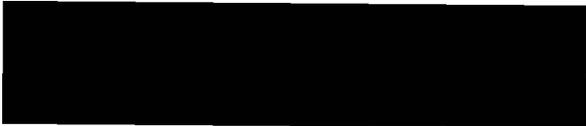




U.S. Citizenship  
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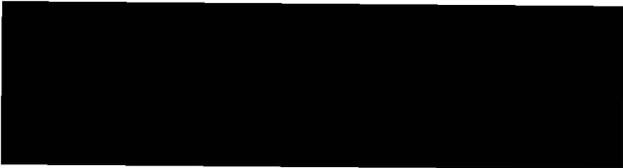
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MAR 26 2007

FILE:  Office: CALIFORNIA SERVICE CENTER Date:  
XSD 87 070 00034

IN RE: Applicant: 

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:  


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 temporary resident status was denied by the Director, Western Regional Processing facility, remanded by the Legalization Appeals Unit (LAU), now the Administrative Appeals Office (AAO). The application was denied by the Director, California Service Center, and is now before the AAO on appeal. The appeal will be dismissed.

The directors denied the application because the applicant had been convicted of three misdemeanors in the United States.

On appeal from the initial decision, the applicant put forth a Freedom of Information Act (FOIA) request, which the director complied with on October 19, 1989. In response, counsel submitted expungement orders for the applicant's convictions.

The applicant put forth another FOIA request, which director complied with on January 5, 1996.

On appeal from the subsequent decision, counsel asserts that the expungements obtained by the applicant render him eligible for the benefit being sought.

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).

"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 following offenses in the state of California:

1. On March 16, 1966, the applicant was arrested for prowling, a violation of section 647 PC. On April 11, 1966, the applicant was convicted of this misdemeanor offense and sentenced to serve 90 days in the county jail. The sentence was suspended and the applicant was placed on probation for three years. On January 2, 1990, the applicant's conviction was expunged in accordance with section 1203.4 PC.
2. On May 10, 1966, the applicant was arrested for burglary. The complaint was amended to prowling, a violation of section 647 PC. On June 23, 1966, the applicant was convicted of this misdemeanor offense and sentenced to serve six months in the county jail. The sentence was suspended and the applicant was placed on probation for three years. On January 2, 1990, the applicant's conviction was expunged in accordance with section 1203.4 PC.
3. On February 21, 1967, the applicant was arrested for prowling, a violation of section 647 PC. On February 21, 1967, the applicant was convicted of this offense and sentenced to serve 30 days in the county jail. The sentence was suspended and the applicant was placed on probation for six months. On January 2, 1990, the applicant's conviction was expunged in accordance with section 1203.4 PC.

The case was forwarded to the LAU for review. On May 25, 1993, the LAU, upon finding that the convictions had been set aside, concluded that the applicant was no longer ineligible for the benefit being

sought. The LAU, however, remanded the matter in order to accord the applicant the opportunity to file a Form I-690, Application for Waiver of Excludability. The LAU determined that the applicant was inadmissible under section 212(a)(4) of the Immigration and Nationality Act (the Act), now section 212(a)(1)(A)(iii)(II) of the Act for being an alien afflicted with either a psychopathic personality, mental disorder or sexual deviation, and section 212(a)(17) of the Act, now section 212(a)(9)(A) of the Act for having returned to the United States, without permission from the Attorney General, within five years after deportation.

On January 12, 1994, the applicant filed a Form I-690 due to his inadmissibility under section 212(a)(9)(A) of the Act.

On December 23, 2000, the director reopened the proceedings and issued a Notice of Decision. The director concluded that the applicant had been convicted of three misdemeanors 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).

The applicant was also advised that his Form I-690 was denied as no purpose would be served in granting the waiver when he was otherwise ineligible for the benefit being sought. The applicant was provided the opportunity to file an appeal with fee in regards to this matter.

On appeal, counsel asserts that the LAU remanded the case on December 6, 2000. Counsel's assertion, however, is unfounded as the record clearly reflects that the LAU issued its decision on May 23, 1993. The Form I-797C, which was issued on December 6, 2000 by the Director, California Service Center, indicated that the appeal would be treated as a motion to reopen for the purpose of approving the application. However, on the basis of a new interpretation, the director found the convictions were disqualifying and issued a Notice of Decision.

On appeal, counsel argues that the director's reliance of *Roldan*, *supra* is misplaced, based on *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). In that case, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) found that aliens who had obtained expungements for first-time drug offenses could not be deported on account of those offenses. Counsel points out that the Ninth Circuit did not necessarily mean to limit its ruling to first-time drug offenses.

The court's decision in *Lujan-Armendariz* only modifies *Matter of Roldan* as it relates to the Federal First Offender Act, and is irrelevant in this case.

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 intent 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 is ineligible for temporary resident status because of his three misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

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.