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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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PUBLIC C



U.S. Citizenship
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Services

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JUN 11 2009



FILE [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
XHP 88 509 6191

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:

SELF-REPRESENTED

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 black ink, appearing to read "J. Grissom".

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's temporary resident status was terminated by the director, California Service Center on February 5, 1993. The appeal of the termination is before the Administrative Appeals Office. The appeal will be dismissed.

The director terminated the applicant's temporary resident status because the applicant has three misdemeanor convictions. The applicant, who represents himself on appeal, states that two of the three convictions have been dismissed. The applicant maintains that he remains eligible for temporary resident status.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to meet his burden of establishing continuous unlawful residence in the United States for the duration of the requisite period, that he has no disqualifying criminal convictions and is thus otherwise admissible to the United States. Here, the applicant has failed to meet this burden because of his felony conviction.

For purposes of qualifying for certain immigration benefits, 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 temporary resident status. Section 245A(a)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1255a(a)(4)(B). "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).

The AAO has reviewed all of the documents and evidence in the file in their entirety. Criminal record documents indicate that the applicant has a series of convictions, including:

- (1) An April 26, 1990 conviction for one count of violating section 12500(A) of the California Vehicle Code – *Unlicensed Driver*. The applicant was sentenced to one year probation and ordered to pay a fine. [REDACTED]. This offense is classified as a misdemeanor.
- (2) A March 14, 1990 conviction for two counts of violating section 40508(A) of the California Vehicle Code – *Failure to Appear*. [REDACTED]. There is no indication in the file indicating the imposition of a penalty, except for the notation on the conviction record that the imposition of sentence was suspended. This offense is classified as a misdemeanor.

There is no evidence in the record to indicate that any of the applicant's misdemeanor convictions have been dismissed for any reason, and a dismissal for anything other than constitutional reasons would have no effect on his immigration status. 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. 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. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

As this case arises within the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit is applicable. The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute and the Ninth Circuit has applied the BIA's reasoning in *Matter of*

Pickering, supra, to California state criminal convictions.² The AAO concludes that the applicant's misdemeanor convictions remain valid for immigration purposes.

The applicant stands convicted of three misdemeanor offenses. He is therefore ineligible for adjustment to temporary resident status pursuant to 8 C.F.R. § 245a.2(c)(1). No waiver of such ineligibility is available. The decision of the director is affirmed.

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

² 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).