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

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FILE:

Office: MILWAUKEE

Date: NOV 06 2008

IN RE:

Applicant:

APPLICATION:

Application for Adjustment to Permanent Resident Status under Section 245 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255

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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The record reflects that the applicant is a native and citizen of Nigeria. On October 20, 2005, the director denied the applicant's Form I-485, Application to Register Permanent Resident or Adjust Status, and the applicant filed an appeal from that denial. The director denied the application because the applicant failed to submit certified court disposition records for a series of arrests between 1993 and 1999. The AAO does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status. The appeal will be rejected.

First and foremost, the authority of the AAO to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception - petitions for approval of schools and the appeals of denials of such petitions are now the responsibility of Immigration and Customs Enforcement.

The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1<sup>st</sup> Cir. 1992) All substantive or legislative rule making requires notice and comment in the Federal Register. Because the AAO lacks jurisdiction over appeals of a denial of a Form I-485, the appeal must be rejected on those grounds.

Additionally, the AAO observes that the record before us reveals a series of convictions which also render the applicant ineligible for lawful permanent resident status. On appeal, counsel argues that the applicant supplied the necessary court records on July 24, 2001, one day after they were requested by notification on Form I-72, issued on July 23, 2001. Counsel asserts that these documents were not given full consideration before denying the application for adjustment from temporary to permanent residence.

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 the applicant is subject to Wisconsin state convictions for *Carrying a Concealed Weapon (Class A misdemeanor)* on April 18, 2000 (Case No. [REDACTED]); *Bail Jumping (Class A misdemeanor)* on November 13, 1996 (Case No. [REDACTED]); *Violation of a Restraining Order (Class A misdemeanor)* on November 13, 1995 (Case No. [REDACTED]); *Violation of a Harassment Injunction (Misdemeanor)* on November 13, 1995 (Case No. [REDACTED]) and *Disorderly Conduct (Class B misdemeanor)* on January 24, 1994 (Case No. [REDACTED]). These offenses all took place in Wisconsin, and are misdemeanors under the Wisconsin state criminal statutes.

Counsel has not provided orders of expungement. Even if counsel had provided evidence of Wisconsin 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 five misdemeanors. He is therefore ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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