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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529 - 2090



U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED]  
MSC-05-323-10789

Office: LOS ANGELES

Date: JUN 08 2009

IN RE: Applicant: [REDACTED]

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:

[REDACTED]

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 pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004, (CSS/Newman Settlement Agreements) was denied by the director of the Los Angeles office, and 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), and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application, finding that the applicant was ineligible to adjust to temporary resident status because he had been convicted of three or more misdemeanors in the United States.

On appeal, counsel asserts that the applicant has been convicted of only one misdemeanor and thus is not ineligible to adjust to temporary resident status.<sup>1</sup>

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status under the provisions of the Immigration and Nationality Act (the Act). Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255(a)(4)(B).

The regulations provide relevant definitions at 8 C.F.R. § 245a. “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 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 Act; 8 U.S.C. § 1101(a)(48)(A).

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.

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<sup>1</sup> The applicant seems to be arguing in the alternative that if the AAO determines that the applicant has been convicted of three misdemeanors, since one of the misdemeanor convictions has been expunged, rendering the conviction inoperative for immigration purposes, the applicant is not ineligible for adjustment to temporary resident status.

The record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses:

- On April 15, 1997, the applicant was charged with violating section 273.5(a) of the California Penal Code (PC), *corporal injury - spouse*. On April 17, 1997 the applicant pled guilty to the charge, a misdemeanor (Municipal Court of California, Central Orange County, [REDACTED])<sup>2</sup>
- On May 27, 1999, the applicant was charged with violating section 148.9 (PC), *falsely representing self to officer*. On July 14, 1999 the applicant pled guilty to the charge, a misdemeanor (Municipal Court of California, Central Orange County, [REDACTED])<sup>3</sup> On February 7, 2007, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the conviction was set aside, a plea of not guilty was entered and the case was dismissed.
- On July 19, 1999, the applicant was charged with violating section 602(j) (PC), *entering land to interfere with lawful business*. On July 20, 1999 the applicant pled guilty to the charge, a misdemeanor (Municipal Court of California, Central Orange County, [REDACTED])<sup>4</sup>

Even though counsel has obtained an order vacating one of the applicant's three misdemeanor convictions due to the applicant's successful completion of the terms of his probation, 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, supra*, at 523, 528 (BIA 1999).<sup>4</sup> Therefore, the applicant remains "convicted" of the three misdemeanor offenses cited above for immigration purposes.

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<sup>2</sup> In the instant application, the applicant has not admitted to having been convicted of this misdemeanor. However, in a statement given on November 11, 2000 as part of deportation proceedings the applicant admitted to a 1997 conviction for a crime involving domestic violence.

<sup>3</sup> The applicant has not admitted to having been convicted of this misdemeanor.

<sup>4</sup> Counsel for the applicant asserts that the expungement of his conviction for a violation of section 148.9 (PC), *falsely representing self to officer*, resulted in eliminating the immigration consequences of the conviction pursuant to the holding in *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000). In *Lujan-Armendariz v. I.N.S., Id.*, the Ninth Circuit partially reversed the holding in *Matter of Roldan, Id.*, in holding that that there is no conviction for immigration purposes where there is a first-time offense involving simple possession of a controlled substance that is expunged pursuant to a state rehabilitative statute, if first offender treatment would have been accorded under the Federal First Offender Act (FFOA), 18 U.S.C. § 3607, had the case been prosecuted federally. However, the holding in *Lujan-Armendariz, Id.*, has not been extended to cases other than the offense of simple possession of a controlled substance, such as the applicant's misdemeanor conviction for *falsely representing self to officer*. See *Ramirez-Castro*, 287 F.3d 1172 (9<sup>th</sup> Cir. 2002), holding that *Lujan-Armendariz, Id.*, does not apply to a case in which the expungement involves a misdemeanor conviction for carrying a concealed weapon, a conviction found not to be within the scope of the FFOA.

Because of the applicant's three misdemeanor convictions, he is ineligible to adjust to temporary resident status. There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States.

The AAO also notes that on February 16, 2001 the applicant was deported from the United States based upon his being present in the United States without having been admitted. See section 212(a)(6)(A)(i) of the Act. Although this ground of inadmissibility is waivable, even if the applicant were to be granted a waiver he remains ineligible to adjust to temporary resident status due to his multiple criminal convictions.<sup>5</sup>

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

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<sup>5</sup> The record of those deportation proceedings is contained in the administrative file