

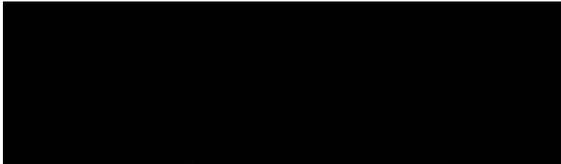
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U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [Redacted]
XAH 88 550 8059

Office: LOS ANGELES

Date: MAR 11 2009

IN RE: Applicant: [Redacted]

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, Los Angeles. The director denied the application and the Administrative Appeals Office (AAO) remanded a subsequent appeal. On remand, the director again denied the application. The denial is now 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 at least 90 man-days of qualifying agricultural employment during the 12-month period ending May 1, 1986, as landscaping, lawn service or gardening were not considered qualifying agricultural employment. Upon review, the AAO remanded with instruction to the director to provide the applicant the opportunity to submit proof that he worked 90 man-days of qualifying employment. The director denied the application, finding that the applicant had two or more misdemeanor convictions, and failed to establish his admissibility or eligibility for the benefit. On appeal, the applicant submits court records indicating that one of the misdemeanor convictions was dismissed.

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).

California Department of Justice records indicate that a bench warrant was issued for the applicant on December 19, 1984 for a violation of California Penal Code Section 166(4), *Willful Disobedience of Court Order, Failure to Pay Fine*, a misdemeanor offense (case no. [REDACTED]). The record contains no subsequent court disposition following the issuance of the bench warrant.

The applicant was arrested by the Santa Ana Police Department on April 20, 2002 and was convicted in the Santa Ana Municipal Court on May 20, 2002 for a violation of VC 23152(A) *Driving Under Influence Alcohol/Drugs*, a misdemeanor offense, and VC 23152(B), *Driving Under Influence Alcohol/.08%*, a misdemeanor offense (case no. [REDACTED]). On appeal, the applicant submits evidence that on November 7, 2008, the conviction under VC 23152(A) was set aside, the guilty plea changed to not guilty, and the case dismissed.

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 criminal 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 misdemeanor offense dismissed by the court on November 7, 2008.

The applicant's failure to obey a court order is a misdemeanor offense under California law. The applicant has failed to provide evidence that the fine was paid or that he was not convicted of the misdemeanor offense. The applicant has failed to establish his eligibility for the benefit. With three misdemeanor convictions, the applicant would be 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.

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(c), 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.