U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUN 2 3 2010

IN RE: Applicant: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for adjustment from temporary to permanent resident status was denied by the Director, Los Angeles, and the Administrative Appeals Office dismissed the appeal. The matter will be reopened and remanded.

The director denied the application, finding the applicant had been convicted of a felony. In a decision dated March 4, 2010, the AAO affirmed the director's decision. The AAO hereby withdraws its decision dated March 4, 2010.

On appeal, counsel for the applicant asserts that the applicant's conviction is for a misdemeanor rather than a felony.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 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).

> 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 issue in this proceeding is whether the applicant has established his eligibility for permanent resident status in that he has not been convicted of a felony. The AAO has reviewed the evidence of record, including the applicant's criminal record, and concludes that the applicant's criminal history does not render him ineligible to adjust from temporary to permanent resident status.

The record before the AAO reveals that the applicant was charged with a felony violation of section 496(a) of the California Penal Code, *receiving/concealing stolen property.* [redacted] on or about September 8, 1994.

California Penal Code § 496(a) states:

> Every person who, being a dealer in or collector of junk, metals or secondhand materials, or the agent, employee, or representative of such dealer or collector, buys or receives any wire, cable, copper, lead, solder, mercury, iron or brass which he knows or reasonably should know is ordinarily used by or ordinarily belongs to a railroad or other transportation, telephone, telegraph, gas, water or electric light company or county, city, city and county or other political subdivision of this state engaged in furnishing public utility service without using due diligence to ascertain that the person selling or delivering the same has a legal right to do so, is guilty of criminally receiving such property, and is punishable, by imprisonment in a state prison, or in a county jail for not more than one year, or by a fine of not more than two hundred fifty dollars ($250), or by both such fine and imprisonment.

California Penal Code § 17 states the following, in pertinent part:

> (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:
>
> (1) After a judgment imposing a punishment other than imprisonment in the state prison.

In the instant case, the applicant was placed on formal probation for a period of three years and ordered to serve 90 days in the Los Angeles County Jail. The applicant's conviction is a misdemeanor conviction as it led to a sentence that did not include any term of confinement in the state prison.

The matter will be remanded to the director to resume adjudication of the applicant's Form I-698 application for adjustment from temporary to permanent resident status.

ORDER: The matter is remanded.