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

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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 10

IN RE: [redacted]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status under Section 245A of the Immigration and Nationality Act, 8 USC 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. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Center Director, Laguna Niguel, California denied the application for adjustment from temporary to permanent resident status. The Director, Legalization Appeals Unit (LAU) dismissed the appeal. The LAU took no action on the applicant's request that proceedings be reopened sua sponte. The applicant was placed in removal proceedings. An immigration judge denied an application for cancellation of removal and ordered the applicant removed. The Board of Immigration Appeals (BIA) dismissed the appeal. The United States Court of Appeals for the Ninth Circuit (9th Circuit) vacated the removal order and remanded to the Administrative Appeals Office (AAO) to reconsider the application to adjust status. Upon reconsideration, the decisions of the Center Director denying adjustment of status and the LAU Director dismissing the appeal will be withdrawn. The application for adjustment of status from lawful temporary to permanent resident is approved, contingent upon criminal and background checks.

The applicant is a native and citizen of Mexico who was granted temporary resident status on August 31, 1989. His application to adjust from temporary to permanent resident status was denied on September 21, 1990. The applicant was found to be ineligible for adjustment of status from temporary to permanent residence under Section 245A of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1255a, because he had been convicted of four misdemeanors. An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment of status from temporary to permanent resident. 8 C.F.R. § 245a.3(c)(1). The applicant timely filed an appeal with the LAU. On December 3, 1991 and January 3, 1992, three of the applicant's four misdemeanor convictions were expunged under California Penal Code Section 1203.4. The record indicates that on March 17, 1992, the applicant submitted to the Immigration and Naturalization Service (INS) copies of the Court Orders expunging the three misdemeanors.[1] On November 10, 1993, the LAU dismissed the appeal without addressing the fact that the convictions had been expunged. On November 20, 1994, the applicant, through prior counsel, filed a request that the LAU reopen the matter sua sponte. Despite inquiries from counsel and a response from the INS indicating that the request had been forwarded to the AAO, no action was taken on the request by the AAO. *See, Brief in Support of Application on Remand,* pages 2-3.

The 9th Circuit held that the LAU abused its discretion in not taking into account evidence that three of the applicant's four misdemeanor convictions had been expunged as it was required to do under INA § 245A(f)(3)(B), 8 U.S.C. § 1255a(f)(3)(B).[2] The INA, from the time it was passed until 1996 did not specifically define the term "conviction." When the decision dismissing the applicant's appeal was issued by the LAU, a non-drug related conviction that had been expunged was no longer a conviction under the Act. See, *Matter of Luviano*, 21 I. & N. Dec. 235 (BIA 1996) (later overturned by *Matter of Luviano*, 23 I. & N. Dec. 718 (A.G. 2005); *see,* also, *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576 (BIA 1966; A.G. 1967); *Matter of G-*, 9. I & N. Dec. 159 (BIA 1960; A.G. 1961); *Matter of A-F-*, 8 I. &. N. Dec. 429 (BIA, A.G. 1959). The definition of conviction added to the Act in 1996 and found at INA § 101(a)(48)(A), 8 U.S.C. §

[1] The applicant submitted copies of a certified mail receipt indicating that the Laguna Niguel Regional Processing Facility received mail from the applicant on March 25, 1992 and copies of court orders expunging three convictions with his appeal. (Attachments B-D).

[2] INA 245A(f)(3) Administrative review....(B) Standard for review. Such administrative appellate review shall be based solely upon the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence as may not have been available at the time of the determination.

101(a)(48)(A), includes convictions that have been expunged for reasons that do not go to the legal propriety of the original judgment, and that continue to impose some restraints or penalties upon the person's liberty. *Matter of Marroquin-Garcia*, 23 I. & N. Dec. 705 (BIA 1997, A.G. 2005). *See,* also, *Matter of Rodriguez-Ruiz,* 22 I. & N. Dec. 1378 (BIA 2000), *holding that a dismissal of a state conviction based on an expungement statute or a state rehabilitative statute was insufficient to terminate deportation proceedings.*

The 9th Circuit has resolved any dispute over whether the decision made by the LAU in 1993 dismissing the applicant's appeal and finding the applicant ineligible for adjustment of status was inconsistent with the evidence that was submitted and BIA precedent at that time:

> [The applicant] contends that the LAU failed to consider relevant orders of expungement that he submitted by certified mail prior to its 1993 decision. The government has not contested this claim. We therefore conclude that the LAU abused its discretion, as it was required to consider [such evidence]. (Citation omitted.) *Decision of the United States Court of Appeals, 9th Circuit,* June 14, 2005.

The INA required the LAU to take into account any additional evidence submitted on appeal that was not available at the time of the determination. *See,* INA 245A(f)(3), 8 U.S.C. § 1255a(f)(3)(B), (footnote 1, above). The matter was remanded because the evidence of the expunged convictions was not considered in making the decision to deny. At the time of the LAU decision, the evidence of the three expunged convictions established that, for purposes of immigration law, the applicant had only one misdemeanor conviction on his record and was therefore eligible for adjustment under INA § 245A, 8 U.S.C. § 1255a. However, if the same facts are evaluated today, the applicant is ineligible for adjustment because he was convicted of four misdemeanors and even the convictions that were expunged are still considered convictions under the Act.

