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Office: California Service Center

Date: NOV 28 2015

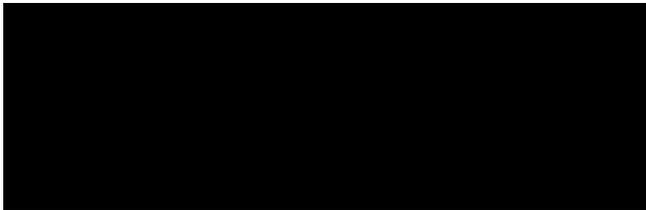
IN RE:

Applicant:



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:



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, Director
Administrative Appeals Office

DISCUSSION: The termination of temporary resident status by the Director, California Service Center is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The Director, California Service Center terminated the applicant's status because the applicant had been convicted of three misdemeanors.

On appeal, counsel contends that some of the applicant's convictions cannot be considered to be misdemeanors because of the punishment incurred. He also maintains that, because the imposition of sentence was suspended, the applicant was not convicted.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 245a.2(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 the applicant was convicted of Driving With a Blood Alcohol Content of .08% or Greater on February 3, 1989, October 3, 1994 and April 23, 1996. He was also convicted of Driving Under the Influence on October 3, 1994. These offenses are misdemeanors under the California Vehicle Code. Thus, the applicant was actually convicted of four misdemeanors. Counsel has provided orders, under section 1203.4/1203.4a of the California Penal Code, which set aside and vacated the convictions.

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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).

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.

There is no indication in this matter that the actions of setting aside the applicant's convictions were based on the merits of the case. Therefore, pursuant to the above precedent decisions, no effect is to be given to such actions.

Counsel states in his appellate brief that the applicant only spent three days in county jail for the October 3, 1994 convictions. Later in the same brief, he states that the applicant served only five days in the county jail for those convictions. The court record shows the applicant was sentenced to five days. Regardless, the number of days served is not significant. What is important is what the crime was punishable by.

Counsel begins by correctly pointing out that the above definition of misdemeanor states "any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor." Driving Under the Influence, and Driving With a Blood Alcohol Content of .08% or Greater, are classified as misdemeanors in the California Vehicle Code. They are punishable by imprisonment in the county jail for a maximum of six months, pursuant to section 42002 of the California Vehicle Code. Therefore, they fall within the above definition of misdemeanor. The fact that the applicant was sentenced to five days is not relevant.

Later in his brief, counsel declares that, within the definition of misdemeanor, it is stated that "a crime is not deemed a misdemeanor if the sentence *imposed* is for a maximum term of five days or less." (emphasis added) The definition, at 8 C.F.R. 245a.1(o), does not state "imposed," but rather focuses on what the crime was punishable by. Counsel's examination of the issue of "sentence imposed" is in part predicated on the director's termination order, in which he stated:

Although you assert that your conviction shall not be deemed a misdemeanor for Legalization purpose pursuant to 8 C.F.R. 245a.1(o), definition of misdemeanor for immigration purposes, you were also ordered to serve 3 years probation. This means that you were not only punishable by imprisonment for a maximum term of five days or less. Since the court finds factual basis for your plea of guilty to the count(s) charged with, particularly since you admitted a prior violation and conviction of the same or similar crime, it is likely that for immigration purposes, we would also deem your conviction as a misdemeanor. The nature of the crime itself is deemed to be a misdemeanor violation.

The director's analysis is confusing. The director seems to imply that the probation period should be added to the jail sentence to determine what the crime was punishable by. If that were to be the case, the applicant would have a conviction punishable by three years and five days, which would be in the felony range. Instead, what is required is simply a review of the state statute in order to determine if the crime is punishable by more than five days imprisonment. In this case, the offenses were punishable by a term of six months, so they constitute misdemeanors.

The director also seems to state that factors such as the nature of the offense, and whether an alien had prior convictions for the same offense, would be discretionary factors which would enable him to determine if a crime is a misdemeanor. These factors are not relevant; rather, the definition of misdemeanor in the regulation is what is controlling.

Counsel also maintains that, because the imposition of the sentence was suspended, the applicant was not actually convicted. However, in the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, it is stated:

The term “conviction” means, with respect to an alien, a formal judgement 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 punishment, penalty, or restraint on the alien’s liberty to be imposed.

Section 101(a)(48)(B) of the Act states:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

In this case the applicant pled guilty, and the judge ordered punishment, although imposition of the sentence was suspended. Therefore, according to above section of law, this constitutes a conviction.

In summary, even though the applicant’s convictions were set aside, the applicant stands convicted of four misdemeanors. He is therefore ineligible for temporary resident status pursuant to 8 C.F.R. § 245a.2(c)(1). No waiver of such ineligibility is available.

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