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U.S. Citizenship
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Services

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FILE: [REDACTED]
XSF 88 511 5034

Office: CALIFORNIA SERVICE CENTER

Date: SEP 13 2007

IN RE: Applicant: [REDACTED]

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: SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to be "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's temporary resident status was initially terminated by the Director, Western Service Center. A timely appeal was filed with the Administrative Appeals Office (AAO) where the matter was remanded for further consideration. The Director, California Service Center, has issued a new decision terminating the applicant's temporary resident status on other grounds. The matter is before the AAO on appeal. The appeal will be dismissed.

The director's most recent termination was based on the determination that the applicant's one felony and three misdemeanor convictions rendered him ineligible for temporary resident status.

On appeal from the director's most recent decision, the applicant's prior counsel, who has since withdrawn his representation of the applicant in the present matter, asserts that the applicant's criminal history should not make him ineligible for temporary resident status and contends that the applicant submitted a timely response to the notice of the director's intent to terminate temporary resident status. The AAO acknowledges the withdrawal of counsel's representation of the applicant in the present matter. Nevertheless, any prior submissions from counsel will be given full consideration in making a final determination with regard to the applicant's eligibility for temporary resident status.

"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 excludable 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 Act, formerly section 212(a)(9) of 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).

In the present matter, the record shows that the applicant has been convicted of the following offenses:

1. On May 15, 1991, the applicant was convicted of driving with a suspended license, a misdemeanor, in violation of Section 14601(a) VC. Case No. [REDACTED]

2. On March 3, 1994, the applicant was convicted of possession of a narcotic controlled substance, a felony in violation of section 11350(a) HS. The applicant was sentenced to two months in jail and placed on probation for three years.
3. On June 5, 1997, the applicant pled guilty and was convicted of violating section 25608 BP, a misdemeanor. The applicant was sentenced to one year of probation and ordered to pay restitution. Case No. [REDACTED]
4. On August 11, 2000, the applicant pled *nolo contendere* to driving under the influence, a misdemeanor in violation of Section 23152(b) VC. The applicant was placed on probation for three years and order to pay a fine of \$1,131.00. Case No. [REDACTED]

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. 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. Therefore, pursuant to the above precedent decisions, even if the applicant had all of his offenses expunged, no effect is to be given to such actions.

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.

In the appellate brief, counsel stated that no evidence has been provided with regard to the criminal convictions cited in the notice of termination.¹ However, a review of the applicant's record of proceeding shows that the applicant's misdemeanor convictions and arrests are all cited in a criminal case docket issued by San Mateo County's Superior Court Northern Branch. The applicant's felony conviction is cited in a print-out issued by the Federal Bureau of Investigations in San Francisco. All documents related to the

¹ Upon review of the record, the AAO discovered that one page was missing from counsel's appellate brief. Accordingly, the AAO contacted counsel, who was still the applicant's attorney of record when the appeal was initially reviewed, and informed counsel of the oversight. In response, counsel submitted a letter dated June 7, 2007, informing the AAO of his withdrawal as the applicant's attorney of record, and declined to submit the missing page from the appellate brief. As such, the AAO will consider the remaining portions of the appellate brief as well as all other evidence and information on record at this time.

applicant's convictions have been incorporated into the applicant's record, which counsel could have reviewed upon request. The record does not show that counsel made such a request. Furthermore, in a letter dated April 8, 2004, counsel stated that he intended to "investigate the true nature of any criminal record [the applicant] may possess." There is no evidence, however, that counsel conducted the investigation and if so, it is unclear why he was unable to review the convictions noted above.

Counsel also asserts that certain sections of the California Civil Code are not "within the ambit of the California Penal [C]ode and therefore cannot be considered a misdemeanor for immigration purposes."² However, the relevant definition of the term "misdemeanor" is found in 8 C.F.R. § 245a.1(p). Regardless of a statutory code's determination of when something is a felony, misdemeanor, or infraction, any offense that fits the above definition of a misdemeanor or felony will be deemed as such notwithstanding the fact that a certain offense is found in portions of California's Civil Code rather than the state's Civil Code. Furthermore, counsel's assertion that the applicant's controlled substance violation is actually a misdemeanor is not supported by the documentation on record. The record clearly classified this offense as a felony. Counsel's assertions to the contrary are not supported by any documentary evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Lastly, counsel asserts that even if the applicant was convicted of a felony offense, waivers are available to cure his inadmissibility. However, the issue in the present matter is not one of admissibility, but rather eligibility for status as a temporary residence. As stated above, any applicant who has been convicted of three misdemeanors or one felony is not eligible for this immigration benefit. 8 C.F.R. § 245a.2(c)(1). While there may be a waiver for the inadmissibility that may result from such convictions, no waiver of such ineligibility is available.

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.

² As the third page of the appellate brief is missing, it is unclear which Civil Code counsel's argument references.