The AAO does not find that imposition of the INA § 101(a)(48)(A), 8 U.S.C. § 101(a)(48)(A) definition of conviction upon an applicant whose convictions were expunged and whose appeal was first decided years before the enactment of that section of the INA to be contrary to the law. The matter is currently pending before the AAO. An appeal must be decided according to the law as it exists on the date it is before the AAO. In the absence of explicit statutory direction to the contrary, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after an application is filed, eligibility must be determined under those more restrictive terms. Conversely, if an amendment makes a statute more generous, eligibility is determined under the more generous terms of the amendment. *Matter of George*, 11 I. & N. Dec. 419 (BIA 1965); *Matter of Leveque,* 12 I. & N. Dec. 633 (BIA 1968).

Applying the current statutory definition of conviction to the applicant does not constitute an impermissible retroactive application of that statutory definition. The Supreme Court established a two-part test to determine whether a statute should have a retroactive effect in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). The first step is to determine Congressional intent. *Landgraf* at 280; *see,* also, *INS v. St. Cyr*, 533 U.S. 289, 317, 121 S.Ct. 2271, 2289 (2001); *Martin v. Hadix*, 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 481 (1997). The second step in determining whether a statute is

impermissibly retroactive is to determine "whether [INA § 101(a)(48)(A)] attaches new legal consequences to events completed before its enactment." *St. Cyr* at 322 (citing *Martin* and *Landgraf*). "A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past..." *Id.* Whether a statute acts retroactively is a judgment "informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expections." *Id.*

Congress expressly indicated that INA §101(a)(48)(A) be applied "to convictions and sentences entered before, on, or after the date of enactment of [IIRIRA]." IIRIRA § 322(c). Since Congressional intent is clear, there is no need to apply the second part of the *Landgraf* test. However, it is noteworthy that there is no basis in the record from which to conclude that the applicant engaged in any conduct, either in committing the four misdemeanors that were the basis of his denied application or in the court proceedings that led to his convictions, in reliance upon precedent that expunged convictions were no longer convictions. Counsel relies on *St.* Cyr in his brief to support the proposition that the law that must apply to the applicant is the law in effect "at the time of the agency error or due process violation." *Brief* at 5. The facts in this matter are inapposite to those in *St. Cyr*. In *St. Cyr*, Congressional intent as to the statute's retroactivity was unclear. The applicant pled guilty to drug trafficking in 1996, in reliance upon the availability of relief that was no longer available when removal proceedings were initiated. The Court found that "given the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial." *Id.* at 324. There is no such evidence of waiving rights or giving up some benefit in reliance upon the availability of relief in the present case.

Since, under current law, the applicant is ineligible for adjustment of status, and since the application of current law to the applicant is both consistent with established precedent and not impermissibly retroactive, the only issue before the AAO is whether current law must be applied to the facts of this case or whether it is appropriate to offer the equitable relief of issuing an order legalizing the applicant *nunc pro tunc* to November 10, 1993.

Nunc pro tunc orders are used to remedy the harshness of United States immigration laws. *Patel v. Gonzalez*, 432 F.3d 685, 693 (6th Cir. 2005); citing *Edwards v. INS*, 393 F.3d 299, 308 (2d Cir.2004)(citing *Matter of L*, 1 I. & N. Dec. 1 (A.G.1940); *Matter of T*, 6 I. & N. Dec. 410, 413 (BIA 1954); *Matter of A*, 3 I. & N. Dec. 168, 172-73 (BIA 1948)). The power to issue *nunc pro tunc* orders is implicit, based upon the finding by the BIA that Congress did not intend for the immigration laws to operate in a "capricious and whimsical fashion," and that Congress therefore must have intended to allow the Attorney General (now Secretary of Homeland Security) to have discretion to correct errors through retroactive orders. *Patel* at 693, citing *Matter of L* at 5-6. *Nunc pro tunc* orders may be awarded in appropriate circumstances to correct error in immigration proceedings. *Edwards* at 310. *Patel* states that the power of the BIA to enter *nunc pro tunc* orders is even greater than that of federal courts, because Congress entrusted DHS and the BIA to implement the INA and the federal courts to ensure that DHS and the BIA act within their statutory authority.[3] Therefore, where there

[3] The AAO, an appellate body within DHS with the authority to implement the INA on matters within its jurisdiction would have a power to enter *nunc pro tunc* orders analogous to that of the BIA.

is no agency error, there is no need for a federal court to act, but the BIA may still determine that a *nunc pro tunc order* is necessary to implement the goals of the INA. *Patel* at 695.

