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

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U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

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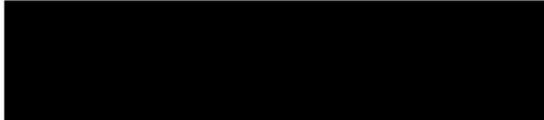
SEP 29 2009

XPW 89 278 01672



IN RE:

Applicant:



APPLICATION: Application for Adjustment from Temporary to Permanent 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of at least three misdemeanors in the United States, and he was therefore ineligible for adjustment from temporary to permanent resident status.

The Director sent a notice informing the applicant that his original Form I-694, Notice of Appeal, filed on August 28, 1992, was not contained in the record.¹ The applicant was directed to submit a duplicate copy of his Form I-694, and was provided with copies of Form I-694 in the event he did not retain a copy of his original appeal. The applicant was provided 30 days in which to reconstruct the appeal.

The applicant, in response, submitted a duplicate Form I-694.

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(b)(C)(ii) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(a)(4)(B); 8 C.F.R. 245a.3(c)(1).

"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).

At the time of his interview for temporary residence on December 9, 1987, the applicant informed the interviewing officer that he had been arrested for driving while intoxicated in 1986, spent 20 days in jail and paid a fine.

On his Form I-698, Application to Adjust Status from Temporary to Permanent Resident, the applicant indicated that he was arrested for driving under the influence and was sentenced to 393 days in the Los Angeles County Jail.

¹ According to the documentation in the record, at the time the applicant filed the Form I-694 in 1992, he requested a copy of the record of proceedings. On March 11, 1993, the applicant's Freedom of Information Act request was administratively closed.

On November 21, 1989, the applicant was requested to submit the court dispositions for all arrests. The applicant, in response, submitted a Form K-4 dated January 22, 1990, from the California Department of Motor Vehicles, which revealed the following offenses:

1. On February 13, 1988, the applicant was arrested for driving under the influence, a violation of section 23152(a) VC. On March 16, 1988, the applicant was convicted of this misdemeanor offense. [REDACTED]
2. On May 14, 1988, the applicant was arrested for driving without a license, a violation of section 12500(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC. On October 6, 1988, the applicant was convicted of both misdemeanor offenses. [REDACTED]

On June 4, 1992, the director denied the Form I-698 application based on the termination of the applicant's temporary residence² due to his three misdemeanor convictions.

The FBI report dated February 21, 2006, reflects the following offenses in the state of California:

3. On July 3, 1991, the applicant was arrested by the Sheriff's Office in Ventura for disobeying a court order. The applicant was charged with violating two counts of section 23175 VC, driving under the influence with specific convictions. The applicant was convicted of violating one count of section 23175 VC, a felony, and was sentenced to serve two years in prison. The applicant was received at the Chino Institute for Men on August 22, 1991.
4. On January 27, 1996, the applicant was arrested by the Sheriff's Office in Ventura for willful violation of a court order. The applicant was charged and subsequently convicted of violating section 273.6(a) PC, violate a court order to prevent domestic violence, a misdemeanor. The applicant was sentenced to serve five days in jail and was placed on probation for three years.
5. On June 11, 2002, the applicant was arrested by the Los Angeles Police Department for two counts of failure to appear.

On appeal, from the termination of his temporary resident status, the applicant submits expungement orders for the following convictions:

6. On October 6, 1988, for violating sections 23152(b) VC and 12500(a) VC. These convictions relate to number two above. On May 4, 2009, the convictions were expunged in accordance with section 1203.4 PC. [REDACTED]
7. On January 30, 1996 for violating section 273.6(a) PC. This conviction relates to number four above. On April 16, 2009, the conviction was expunged in accordance with section 1203.4 PC. [REDACTED]

² The termination of the applicant's temporary residence was subsequently reopened by U.S. Citizenship and Immigration Services and again terminated by the director. The AAO is dismissing the appeal of the termination contemporaneously with the present decision.

8. On October 13, 1999, for violating section 647(f) PC, disorderly conduct, a misdemeanor. On April 13, 2009, the conviction was expunged in accordance with section 1203.4 PC. [REDACTED]
9. On June 12, 2002, for violating section 41.27(c) LAM, drinking in public, a misdemeanor. On April 3, 2009, the conviction was expunged in accordance with section 1203.4 PC. [REDACTED]

The record of proceedings, in this case, does not contain the court dispositions for the applicant's arrests for numbers three and five above to establish that he was, in fact, convicted of the offenses listed in the FBI report. The applicant must agree to fully cooperate in the verification process. Failure to assist U.S. Citizenship and Immigration Services (USCIS) in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

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. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).³ 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. *Matter of Roldan, id.*

The record before the AAO clearly establishes that the applicant has at least six misdemeanor convictions in 1988, 1996, 1999 and 2002. In this case, there is no evidence in the record to suggest that some of the applicant's convictions were overturned on account of an underlying procedural or constitutional defect in the merits of the case. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). Therefore, despite the expungements of the convictions, the offenses remain valid convictions for immigration purposes.

Although these precedent decisions were finalized after the applicant applied for permanent residence, 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 USCIS offices.

³ 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).

The applicant is ineligible for adjustment to permanent resident status because he has been convicted of at least six misdemeanors in the United States. 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available. In addition, the applicant failed to establish he is admissible due to his failure to provide the court dispositions necessary for the adjudication of the application in numbers three and five above.

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.3(c)(1). The applicant has failed to meet this burden.

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