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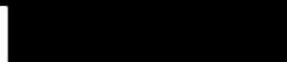
U.S. Citizenship
and Immigration
Services

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FILE:



MSC 07 163 12381

Office: LOS ANGELES

Date: NOV 17 2008

IN RE:

Applicant:



APPLICATION:

Application for Adjustment from Temporary to Permanent 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 National Benefits Center. 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 "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status was denied by the District Director, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of three misdemeanors, which rendered him statutorily ineligible for permanent resident status.

On appeal, counsel asserts that the applicant no longer stands convicted of three misdemeanors in light of the judge's motion vacating one of the applicant's convictions.

An applicant for adjustment from temporary to permanent resident status must establish: 1) that he or she is admissible to the United States as an immigrant (with certain exceptions) and 2) that he or she has not been convicted of any felony or three or more misdemeanors committed in the United States. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C).

"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 three misdemeanor offenses in the State of California. In 1986, the applicant was convicted of *driving under the influence of alcohol* in San Bernadino County. The two latest convictions stemmed from a February 9, 2000 arrest in which the applicant was charged with *driving under the influence of alcohol* in violation of sections 23152(a) and *driving with a blood alcohol content of 0.08% or more* in violation of section 23152(b) of the California Vehicle Code. On April 6, 2000, the applicant pled guilty to both counts and was therefore convicted. He was sentenced to 36 months of probation and ordered to pay a fine. (Case No. [REDACTED]).

On appeal, counsel points out that on January 16, 2004, the court granted a motion to withdraw the applicant's plea pursuant to a plea bargain, thereby allowing the applicant to plead guilty to count one (driving under the influence of alcohol), while dismissing count two (driving with a blood alcohol content of 0.08% or more). In light of the court's action, counsel now argues that the applicant has only two misdemeanor convictions and is therefore not statutorily ineligible for permanent resident status based on his criminal record. Counsel further states that Citizenship and Immigration Services erred in citing *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), as the court's action in the present matter was not rehabilitative and the applicant's conviction was not expunged. In light of counsel's argument, the AAO points to *Matter of Pickering*, a more recent precedent decision in which the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). As discussed in the AAO's prior decision, section 101(a)(48)(A) of the Act defines the term "conviction" as "a formal judgment 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 form of punishment, penalty, or restraint on the alien's liberty to be imposed."

In the present matter, the applicant was convicted of three misdemeanors and sentenced accordingly. Although judgment with respect to one of the convictions was vacated pursuant to a motion, there is no indication that such court action was prompted by a procedural or substantive defect in the underlying proceeding. *See Matter of Pickering*, 23 I&N Dec. at 624. In fact, in his notice of motion to vacate, dated January 13, 2004, counsel expressly stated that the basis for the motion was the applicant's lack of knowledge that his plea of guilty to two misdemeanor offenses in 2000 may jeopardize his U.S. residency. Thus, the subsequent granting of counsel's motion, which resulted in the dismissal of one of the applicant's misdemeanor convictions, was motivated not by procedural or substantive defect, but rather by the effect that the convictions had on the applicant's immigration status. For this reason, the motion to vacate one of the applicant's misdemeanor convictions will not alter the prior determination that the applicant is statutorily ineligible based on his three misdemeanor convictions. The applicant 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 dismissed. This decision constitutes a final notice of ineligibility.