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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED]
XHO 88 549 04055

Office: CALIFORNIA SERVICE CENTER

Date: MAR 12 2007

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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The termination of temporary resident status by the Director, Western Service Center. The matter was remanded by the Legalization Appeals Unit (LAU), now the Administrative Appeals Office (AAO). The matter is now before the AAO on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant had not provided the requested court dispositions.

On appeal, counsel requested a copy of the record proceedings, which was complied with by the director on November 17, 1993. Counsel, in response, asserted that the applicant's convictions had been expunged.

The temporary resident status of an alien who has been convicted of a felony or three or more misdemeanors in the United States may be terminated at any time. 8 C.F.R. § 245a.2(u)(1)(iii).

"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).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 Title 21). Section 212(a)(2)(A)(i)(II) of the Act.

The FBI record dated March 14, 1989 revealed the following offenses in the state of California:

1. On August 16, 1984, the applicant was arrested by the Long Beach Police Department for being under the influence of phencyclidine (PCP), a violation of section [REDACTED]
2. On September 24, 1985, the applicant was arrested by the Los Angeles Police Department for possession of PCP for sale, a violation of section 11378.5 H&S.
3. On November 6, 1985, the applicant was arrested by the Los Angeles Police Department for attempted rape by force, a violation of section 220 PC. On February 19, 1986, the charge was dismissed. The applicant was convicted of assault with a deadly weapon causing great bodily injury, a violation of section 245(a) PC, a felony. The applicant was sentenced to serve 365 days.

4. On May 8, 1988, the applicant was arrested under the alias [REDACTED] by the Los Angeles Police Department for use/under the influence of a controlled substance.

On July 30, 1991, the director issued a Notice of Intent to Terminate advising the applicant of his conviction in number three above as well as his arrests in numbers one, two and four. The applicant was also advised of his statement, made at the time of his interview, that he had been arrested on gang-related charges in 1981 and 1985. The applicant was requested to submit the court dispositions for the above arrests excluding number three above. Counsel, in response, requested an extension of 60 days in which to submit the requested documentation. However, more than nine months later, the requested court dispositions had not been provided, and accordingly, on May 14, 1992, the director terminated the applicant's status as a temporary resident.

On September 30, 1993, the LAU remanded the case for processing of counsel's request for a copy of the record of proceedings. On November 17, 1993, the director provided the applicant and his counsel with a copy of the applicant's record of proceedings.

On appeal, counsel submits an incomplete California Department of Justice printout dated September 23, 1991, which revealed some of the applicant's criminal history via a fingerprint check, namely the applicant's probation in Case no. [REDACTED] issued on February 19, 1986 for number three above as well as:

- On January 23, 1988, the applicant was arrested by the Sheriff's Office in Los Angeles for possession of a controlled substance, a violation of section 11377(a) H&S. On June 26, 1989, the applicant was convicted of use/under the influence of a controlled substance, a violation of section 11550 H&S, a misdemeanor. The remaining charge was dismissed. Case no. [REDACTED].
- On May 8, 1988, the applicant was arrested by the Los Angeles Police Department for use/under the influence of a controlled substance, a violation of section 11550 H&S, a misdemeanor.

Counsel submits a FBI report dated September 23, 1991, which revealed the offenses mentioned in number one, two and three above as well as the applicant's arrests on January 23, 1988 and May 8, 1988.

Counsel and the applicant also submit the following:

- The court disposition and an expungement order for number four above. On May 9, 1988, the applicant was charged with violating section 11550 H&S, use/under the influence of a controlled substance. On February 7, 1989, the complaint was amended to add a violation of section 11377 H&S, possession of a controlled substance. On February 7, 1989, the applicant convicted of violating section 11377 H&S, a misdemeanor. The applicant was placed on probation for three year. The remaining charge was dismissed. On May 27, 1993, the applicant's conviction was expunged in accordance with section 1203.4 PC. Case no. [REDACTED].
- A court disposition and an expungement order for violating section 11550 H&S, use/under the influence of a controlled substance, a misdemeanor. On August 31, 1988, the applicant was charged with violating section 23152(a) VC, driving under the influence, and section 11550 H&S. On June 26, 1989, the applicant was convicted of violating section 11550 H&S, a misdemeanor. The remaining charge was dismissed. On May 25, 1993, the applicant's conviction was expunged in accordance with section 1203.4 PC. Case no. [REDACTED].

- An expungement order dated September 2, 1992 issued by Central District for the Los Angeles County Superior Court for Case no. ~~774601~~. This expungement order relates to number three above.

A recent FBI record check dated January 7, 2004, revealed that in item number two above, the district attorney declined to prosecute due to lack of probable cause. The applicant, however, has not provided the requested court disposition or evidence that no charge was filed for number one above.

Declarations by an applicant that he or she has not had a criminal record are subject to verification of facts by Citizenship and Immigration Services (CIS). The applicant must agree to fully cooperate in the verification process. Failure to assist CIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

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).

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 expungements.

The applicant has been convicted of a felony and three misdemeanors and, therefore, is ineligible for the benefit being sought. 8 C.F.R. § 245a.2(u)(1)(iii). Within the legalization program, no waiver is available to an alien convicted of a felony or three or more misdemeanors committed in the United States. The applicant is also ineligible for the benefit being sought as he has failed to provide the court disposition necessary for the adjudication of the application in number one above. 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. The applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. 1182(a)(2)(A)(i)(II) for his drug convictions. Section 245A(d)(2)(B)(ii)(1) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(ii)(II) and 8 C.F.R. § 245a.2(k)(3)(ii) precludes waivers of inadmissibility for aliens convicted of a controlled substance except for a single offense of simple possession of thirty grams or less of marijuana.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she 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.