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FILE: [REDACTED]
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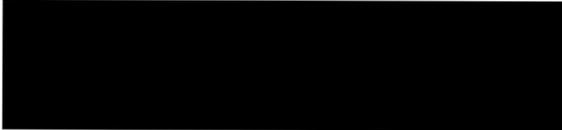
Office: LOS ANGELES

Date: JUN 01 2009

IN RE: Applicant: [REDACTED]

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. 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 adjustment from temporary to permanent resident status was denied by the Director, Los Angeles, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of three misdemeanors.

On appeal, counsel asserts that the applicant's misdemeanor convictions have been expunged. The entire record was reviewed and considered in rendering a decision on the appeal.

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).

"Conviction" is defined under section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) as a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where 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 the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Court dispositions in the record reflect that the applicant has been convicted, pursuant to 8 C.F.R. § 245a.1(o), of the following misdemeanor offenses:

On July 13, 1984, the applicant was convicted of *Driving Under the Influence* in violation of section 316.193 of the Florida Statutes and sentenced to six months probation (Circuit/County Court for Broward County, Florida, [REDACTED]). The maximum term of imprisonment for a first violation of this statute is not more than six months. Fla. Stat. Ann. § 316.193 (West 1987).

- On October 8, 1987, the applicant was convicted of *Driving While License Suspended or Revoked* as a second degree misdemeanor in violation of section 322.34 of the Florida Statutes.

A second degree misdemeanor is punishable by a definite term of imprisonment not exceeding 60 days. Fla. Stat. Ann § 775.082 (West 1987).

- On April 1, 1997, the applicant was convicted of *Driving Under the Influence* with .08% or more, by weight, of alcohol in his blood in violation of section 23152(b) of the California Vehicle Code and sentenced to 36 months summary probation and 48 hours in Los Angeles County jail (Municipal Court of Metropolitan Courthouse Judicial, County of Los Angeles, [REDACTED]). This offense is a misdemeanor pursuant to section 40000.15 of the California Vehicle Code. The maximum term of imprisonment for a first violation of this statute is not more than six months. Cal. Vehicle Code § 23160 (West 1997).
- On July 29, 1997, the applicant was convicted of *Driving with a Suspended License* in violation of section 14601.2(a) of the California Vehicle Code and sentenced to three years summary probation (Municipal Court of West Covina Courthouse Judicial, County of Los Angeles, [REDACTED]). **The maximum term of imprisonment for a first violation of this statute is not more than six months.** Cal. Vehicle Code § 14601.2(d) (West 1997).
- On October 20, 1997, the applicant was convicted of *Driving with a Suspended License* in violation of 14601.2(a) of the California Vehicle Code and sentenced to three years summary probation and 30 days imprisonment (Municipal Court of West Covina Courthouse Judicial, County of Los Angeles, [REDACTED]). The maximum term of imprisonment for a first violation of this statute is not more than one year. Cal. Vehicle Code § 14601.2(d) (West 1997).

In addition, a Federal Bureau of Investigation (FBI) report based upon the applicant's fingerprints reveals that on April 30, 1990, the applicant was convicted of *Driving Under the Influence* in violation of section 316.193 of the Florida Statutes and sentenced to one year probation (Palm Beach County Court, [REDACTED]). The maximum term of imprisonment for a second violation of this statute is not more than nine months. Fla. Stat. Ann. § 316.193 (West 1990).

On appeal, counsel asserts that the applicant's three misdemeanor convictions have been expunged.¹ Counsel furnished the following orders setting aside judgments pursuant to section 1203.4 of the California Penal Code.:

- A court order setting aside the finding of guilt, entering a plea of not guilty, and dismissing the complained related to the applicant's April 1, 1997 conviction for *Driving Under the Influence* with .08% or more, by weight, of alcohol in his blood in violation of section 23152(b) of the

¹ Although the record reflects that the applicant has been convicted of six misdemeanors, the director only cited to the applicant's three misdemeanors in 1997 as the basis for denial. The expungments furnished by counsel relate to those three misdemeanors.

California Vehicle Code (Superior Court of California, Metropolitan Branch Court, County of Los Angeles, [REDACTED], December 3, 2007).

- A court order setting aside the finding of guilt, entering a plea of not guilty, and dismissing the complaint related to the applicant's July 29, 1997 conviction for *Driving with a Suspended License* in violation of section 14601.2(a) of the California Vehicle Code (Municipal Court of California, County of Los Angeles, [REDACTED], October 18, 2007).
- A court order setting aside the finding of guilt, entering a plea of not guilty, and dismissing the complaint related to the applicant's October 20, 1997 conviction for *Driving with a Suspended License* in violation of 14601.2(a) of the California Vehicle Code (Municipal Court of California, County of Los Angeles, [REDACTED], October 18, 2007).

Under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), 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 by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), a more recent precedent decision, 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.

On appeal, counsel asserts, in pertinent part, that the Ninth Circuit Court of Appeals disagreed with the holding in *Matter of Roldan* and in a series of cases determined that state judicial expungements will be considered effective for eliminating the conviction if the alien would have been eligible under FFOA or a similar statute. Counsel states that in *In re Luviano*, 21 I&N Dec. 235 (BIA 1996), the Board of Immigration Appeals (BIA) held that an alien whose conviction for a non-narcotics related offense that had been expunged pursuant to section 1203.4(a) of the California Penal Code had not been convicted for purposes of section 241(a)(2)(C) of the Act. Counsel notes that *Matter of Marroquin*, 23 I&N Dec. 705 (AG 2005), concluded that the new federal definition of conviction did not affect the Board's decision in *Luviano* and therefore the decision is still controlling.

The AAO disagrees with counsel's interpretation of *Matter of Marroquin*, *supra*. The applicant's convictions were expunged pursuant to section 1203.4(a) of the California Penal Code. In *Matter of Marroquin*, 23 I&N Dec. 705, 717, the Attorney General held:

There remains the final question whether the expungement that Marroquin-Garcia received in this case removes that conviction from the scope of the new federal statutory definition of “conviction.” As has already been noted, section 1203.4(a) of the California Penal Code does not serve to provide relief that is based on a judgment about the legal propriety of the underlying judgment of conviction. It merely provides a means by which certain defendants who have been lawfully convicted and subjected to punishment may be relieved of many, though not all, of the remaining legal consequences that normally attend an adjudication of guilt. Therefore, notwithstanding the relief that petitioner received under section 1203.4(a) of the California Penal Code, he has been “convicted” for purposes of what was then section 241(a)(2)(C) of the INA.

The AAO finds that pursuant to the above holding in *Matter of Marroquin*, the applicant’s expungements do not erase his convictions for immigration purposes. Accordingly, the applicant remains convicted of the three misdemeanors the director cited as the basis for denial. Furthermore, as previously discussed, the record reflects that the applicant was convicted of three additional misdemeanors.

In conclusion, the applicant has not met his burden of proof in establishing his eligibility for adjustment to permanent resident status pursuant to 8 C.F.R. § 245a.3(b). The record reveals that the applicant has been convicted of six misdemeanors. There is no documentation in the record to show that he has not been convicted of these offenses. The applicant is, therefore, ineligible for adjustment of status under section 245A of the Act. 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.