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U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

XPW 90 020 01871  
WAC 04 261 51028

IN RE:

Applicant:



APPLICATION: Application for Adjustment from Temporary to Permanent Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

ON BEHALF OF APPLICANT:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for adjustment from temporary to permanent resident status was denied by the Director, Western Service Center. The matter was remanded by the Legalization Appeals Unit (LAU), now the Administrative Appeals Office (AAO). The Director, California Service Center then denied the application again, and that action is now before the AAO on appeal. The appeal will be dismissed.

The directors denied the application because the applicant had been convicted of a felony, and he was therefore ineligible for adjustment from temporary to permanent resident status.

On appeal, from the initial decision, the applicant asserted that the conviction was a misdemeanor pursuant to section 17(b) PC. The applicant requested a copy of the record of proceedings, which the director complied with on June 1, 1993. Subsequently, the applicant submitted an expungement order dated June 4, 1993 for his conviction.

On appeal, from the subsequent decision, counsel requested an extension of time in order to submit additional information. To date, however, neither counsel nor the applicant had addressed the subsequent Notice of Decision or submitted any evidence to overcome the director's findings.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(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).

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 Immigration and Nationality Act (the Act).

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951).

At the time the applicant filed his Form I-698, Application to Adjust Status from Temporary to Permanent Resident, the applicant submitted a court disposition for Case no. [REDACTED] which revealed that on January 24, 1989, the applicant was charged with two counts of assault with a deadly weapon causing great bodily injury, a violation section 245(a)(1) with special allegations under section 12022.5a PC/1203.06(a)(1) PC, both felonies. On March 9, 1989, the applicant was convicted in the Los Angeles County Superior Court of one count of violating section 245(a)(2), assault with a firearm on person, a felony. On July 21, 1989, the applicant was placed on probation and imposition of sentence was suspended on condition the applicant served 365 days in jail.

On April 6, 1992, the director issued a Notice of Intent to Terminate, which advised the applicant of the director's intent to terminate his temporary residence status due to his felony conviction. The applicant did not respond to said notice.

On April 12, 1993, the director denied the application for adjustment of status. The director also found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act as the conviction constituted a crime involving moral turpitude.

The case was forwarded to the LAU for review. On May 13, 1997, the LAU, upon finding that the conviction had been set aside, concluded that the applicant was no longer ineligible for the benefit being sought. The LAU remanded the case for the purpose of adjudicating the application on its merits.

On the basis of a new interpretation, the director found the felony conviction was disqualifying and on November 3, 2004, the director issued a Notice of Decision. The director concluded that the applicant had been convicted of a felony in the United States. The applicant was advised that 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. 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).

While not mentioned in the director's decision, it is noted the Board of Immigration Appeals (BIA) 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.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the 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. 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.

Although these precedent decisions were finalized after the applicant applied for temporary residence, 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). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungement.

The applicant is ineligible for adjustment to permanent resident status because of his felony conviction. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available. Assault with a deadly weapon is a crime involving moral turpitude. *Matter of O-*, 3 I&N Dec. 193 (BIA 1948). Therefore, the applicant's conviction for this offense renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. There is no waiver available to an alien inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1255(a)(d)(2)(B)(ii)(I).

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.