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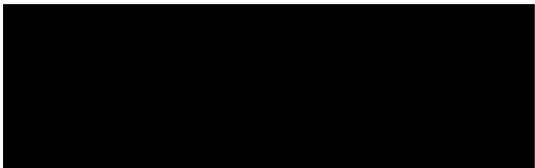
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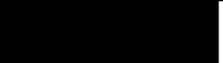
U.S. Citizenship
and Immigration
Services

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FILE:



XID 88 123 2006

Office: LOS ANGELES

Date: JAN 13 2009

IN RE:

Applicant:



APPLICATION:

Application for Status as a Temporary Resident pursuant to Section 210 of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

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 remanded for further action, you will be contacted.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center. The director subsequently reopened and again denied the application. The applicant filed a timely appeal. The Administrative Appeals Office (AAO) remanded the case upon request of the director. The application was then denied by the Director, Los Angeles,¹ and is again before the AAO on appeal. The appeal will be dismissed.

The application was initially denied because the applicant failed to demonstrate that he had performed qualifying agricultural employment during the 12-month period ending May 1, 1986. Upon review, the director reopened the decision, and then denied the application because the applicant had been convicted of a felony.

On appeal, counsel argues that the applicant was convicted of a felony prior to the effective date of the statute providing for the denial of permanent resident status and termination of temporary resident status for aliens convicted of one felony or three misdemeanors.

The Attorney General [now Secretary, Department of Homeland Security] may deny adjustment to permanent residence and terminate the temporary residence status of a special agricultural worker if the applicant is convicted of a felony or three or more misdemeanors in the United States. Section 210(a)(3)(B)(ii) of the Immigration and Nationality Act (INA)(the Act), 8 U.S.C. § 1160(a)(3)(B)(ii). An applicant is ineligible for temporary residence if he or she has been convicted of any felony or three or more misdemeanors in the United States. 8 C.F.R. § 210.3(d)(3).

On December 1, 1986 the applicant was arrested by the San Bernardino Sheriff's Department for a violation of Cal. Health & Safety Code § 11352, *Transportation/sale designated controlled substances*. No criminal complaint was filed following this arrest.

On April 21, 1987 the applicant was arrested and charged with conspiracy to distribute cocaine and multiple related counts. On December 11, 1987 the applicant was convicted in the Superior Court of California, Los Angeles County, of a violation of Cal. Health & Safety Code § 11351, *Possession or purchase for sale of designated controlled substances*, case number [REDACTED], a felony. On October 31, 1990, the conviction was set aside and the case was dismissed pursuant to section 1203.4 of the California Penal Code, a state rehabilitative statute.

The director denied the application for temporary resident status because the applicant was convicted of a felony and was thus ineligible for adjustment to permanent residence under Section 210(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1160(a)(3)(B)(ii). On appeal, counsel states that the director found the applicant ineligible for adjustment to temporary resident status under a statute and regulation with an effective date subsequent to the criminal conviction.

¹ The director of the Western Service Center and the director of the Los Angeles Office will be referred to interchangeably as the director.

An appeal must be decided according to the law as it exists on the date it is before the United States Citizenship & Immigration Services (USCIS). In the absence of explicit statutory direction to the contrary, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after an application is filed, eligibility must be determined under those more restrictive terms. Conversely, if an amendment makes a statute more generous, eligibility is determined under the more generous terms of the amendment. *Matter of George*, 11 I&N Dec. 419 (BIA) 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968)

Applying the statute that renders ineligible for adjustment of status to permanent residence any alien who has committed one felony or three misdemeanors and provides that the director may terminate the temporary residence of an alien who has been convicted of a felony or three misdemeanors does not constitute an impermissible retroactive application of the law in this case. The Supreme Court established a two-part test to determine whether a statute should have a retroactive effect in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The first step is to determine Congressional intent. *Landgraf* at 280; *see also*, *INS v. St. Cyr*, 533 U.S. 289 (2001); *Martin v. Hadix*, 527 U.S. 343, 352 (1997). The second step in determining whether a statute is impermissibly retroactive is to determine:

whether [the statute and regulation] attach[] new legal consequences to events completed before its enactment. . . A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. . . [Whether a statute acts retroactively is a judgment] informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

Id. In this case, Congress expressly intended upon the enactment of the law that an alien would be ineligible to adjust status to permanent residence, and that the director may terminate any temporary residence previously granted, if the alien is convicted of a felony or three misdemeanors. The law was enacted on December 18, 1989. PL 101-238, 103 stat 2099; Section 210(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1160(a)(3)(B)(ii). The implementing regulation under which an applicant is declared ineligible for temporary residence if he or she has been convicted of any felony or three misdemeanors, had an effective date of April 5, 1990. 55 FR 12629; 8 C.F.R. § 210.3(d)(3).

The applicant in this case would not have been eligible for adjustment to permanent resident status until December 1, 1990, after the effective date of the law providing that an alien who has committed one felony is not eligible to adjust status to permanent residence and that the director may terminate any temporary residence previously granted. 8 C.F.R. § 210.5(a)(2). Congress clearly intended the law upon enactment to prohibit any felon who had previously been granted temporary status from automatic adjustment to permanent residence under section 210(a)(2) of the Act, 8 U.S.C. § 1160(a)(1); 8 C.F.R. § 210.5. The statute thus does not have an impermissible retroactive effect as to any permanent benefit the applicant seeks as a special agricultural worker.

Under the terms of the law, any temporary status previously granted to the applicant would have been subject to termination because of his felony conviction as of the effective date of the legislation.

As the law was enacted prior to the applicant's adjustment of status to temporary residence, and prior to the time the applicant would have been eligible to adjust to permanent residence under 8 C.F.R. § 210.5(a)(2), there is no impermissible retroactive impact of the law under which the director denied the Form I-700 application.

The record reflects, and the applicant admits, that the applicant has been convicted of a felony. "Felony" means a crime committed in the United States, punishable by imprisonment for more than one year, regardless of the term actually served, if any. 8 C.F.R. § 245a.1(p).

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 reflects that the court in this case ordered the applicant's conviction vacated under the California rehabilitative statute at section 1203.4 of the California Penal Code. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In this case, the applicant does not claim any defect in the underlying criminal proceedings.

Congress has not provided any exception for applicants who have been accorded rehabilitative treatment under state law. Any rehabilitative action that overturns a state conviction is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. at 523, 528. Therefore, the applicant remains "convicted" of the felony offense cited above for immigration purposes.

Because of his felony conviction, the applicant is ineligible to adjust to temporary resident status under 8 C.F.R. § 210.3(d)(3). There is no waiver available to an applicant convicted of a felony or three or more misdemeanors committed in the United States.

Beyond the decision of the director, the applicant is not eligible for adjustment of status to temporary residence as he has been convicted of trafficking in a controlled substance. Section 212(a)(2)(C) of the Act, 8 U.S.C. § 1182(a)(2)(C). There is no waiver available to an applicant convicted of trafficking in a controlled substance. For this additional reason, the application may not be approved.

An applicant for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has worked the requisite number of days, is admissible to the United States under the provisions of section 210(c) of the Act, 8 U.S.C. § 1160, and is otherwise eligible for adjustment of status. 8 C.F.R. § 210.3(b)(1). The applicant has failed to meet this burden.

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