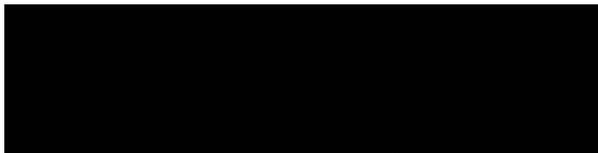


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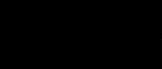
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FILE:



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Office: CALIFORNIA SERVICE CENTER

Date:

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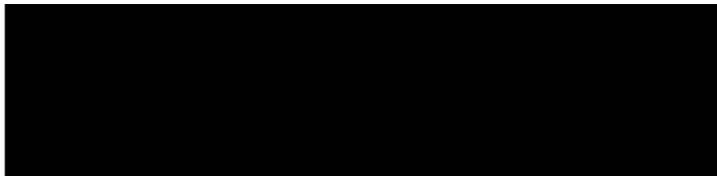
Applicant:



APPLICATION:

Termination of 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. 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.

A handwritten signature in ink, appearing to be "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The applicant's status as a temporary resident was terminated by the Director, California Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act). The applicant was granted temporary resident status on May 12, 1989. During a routine procedure to replace a lost employment authorization document, a fingerprint check performed on August 3, 2003 revealed that the applicant was arrested on January 25, 1997 by the police department of Phoenix, AZ. The applicant was charged with:

- (1) One count of violating Chapter 13, section 3408 of the Arizona Revised Statutes – *Possession of Narcotic Drugs*,
- (2) One count of violating Chapter 13, section 3415 of the Arizona Revised Statutes – *Possession/Mfg. of Drug Paraphernalia*, and
- (3) One count of violating section 5499 of the Arizona Revised Statutes – *Driving with a Suspended/Revoked License*.

The AAO notes that both drug offenses listed above are considered felony offenses under Arizona law. The record indicates that the *Possession of Narcotic Drugs* charge was dismissed pursuant to a plea agreement and the applicant pleaded guilty to one count of violating Chapter 13, section 3415 of the Arizona Revised Statutes – *Possession/Mfg. of Drug Paraphernalia*. The applicant was sentenced to 60 days in jail and a term of probation for three years. There is no record of disposition for the charge of *Driving With a Suspended License*.

The director issued a Notice of Intent to Terminate (NOIT) on August 28, 2006, informing the applicant that the fingerprint background investigation suggested that the applicant may have disqualifying felony convictions which would require that his temporary resident status be terminated. In a decision dated November 20, 2006, the Director terminated the applicant's temporary resident status because of the applicant's failure to meet his burden of proving that he was not convicted of one felony or three misdemeanor offenses.

The applicant is represented by counsel on appeal. Counsel maintains that the applicant has only one misdemeanor conviction, and therefore remains eligible for temporary residence status. In support of his assertions, counsel submitted two documents: (1) a minute entry dated September 22, 2006 from the Superior Court of Arizona, Maricopa County and signed by the [REDACTED], Judge of the Superior Court, and (2) an order filed on September 30, 1998 in the Superior Court of Arizona, Maricopa County that refers to Criminal Docket No. [REDACTED]. The order filed on September 30, 1998 states that the applicant has substantially complied with the terms of the "Drug Court contract" and orders that the applicant be released from probation. The order also states that the "offense [is] now designated a misdemeanor."

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(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).

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 has reviewed the evidence of record in this case. Initially, we note that the applicant does not identify which of his three criminal charges was designated as a misdemeanor by the court's September 30, 1998 order. Because the FBI background report suggests that the drug possession charge was dismissed, and there is no evidence in the record regarding the driving with a revoked/suspended license charge, we conclude that the order identifying Criminal Docket No. [REDACTED] refers to violating Chapter 13, section 3415 of the Arizona Revised Statutes – *Possession/Mfg. of Drug Paraphernalia* and it is this conviction that the court now identifies as a misdemeanor as opposed to its statutory classification as a felony offense. Nonetheless, the AAO

concludes that the conviction remains a felony for immigration purposes and thus disqualifies the applicant from adjustment to permanent resident status.¹

It is clear from the court's order issued on September 30, 1998, that the conviction was reduced from its original felony classification to a misdemeanor because the applicant successfully completed a drug rehabilitation type program and complied with the terms of his three year sentence of probation. The court's action in this case is a form of post-conviction relief akin to an expungement, vacatur, or dismissal of the charges that is generally not recognized in immigration proceedings, unless the court's action was undertaken to correct a significant procedural or substantive error in the original criminal proceedings.² There is nothing in the record, and the applicant has not offered any evidence on appeal to suggest that his original felony conviction was reduced to a misdemeanor because of a procedural or constitutional defect in the underlying trial court proceedings.

As noted above, to meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony, and in this case he has failed to do so. Therefore, he has failed to establish by a preponderance of the evidence that he has no disqualifying criminal convictions and is otherwise admissible to the United States, as required under both 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5). The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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

¹ The record also reveals that the applicant was apprehended on September 8, 1991 in Tucson, Arizona, while transporting two illegal aliens to Phoenix. However, immigration officials declined to prosecute the applicant on this charge.

² The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type rehabilitative statute unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).