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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529 - 2090

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

JUL 27 2009

FILE: [redacted] Office: LOS ANGELES Date:
MSC-05-232-14311

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004, (CSS/Newman Settlement Agreements) was denied by the director of the Los Angeles office, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application, finding that the applicant was ineligible to adjust to temporary resident status because he had been convicted of three or more misdemeanors in the United States.

On appeal, counsel asserts that the director committed an error in failing to issue a Notice of Intent to Deny (NOID) on the basis of ineligibility for class membership. Counsel advised that a brief would be submitted with 30 days of appeal. The applicant has not submitted a brief or any additional evidence on appeal.

Under the CSS/Newman Settlement Agreements, if the director finds that an applicant is ineligible for class membership, the director must first issue a notice of intent to deny, which explains any perceived deficiency in the applicant's Class Member Application and provide the applicant 30 days to submit additional written evidence or information to remedy the perceived deficiency. Once the applicant has had an opportunity to respond to any such notice, if the applicant has not overcome the director's finding then the director must issue a written decision to deny an application for class membership to both counsel and the applicant, with a copy to class counsel. The notice shall explain the reason for the denial of the application, and notify the applicant of his or her right to seek review of such denial by a Special Master. *See* CSS Settlement Agreement paragraph 8 at page 5; Newman Settlement Agreement paragraph 8 at page 7. However, in this case the director adjudicated the I-687 application on the basis of applicant's ineligibility due to his multiple misdemeanor convictions. As a result, the director is found not to have denied the application for class membership. Therefore, the director was not required to issue a NOID on the basis of ineligibility for class membership.[1]

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status under the provisions of the Immigration and Nationality Act (the Act). Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255(a)(4)(B).

The regulations provide relevant definitions at 8 C.F.R. § 245a. "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 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).

[1] The AAO notes that on February 28, 2006 the director of the Missouri Service Center issued a NOID on the basis of the applicant's possible ineligibility for temporary residence due to his multiple misdemeanor convictions.

The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if 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; 8 U.S.C. § 1101(a)(48)(A).

The record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses:

- On December 17, 2002 the applicant was charged with violating section 273.6(A) of the California Penal Code (PC), *violation of protective order/injunction*. On December 18, 2002 the applicant pled nolo contendere to the charge, a misdemeanor (Superior Court of California, County of Los Angeles, [redacted]). On April 26, 2006, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the conviction was set aside, a plea of not guilty was entered and the case was dismissed.

- On December 17, 2002, the applicant was charged with violating section 148(A)(1) (PC), *unlawful obstruction peace officer*. On December 18, 2002 the applicant pled nolo contendere to the charge, a misdemeanor (Superior Court of California, County of Los Angeles, [redacted]). On April 26, 2006, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the conviction was set aside, a plea of not guilty was entered and the case was dismissed.

- On November 12, 1986, the applicant was charged with four counts of violating section 594(A) (PC), *vandalism*. On November 12, 1986 the applicant pled guilty to the charges, misdemeanors (Municipal Court of Los Angeles, County of Los Angeles, [redacted]. On April 26, 2006, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the convictions were set aside, a plea of not guilty was entered and the case was dismissed.

Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings.

The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 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. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act; if, however, a

court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999). [2] In this case, the applicant does not claim any defect in the underlying criminal proceedings.

Even though counsel has obtained an order vacating the applicant's misdemeanor convictions due to the applicant's successful completion of the terms of his probation, Congress has not provided any exception for applicants who have been accorded rehabilitative treatment under state law. Any rehabilitative action that overturns a state conviction is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan, supra,* at 523, 528 (BIA 1999). Therefore, the applicant remains "convicted", for immigration purposes, of the above-cited misdemeanor offenses. Because of the applicant's misdemeanor convictions, he is ineligible to adjust to temporary resident status. There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States.

As stated in 8 C.F.R. §103.3(a)(3)(iv), any appeal which is filed that fails to state the reason for appeal, or is patently frivolous, will be summarily dismissed.

A review of the decision reveals the director accurately set forth a legitimate basis for denial of the application. On appeal, the applicant has not addressed the grounds stated for denial, nor has he presented additional evidence relevant to the grounds for denial or the stated reason for appeal. The appeal must therefore be summarily dismissed.

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

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[2] See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony). More recently, in the case of *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000), the Ninth Circuit partially reversed the holding in *Matter of Roldan, Id.,* in holding that that there is no conviction for immigration purposes where there is a first-time offense involving simple possession of a controlled substance that is expunged pursuant to a state rehabilitative statute, if first offender treatment would have been accorded under the Federal First Offender Act (FFOA), 18 U.S.C. § 3607, had the case been prosecuted federally. However, the holding in *Lujan-Armendariz, Id.*, has not been extended to cases other than the offense of simple possession of a controlled substance, such as the applicant's misdemeanor convictions stated above. See *Ramirez-Castro, Id.*, holding that *Lujan-Armendariz, Id.,* does not apply to a case in which the expungement involves a misdemeanor conviction for carrying a concealed weapon, a conviction found not to be within the scope of the FFOA.