

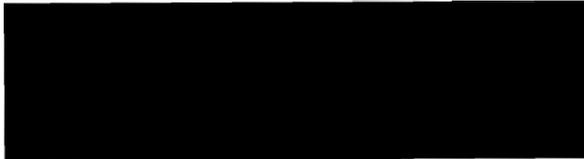
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

XFR 88 151 03262

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 30 2009**

IN RE:

Applicant:



APPLICATION:

Application for 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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The termination of temporary resident status by the Director, California Service Center, is before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant had been convicted of at least three misdemeanors in the United States.

On appeal, the applicant argued that the director's finding that the expungement of his conviction be given no effect is contrary to congressional intent. The applicant argued that a fair review of the record and court documentation do establish that he was relieved of the liabilities of his August 22, 1987 conviction. The applicant asserted that the director "ought to have used a balancing approach in reaching its decision." The applicant requested a copy of the record of proceedings. The applicant's request was complied with on August 13, 2008.

The temporary resident status of an alien who has been convicted of a felony or three or more misdemeanors in the United States may be terminated at any time. Section 245A(b)(2) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(2)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(u)(1)(iii).

"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).

At the time of his interview, on June 1, 1988, the applicant informed the interviewing officer that he had been arrested approximately five times between 1981 and 1988. Accordingly, the applicant was given a Form I-72 requesting that he provide evidence of his arrests from 1981 to 1988. The applicant, in response, submitted a local summary criminal history document from the Dinuba Police Department in California, which indicated the following:

1. On June 5, 1983, the applicant was charged with driving under the influence, a violation of section [REDACTED]. The applicant served 54 hours in jail, paid a fine and was placed on probation for three years.
2. On December 29, 1983, the applicant was arrested under warrant no. [REDACTED] for failure to remand, a violation of [REDACTED]. The applicant served 54 hours in jail and paid a fine.
3. On December 23, 1984, the applicant was arrested under warrant no. [REDACTED] for failure to remand pursuant to a driving under the influence offense. The applicant served 54 hours in jail, paid a fine and was placed on probation for three years.
4. On May 12, 1985, the applicant was arrested for public intoxication, a violation of section 647(f) PC. The applicant was fined \$85.00. Case no. [REDACTED]

5. On July 21, 1985, the applicant was arrested under warrant no. [REDACTED] for failure to pay fine, a violation of section 166.4 PC pursuant to his May 12, 1985 offense for public intoxication. The applicant was fined \$85.00 for each offense.
6. On August 22, 1987, the applicant was arrested for public intoxication, a violation of section 647(f) PC. The applicant was fined \$85.00. Case no. [REDACTED]

On November 12, 1993, the director received an expungement order from the applicant, which indicated that on October 4, 1993, the conviction for number six above was expunged in accordance with section 1203.4 PC. The applicant indicated that he could not obtain expungement orders for numbers one and four above because "the court has informed me that the records do not exist anymore." The applicant, in a statement dated November 1, 1993, stated, in part:

A [sic] order to dismissed [sic] the conviction of June 5, 1983 Section violation [REDACTED] VC and May 12, 1985 647(F) pc could not have been filed as the records do not exist.

According to the Federal Regulations, three (3) or more misdemeanors will disqualify you for your 245A application. I am now eligible as I only have two (2) misdemeanors.

It is noted that in response to a Notice of Intent to Terminate dated August 31, 2004, the applicant submitted a court document dated September 8, 2004 from the Tulare County Superior Court which listed the offenses in numbers four and six above as well as a charge of violating sections "23152(a)/(b) w/1 pr," driving under the influence of alcohol and driving with .10 percent or more alcohol in the blood. Case no. [REDACTED] The court document also indicated that the cases "may have been destroyed" pursuant to Government Code [REDACTED]

As the courts routinely destroy old records as a matter of administrative procedure; this act does not affect an underlying charge or conviction.

In issuing the Notice of Termination, the director informed the applicant that under the 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. 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).

While not mentioned in the director's notice, it is noted that the Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the 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. The BIA 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.

Despite the expungement of the applicant's conviction in number six above, the applicant remains convicted, for immigration purposes, of the charge above.

Although these precedent decisions were finalized after the applicant applied for temporary residence, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices.

The applicant has been convicted of three misdemeanors and, therefore, is ineligible for the benefit being sought. 8 C.F.R. § 245a.2(u)(1)(iii). Within the legalization program, no waiver is available to an alien convicted of three or more misdemeanors committed in the United States. An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she is admissible to the United States under the provisions of section 245a of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden.

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