Although the authority to issue *nunc pro tunc* orders is discretionary, such orders are issued in only two situations: (1) where the only ground of deportability or inadmissibility would thereby be eliminated; and (2) where the alien would receive a grant of adjustment of status in connection with the grant of any appropriate waivers. *Patel* at 693 citing *Matter of Felipe Garcia-Linares,* 21 I. & N. Dec. 254, 259 (BIA 1996) and *Matter of Roman,* 19 I. & N. Dec. 855, 857 (BIA 1988). As the issuance of a *nunc pro tunc* order is discretionary, weighing such equities as are present in the case may be appropriate. *See, Matter of T,* 6 I. & N. Dec. at 413-14; *Matter of A,* 3 I. & N. Dec. at 171-72.

The 9th Circuit found that the LAU erred in not considering evidence that his convictions were expunged. The applicant was denied the opportunity to have the entirety of his case considered despite submitting relevant evidence in timely fashion. The erroneous failure to consider relevant evidence was harmful to the applicant as it prevented his adjustment to lawful permanent resident status in November 1993, more than twelve years ago. When the definition of conviction was added to the INA in 1996, the applicant became ineligible to adjust to the status he should have been granted almost three years earlier. In a suspension of deportation case, when the BIA refused to consider evidence submitted on appeal that was not available at the time of an applicant's immigration court hearing, the 9th circuit ruled that an applicant's due process right to a fair hearing had been violated. *Ramirez-Alejandre* v. Ashcroft, 320 F.3d 858 (9th Cir. 2003)(en banc).[4] While *Ramirez* is not directly analogous, it provides some indication of the disfavor with which the 9th circuit looks at agency imposed obstacles preventing due consideration of relevant, timely submitted evidence.

There is precedent supporting the use of *nunc pro tunc* orders to return aliens to the position in which they would have been, but for an error in their immigration proceeding, when changes in the law made unavailable the relief initially sought. *See, e.g., Castillo-Perez v. INS,* 212 F.3d 518, 528 (9th Cir.2000)*; also, Batanic v. INS,* 12 F.3d 662, 667 (7th Cir.1993). In *Castillo,* the applicant established that his failure to file for suspension of deportation was the result of ineffective assistance of counsel. The 9th Circuit found that, in light of that ineffective assistance of counsel effectively denying the applicant of the right to be heard on the merits of his suspension application, and in view of circumstances and changes in the law that made him no longer eligible to apply for suspension of deportation, the only effective remedy was to remand with instructions to apply the law as it existed at the time of Castillo's hearing before the IJ. *Castillo* at 529. In *Batanic,* the 7th circuit remanded an asylum application back to the BIA with instructions that an applicant be allowed to file for asylum *nunc pro tunc* to the date of his immigration court hearing when agency error denied him the assistance of counsel. Subsequent amendments to the law made the applicant, who had committed an aggravated felony, ineligible for asylum.

The applicant in this matter, but for agency error, would have been found eligible for adjustment of status in 1993. That agency error was further compounded by the inaction that met counsel's request that the case be opened sua sponte in 1994. The convictions that are the basis of the initial denial of the application include

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[4] *Ramirez-Alejandre* deals with an earlier BIA practice that has been superseded by subsequent regulation. *See* 8 C.F.R. § 1003.1(d)(3)(iv).

two misdemeanor failures to appear in court, a conviction for driving without a license and a conviction for driving under the influence. The last conviction occurred on October 31, 1988. *See Decision of the LAU Director,* November 10, 1993. There is no evidence in the record of subsequent misconduct. All of the offenses are misdemeanors and the latest conviction occurred more than seventeen years ago. After providing evidence that the convictions were expunged, the applicant should have been found eligible for adjustment of status on November 10, 1993, more than 12 years ago. During those twelve years he has continued to live in the United States where he has resided since December 1981. He has three United States citizen children. His mother, two brothers and four sisters live in the United States as lawful permanent residents or citizens. The applicant faces the imposition of a law that was enacted eight years after his last misdemeanor conviction and three years after he had every reasonable expectation of being granted adjustment of status and joining his mother and siblings as lawful permanent residents of the United States. If he is not granted adjustment of status, he is subject to removal from the United States and separation from his family and long established ties. While criminal conduct is not to be condoned, the equities when considered in their entirety are in the applicant's favor.

The 7th circuit held in *Batanic* that when a procedural defect results in the loss of the opportunity for statutory relief, that defect is cured by allowing the applicant the opportunity to apply [for relief] *nunc pro tunc. Batanic* at 668. Similarly, the failure of the LAU to consider properly submitted evidence in a timely fashion prevented the applicant's adjustment of status more than twelve years ago. The only way to remedy that error, in view of a subsequent amendment to the INA that now makes him ineligible for adjustment, is to order that the applicant be found eligible for adjustment of status *nunc pro tunc* to November 10, 1993 contingent upon required criminal and security checks, and remand the matter back to the Service Center so that those checks may be performed.

ORDER: The decisions of the Center Director denying adjustment of status and the LAU Director dismissing the appeal are withdrawn. The application for adjustment of status from lawful temporary to permanent resident is approved contingent upon completion of the requisite criminal and background checks.