that the applicant has been convicted of a felony. Counsel states:

> The decision of the Director dramatically and point[ed]ly does not cite any record of a felony conviction for Mr. [redacted] It shows as follows:

Date of Arrest: May 25, 1998
Conviction Date: September 22, 1998
Court: Superior Court of the State of California in the County of Santa Clara
Charge(s): 23175.5(a) VC – Driving Under the Influence with Priors – a felony; 14601.2(a) - Misdemeanor.

On May 25, 1998 Mr. [redacted] was charged with D.U.I. under California Vehicle Code Section 23175.5(a) and driving [on] a suspended or revoked driver's license. On September 22, 1998, according to your notice of termination, a conviction of some offense was entered. Your notice of termination does not identify the offense for which he was convicted. This report says that a conviction of something took place on September 22, 1998, and that certain charges, including felony D.U.I. had been filed. This is not evidence of a felony conviction.

Counsel's assertion is incorrect. As previously stated, the record contains a copy of an Abstract of Judgment – Commitment from the Superior Court of California, County of Santa Clara, detailing the applicant's conviction upon a guilty plea to driving under the influence of alcohol with two prior convictions in violation of section 23175.5(a) and one count of driving on a suspended or revoked license in violation of section 14601.2(a) of the California Vehicle code, a misdemeanor. This document establishes that the applicant has been convicted of a felony.

Finally, counsel asserts that the Notice of Termination was issued five months prior to the publication of *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Counsel asserts that the BIA did not rule in *Matter of Roldan* that applications granted prior to the issuance of that decision "can or should be reopened and denied."

It appears that counsel is referring to the applicant's convictions detailed in Nos. 1, 2, and 3 above. The applicant, on appeal from the initial denial decision, submitted court documents dismissing these convictions pursuant to section 1203.4 of the California Penal Code because he had fulfilled the conditions of probation for the entire period thereof.

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). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The Board of Immigration Appeals (BIA) sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), stated that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec 1378 Dec. 1378 (BIA 2000).

Counsel has not provided any evidence to establish that the court dismissed the applicant's convictions based on the merits of the case. Therefore, pursuant to the above precedent decisions, no effect will be given to the court dismissal of the convictions detailed in Nos. 1, 2, and 3 above.

Furthermore, although *Matter of Roldan* and *Matter of Pickering* were finalized after the applicant's temporary resident status was terminated based on his record of one felony and three or more misdemeanor convictions, it is a long-standing principle that issues of present inadmissibility 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.

In summary, the record confirms that the applicant has been convicted of two felonies and 12 misdemeanors. The applicant's criminal record rendered him ineligible for temporary resident status pursuant to section 245(A)(a)(4)(B) of the Act and necessitated the termination of his temporary resident status pursuant to section 245A(b)(2)(B)(ii) of the Act.

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