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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 2 3 2007

XPS 92 071 0174

IN RE: Applicant: [redacted]

APPLICATION: Application for Adjustment from Temporary to Permanent 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 application for adjustment from temporary to permanent resident status was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to respond to the notice of intent to deny (NOID), which was based on the applicant's three misdemeanor and one felony convictions.

On appeal, counsel concedes the fact of the convictions, but seemingly disputes the director's finding that the applicant failed to respond to the NOID, claiming that a letter of disposition from the Harris County District Clerk's office was submitted. However, while the record shows that the applicant provided court disposition documents in response to a Citizenship and Immigration Services (CIS) request for documentation dated November 16, 2004, there is no evidence that the applicant responded to the NOID issued on January 31, 2005, which informed the applicant of adverse information and allowed him time in which to address the director's findings.[1]

Counsel further states that the director improperly found the applicant to be lacking good moral character as a result of his criminal convictions. However, there is no indication either in the NOID or in the final notice of denial that the director made any mention of the applicant's character. The director's denial merely listed the applicant's criminal convictions, which served as the basis for his adverse finding.

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).

"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 that the applicant had the following convictions in the state of Texas at the time the denial was issued:

1. On August 17, 1990, the applicant was convicted of driving while intoxicated, a misdemeanor. He was sentenced to 35 days in jail and fined $100. Case No. [redacted]

[1] The record shows that CIS initially attempted to send the NOID on January 13, 2005. However, as a result of service error the notice was sent to an incorrect address and had to be resent on January 31, 2005.

2. On June 17, 1991, the applicant was convicted of failure to stop and give information, a misdemeanor. He was sentenced to 60 days in jail and fined $300. Case No. [redacted]

3. On July 8, 1991, the applicant was convicted of driving while intoxicated, a misdemeanor. He was sentenced to 60 days in jail and fined $300. Case No. [redacted]

4. On May 29, 1997, the applicant was convicted of driving while intoxicated for the third time, thereby making his offense a third degree felony. He was sentenced to seven years of probation prefaced by 45 days in jail and 300 hours of community service, and ordered to pay a fine of $1,000 and restitution in the amount of $1,375. Case No. [redacted]

Counsel has not provided orders of expungement. However, even if counsel had provided evidence of Texas State expungements, 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 by operation of a state rehabilitative statute. Any subsequent action that overturns a state 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).

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

The applicant stands convicted of thee misdemeanors and one felony. He is therefore ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. §§ 245a.3(c)(1) and 245a.1(p). No waiver of such ineligibility is available.

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