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



U.S. Citizenship  
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Services

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**PUBLIC COPY**

[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES

Date:

JAN 14 2010

XUH-88-097-1278

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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. 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.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The termination of the applicant's temporary resident status by the Director, Los Angeles, is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was granted temporary resident status on August 4, 1992 under section 245A of the Immigration and Nationality Act (Act), as amended, 8 U.S.C. § 1255a. On October 5, 1993, the applicant filed a Form I-698 Application to Adjust from Temporary to Permanent Resident. This application was denied on October 22, 2007. The director denied the application based on the determination that the applicant's felony conviction rendered him both inadmissible and statutorily ineligible for adjustment to permanent resident status.

On appeal, counsel asserts that the applicant's felony conviction has been reduced to a misdemeanor, leaving the applicant with two misdemeanor convictions. A supporting brief is submitted to further explain the procedural aspects, which, according to counsel, do not render the applicant inadmissible or statutorily ineligible for adjustment of status.

Temporary resident status may be terminated if the alien is convicted of a felony, or three or more misdemeanors. *See* 8 C.F.R. § 245a.2(u)(1)(iii). Also, such status may be terminated if the alien was ineligible for temporary residence. 8 C.F.R. § 245a.2(u)(1)(i). Finally, status may be terminated if the alien commits an act which renders him inadmissible as an immigrant. 8 C.F.R. § 245a.2(u)(1)(ii).

"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 record reveals that the applicant was convicted of the following offenses in the State of California:

1. On September 13, 1989, the applicant was convicted of grand theft auto, a felony, in violation of section 487.3 of the California Vehicle Code. On November 19, 2000, the applicant's conviction was expunged pursuant to a judicial order. [REDACTED]

2. On December 29, 1992, the applicant was convicted of driving without a driver's license, a misdemeanor, in violation of section 12500(a) of the California Vehicle Code. [REDACTED]

On appeal, counsel asserts that the applicant's conviction has been expunged and, more importantly, that the underlying offense of which the applicant was convicted has been reduced from a felony to a misdemeanor. Counsel acknowledges that the expungement alone is insufficient to overcome the applicant's ineligibility, but states that the reduction of the offense from a felony to a misdemeanor suggests that the applicant has overcome the sole ground of ineligibility.

In this case, there is no evidence in the record to suggest that the applicant's felony *Grand Theft Auto* conviction was defined by the trial court as a misdemeanor. Additionally, the Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.<sup>1</sup> Section 1203.4 of the California Penal Code (CPC) is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction for grand theft auto was expunged because of an underlying procedural defect in the merits of the case, and the vacated conviction remains valid for immigration purposes.

In the present matter, counsel asserts that the applicant only has two misdemeanor convictions, and he provides a copy of the Minute Order from Superior Court of California, County of Los Angeles. The Minute Order indicates that the applicant's felony conviction was reduced to a misdemeanor pursuant to section 1203.4 CPC. Also included in the record of proceedings is the November 19, 2000 Petition and Order expunging the applicant's felony conviction. Thus, the court ordered reduction of the applicant's felony conviction, to that of a misdemeanor pursuant to the state's rehabilitation statute, has no effect on these immigration proceedings.

He is therefore ineligible for adjustment to permanent resident status pursuant to 8 C.F.R. § 245a.3(c)(1). No waiver of such ineligibility is available.

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

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<sup>1</sup> 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).

