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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:

XPW 92 271 0356

Office: Los Angeles

Date:

FEB 11 2009

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status was denied by the 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.

On appeal, the applicant states that one of the misdemeanor convictions was a bench warrant for failure to appear, one of them was a traffic citation, and that he has only been convicted of one misdemeanor offense.

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 term 'conviction' means, with respect to an alien, 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.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The record reveals the applicant was convicted of the following offenses: *Driving With a Blood Alcohol Content of .08% or Greater*, a misdemeanor offense under CA Penal Code § 23152 on November 30, 2005 in the Metropolitan Courthouse Division, County of Los Angeles, Superior Court of California (Docket # [REDACTED]); *Public Intoxication* on November 8, 2000, an infraction under the Los Angeles Municipal Code 41.27, in Los Angeles Traffic Court (Docket # [REDACTED]); *Possession of less than 1 oz of Marijuana* on November 8, 2000, a misdemeanor offense under CA H&S § 11357, in Los Angeles Traffic Court (Docket # [REDACTED]); *Possession of Narcotic Controlled Substance*, on June 13, 1994, a felony offense under CA H&S 11350, in the Metropolitan Courthouse Division, County of Los Angeles, Superior Court of California (Docket # [REDACTED]).

[REDACTED]; the court ordered the charge diverted for two years and subsequently dismissed the charge pursuant to CA Penal Code 1000.3 on March 13, 1995; *Failure to Appear after Written Promise* on July 8, 2000, a misdemeanor offense under CA Penal Code § 853.7 (Case No. [REDACTED], CA Police Department, Los Angeles Valley Jail).

The applicant's conviction of public intoxication is an infraction under the Los Angeles Municipal Code, and does not negatively impact the applicant's eligibility for the benefit.

The applicant argues that the bench warrant issued for his failure to appear does not constitute a separate misdemeanor offense. CA Penal Code § 853.7 states that "[a]ny person who willfully violates his or her written promise to appear or a lawfully granted continuance of his or her promise to appear in court is guilty of a misdemeanor, regardless of the disposition of the charge upon which he or she was originally arrested." The applicant is guilty of a misdemeanor offense under this charge.

The director did not address the applicant's felony conviction. Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan*, *id.*

The AAO finds that the applicant's 1994 felony conviction has been expunged and is no longer a valid conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The AAO has reviewed the cited authority and concludes that the expungement of the applicant's conviction in this case fits within the parameters outlined in *Lujan-Armendariz*. In that case, the Court held that an alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand "convicted" for immigration purposes, because the alien defendant would have qualified for treatment under the FFOA had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a "conviction" for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if he or she has no prior drug offense convictions, has not previously been the subject of a disposition under FFOA, and was placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him or her from

probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique, id.*

Like the alien defendant in *Lujan-Armendariz*, the applicant in the matter presently before the AAO would have qualified for disposition under the provisions of the FFOA with respect to the 1994 felony conviction. First, the AAO observes that the crime for which the applicant stands convicted is a first time offense for “simple possession of a controlled substance.” He has not previously been the subject of a disposition under the FFOA, and he was sentenced to a term of probation. The entry of judgment was deferred, and the applicant was placed on probation for a period of 24 months. Ultimately, the court granted the applicant’s motion to set aside the guilty plea, pursuant to section 1000.3 of the California Penal Code. Thus, the applicant would have qualified for treatment under the FFOA had he been charged with a federal offense. Therefore, the applicant’s expungement under California state law is the equivalent of treatment under the FFOA, and is not a valid felony conviction for immigration purposes.

The applicant stands convicted of three 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 dismissed. This decision constitutes a final notice of ineligibility.