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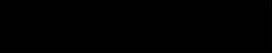
U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 12 2009**

XPW 91 053 0683

IN RE:

Applicant:



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. All documents have been returned to the National Benefits Center. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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 based on the determination that the applicant's drug-related criminal offenses rendered him statutorily ineligible for adjustment of status to that of a permanent resident.

On appeal, counsel disputes the director's finding on the basis that the applicant's convictions were set aside pursuant to California Penal Code section 1000.3.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C).

"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).

"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).

The record reveals that on February 15, 2002, in the State of California, the applicant pled guilty to one count of possession of a controlled or narcotic substance, a felony, in violation of section 11350(a) H&S and one count of using or being under the influence of a controlled substance, a misdemeanor, in violation of section 11550(a) H&S. The record shows that the applicant's two convictions were deferred pending his completion of an 18-month diversion program.

On appeal, counsel points to evidence showing that the applicant did in fact complete the diversion program and argues that the setting aside of the applicant's guilty pleas precludes U.S. Citizenship and Immigration Services (USCIS) from using the applicant's criminal offenses as the basis for an adverse decision. Thus, counsel asserts that the applicant's offenses should be considered under the relevant provisions of the Federal First Offender Act (FFOA), 18 U.S.C.A. § 3607, which contains, in part, the following provisions:

(a) Pre-judgment probation.--If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--

(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and

(2) has not previously been the subject of a disposition under this subsection;

the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

In light of the above, the applicant's felony conviction for possession of a controlled substance will not be considered for the purpose of determining the applicant's eligibility to adjust his status to that of a permanent resident. As the applicant's second controlled substance offense would not fall within the guidelines of the FFOA, the applicant stands convicted of a single misdemeanor offense. Therefore, the applicant has not been convicted of one felony or three misdemeanors and is not ineligible under section 245A(b)(1)(C)(ii) of the Act.

However, in order for the applicant to be eligible to adjust from temporary to permanent resident status, he must establish admissibility as an immigrant. *See* section 245A(b)(1)(C)(i) of the Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act. An alien is also inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act, formerly section 212(a)(23) of the Act.

In the present matter, only one of the applicant's convictions is subject to treatment under the provisions of the FFOA, thereby leaving the applicant with a single controlled substance violation to which the applicant has pled guilty. Thus, regardless of the fact that the conviction for this remaining offense was set aside, the statutory provision discussed above clearly indicates that an applicant's mere admission of having violated a law dealing with controlled substances is sufficient to render the applicant inadmissible. The fact that the applicant pled guilty to a violation of a law

relating to a controlled substance makes the applicant inadmissible, and therefore ineligible for the immigration benefit sought herein.

For purposes of determining the applicant's eligibility for the immigration benefit sought in the present proceeding, the applicant stands convicted of one drug-related offense. He is therefore inadmissible, as discussed above, and ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. §§ 245a.3(c)(1) and (2). No waiver of such ineligibility is available.

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