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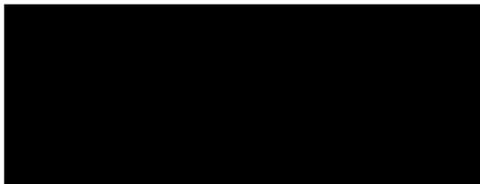
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529 - 2090



U.S. Citizenship
and Immigration
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FILE: [REDACTED]
XVN 88 517 1155

Office: CALIFORNIA SERVICE CENTER DATE: MAR 04 2010

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 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 temporary resident status was denied by the director, Western Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for temporary residence, finding the applicant was statutorily ineligible on account of his seven misdemeanor convictions.

The applicant represents himself on appeal. He states that the record as stated in the notice of denial is incorrect and that he would submit a correct record of final dispositions within six months of the appeal. Years have lapsed and he has not submitted additional evidence for the record.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

The issue in this proceeding is whether the applicant has established his eligibility for temporary resident status. The AAO has reviewed the evidence of record, including the applicant's criminal record, and concludes that the applicant has not met his burden of proof to establish his eligibility for temporary resident status.

The record before the AAO reveals that the applicant has multiple criminal convictions. An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to temporary resident status. 8 C.F.R. § 245a.2(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 record reflects the applicant has the following convictions:

1. A July 19, 1983 conviction for violating section 12500(a) of the California Vehicle Code - *Driving without valid driver's license*. This offense is considered a misdemeanor.
2. A July 22, 1983 conviction for violating section 40508(a) of the California Penal Code - *Failure to appear*. This offense is considered a misdemeanor.
3. An August 3, 1983 conviction for violating section 40508(a) of the California Penal Code - *Failure to appear*. This offense is considered a misdemeanor.
4. A December 30, 1987 conviction for violating section 40508(a) of the California Penal Code - *Failure to appear*. This offense is considered a misdemeanor.
5. A January 29, 1988 conviction for violating section 40508(a) of the California Penal Code - *Failure to appear*. This offense is considered a misdemeanor.
6. A January 15, 1988 conviction for violating section 40508(a) of the California Penal Code - *Failure to appear*. This offense is considered a misdemeanor.
7. An August 1, 1986 conviction for violating section 484 of the California Penal Code - theft - in the Municipal Court of Downey Branch, County of Los Angeles, California. [REDACTED]. This offense was prosecuted as a misdemeanor.

The applicant submitted evidence that his convictions number four and seven above were expunged pursuant to section 1203.4 of the California Penal Code. Nonetheless, these convictions stand for immigration purposes. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has ruled on the effect of post-conviction expungements pursuant to a state rehabilitative statute.¹

¹ 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).

Generally, expungements or vacatures of a criminal conviction pursuant to the successful completion of some form of rehabilitation or probation are considered valid convictions for immigration purposes unless the conviction was dismissed because of a fundamental procedural or constitutional error in the trial court proceedings. *Matter of Roldan, supra*. Section 1203.4 of the California Penal Code 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 convictions were expunged because of an underlying procedural defect in the trial court proceedings, and the vacated judgments remain valid for immigration purposes.

The applicant stands convicted of seven misdemeanors. He is therefore ineligible for temporary resident status pursuant to 8 U.S.C. §1255a(4)(B); 8 C.F.R. § 245A.4(B). No waiver of such ineligibility is available. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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