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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
MSC 05 328 10987

Office: LOS ANGELES

Date: **MAR 20 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: 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 remanded for further action, you will be contacted.

A handwritten signature in black ink, appearing to read "John F. Grissom".

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, and *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, Los Angeles, California. The decision 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 in the United States.

On appeal the applicant requests that his application be reconsidered as he has not been in trouble with the law since 1997. The applicant provides an expungement order for two of his convictions.

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. Section 245A(a)(4)(B) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B). The regulation provides relevant definition at 8 C.F.R. 245a.2(c)(1).

“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 record reflects the applicant’s criminal history in the State of California:

1. On November 5, 1990, the applicant was arrested and subsequently charged with violating section 23152(a) VC, driving under the influence, and section 23152(b) VC, driving with .08% or more alcohol in the blood. On January 14, 1991, the applicant pled guilty to violating section 23152(a) VC, a misdemeanor. The applicant was ordered to serve time in jail and placed on probation for five years. The remaining violation was dismissed. Case no. [REDACTED]
2. On July 12, 1997, the applicant was arrested and subsequently charged with violating section 23152(a) VC, driving under the influence, section 23152(b) VC, driving with .08% or more alcohol in the blood, section 14601.1(a) VC, driving while license is suspended, and section 12500(a) VC, driving without a license. On August 21, 1997, the complaint was amended to include a violation of section 23103 VC, reckless driving. On August 21, 1997, the applicant was convicted of driving while license is suspended and reckless driving, both misdemeanors. For his driving while license is suspended conviction, the applicant was placed on probation for two years on the condition he pay a fine or serve 10 days in jail. For his reckless driving conviction, the applicant was placed on probation for three years on the condition he pay a fine or serve 10 days in jail, and enroll in an Alcoholic Anonymous program. The remaining violations were

dismissed. On February 7, 2007, the convictions were expunged in accordance with section 1203.4 PC. Case no. [REDACTED]

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, 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. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the 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. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains "convicted" for immigration purposes.

Finally, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all U.S. Citizenship and Immigration Services offices.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungements.

The applicant is ineligible for temporary resident status because of his three misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden.

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