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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: LOS ANGELES Date: OCT 13 2010

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 210 of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:
[REDACTED]

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Temporary Resident Status as a Special Agricultural Worker was denied by the director of the Los Angeles office. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-700, Application for Temporary Resident Status as a Special Agricultural Worker under section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160. On September 11, 2007, the director denied the application, finding that the applicant is ineligible to adjust to temporary resident status because he has been convicted of a felony and/or of three or more misdemeanors committed in the United States.

On appeal, counsel asserts that there is no evidence that the applicant has been convicted of a felony and/or three or more misdemeanors. The record reflects that the applicant's FOIA request, [REDACTED], was closed for failure to comply on February 6, 2010. Counsel has submitted additional evidence on appeal.¹ The AAO has considered counsel's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.²

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

"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).

¹ Further, counsel asserts that there is a procedural error in the court's record regarding the applicant's criminal conviction in 1996. Counsel asserts that the full criminal disposition lists the applicant's 1996 conviction as a felony. The record reveals that the statute under which the applicant was charged, section 273.5 of the California Penal Code, is clearly a "wobbler" statute, in that it carries a range of punishments. Although the court documents identify the applicant's offense initially as a felony, as discussed more fully below the applicant pleaded guilty to the charge as a misdemeanor, which charge was subsequently vacated.

² The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 Act; 8 U.S.C. § 1101(a)(48)(A).

The record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses:

- On or about February 13, 1990, the applicant was convicted of a violation of the California Vehicle Code (VC) section 23152(a), *driving under the influence of alcohol or drugs or both*, a misdemeanor.³ The record does not contain information regarding the applicant's sentence regarding this matter. (Municipal Court of San Fernando Judicial District, Los Angeles County, case number [REDACTED]).
- On January 29, 1990, the applicant was charged with violating the following sections of the California Vehicle Code (VC): section 23152(a), *driving under the influence of alcohol or drugs or both*, a misdemeanor; section 23152(b), *driving with a blood alcohol content (BAC) of 0.08% or higher*, a misdemeanor; section 12500(a), *unlawful to drive unless licensed*, a misdemeanor; section 16028(a), *no proof of car insurance*, an infraction; and section 27315(d), *driver unrestrained*, an infraction. On June 7, 1990, the applicant pleaded guilty to counts two and three. The applicant was placed on summary probation for a period of 5 years, and sentenced to 2 days in jail. Imposition of sentence was suspended. The remaining charges were dismissed. On January 8, 2002, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the convictions were set aside, pleas of not guilty were entered and the charges were dismissed. (Municipal Court of Newhall Judicial District, Los Angeles County, case number [REDACTED]).
- On October 11, 1996, the applicant was charged with violating section 273.5(a) of the California Penal Code (PC), *inflict corporal injury on spouse/cohab*, a felony. On December 5, 1996, the charge was reduced to a misdemeanor, and the applicant pleaded guilty to the charge. The applicant was sentenced to formal probation for 3 years and jail for 120 days. Imposition of sentence was suspended. On March 12, 2002, based upon the applicant's petition for expungement pursuant to PC §1203.4 and upon the applicant's compliance with the terms of his probation, the conviction was set aside, a plea of not guilty was entered and the charge was dismissed. (Superior Court of California, Riverside County, case number [REDACTED]).

The applicant meets the two prong test outlined in Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A). First, regarding his June 7, 1990 and December 5, 1996 convictions, the applicant entered pleas of guilty. Second, the judge ordered some form of punishment, penalty, or restraint on the

³ On June 7, 1990, the applicant admitted to this conviction at the time of his sentencing in a subsequent criminal case. (Municipal Court of Newhall Judicial District, Los Angeles County case number [REDACTED]).

alien's liberty to be imposed. Specifically, the judge ordered the applicant serve probation and time in jail. Clearly, the applicant has been convicted, on at least three occasions, under the statutory definition of this term provided at section 101(a)(48)(A)(i) of the Act. Further, the applicant has admitted to an additional misdemeanor conviction occurring on February 13, 1990.

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.

The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the Board of Immigration Appeals (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. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).⁴ In this case, the applicant does not claim any defect in the underlying criminal proceedings.

Even though counsel has obtained an order vacating the applicant's misdemeanor convictions due to the applicant's successful completion of the terms of his probation, Congress has not provided any exception for applicants who have been accorded rehabilitative treatment under state law. Any rehabilitative action that overturns a state conviction is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan, supra*, at 523, 528 (BIA 1999). Therefore, the applicant remains "convicted", for immigration purposes, of the above-cited misdemeanor offenses. Because of the applicant's misdemeanor convictions, he is ineligible to adjust to temporary resident status.

⁴ 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). More recently, in the case of *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000), the Ninth Circuit partially reversed the holding in *Matter of Roldan, Id.* in holding that there is no conviction for immigration purposes where there is a first-time offense involving simple possession of a controlled substance that is expunged pursuant to a state rehabilitative statute, if first offender treatment would have been accorded under the Federal First Offender Act (FFOA), 18 U.S.C. § 3607, had the case been prosecuted federally. However, the holding in *Lujan-Armendariz, Id.*, has not been extended to cases other than the offense of simple possession of a controlled substance, such as the applicant's misdemeanor convictions stated above. See *Ramirez-Castro, Id.*, holding that *Lujan-Armendariz, Id.*, does not apply to a case in which the expungement involves a misdemeanor conviction for carrying a concealed weapon, a conviction found not to be within the scope of the FFOA.

There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States.⁵

The applicant has not met his burden of proof in establishing his eligibility for temporary resident status pursuant to 8 C.F.R. § 210.3(b). The record reveals that the applicant has been convicted of three misdemeanors. The applicant is, therefore, ineligible for temporary resident status under section 210 of the Act. 8 C.F.R. § 210.3(d)(3). No waiver of such ineligibility is available.

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

⁵ In addition, the Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has held that a conviction under section 273.5(a) of the California Penal Code that was limited to spousal abuse would be a conviction for a crime involving moral turpitude (CIMT). *See Grageda v. INS*, 12 F.3d 919 (9th Cir. 1993). As noted above an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. See 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if the maximum penalty possible for the crime of which the alien was convicted did not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of 6 months. Since the applicant was sentenced to a jail term of 4 months, the applicant's CIMT conviction meets the petty offense exception, and he is not inadmissible.