identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

L1

[redacted]

FEB 14 2011

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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. 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 was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application noting that the applicant had been convicted on May 4, 1987 of violating 8 USC §1324(a)(1)(B), *Illegal Transportation of Aliens*. Additionally, the director noted that California Department of Motor Vehicle records indicate that the applicant has been convicted of violating California Vehicle Code (CVC) §12500 *Driving without a License* on September 15, 1980 and CVC §23103 *Reckless Driving* on December 8, 1986. The director noted that Section 212(a)(6)(E)(i) of the Act renders aliens inadmissible who have aided, inducted or assisted any other alien entering the United States in violation of the law. Thus, the director indicated that the applicant's conviction under 8 USC §1324(a)(1)(B) renders him inadmissible.

On appeal, the applicant indicates that two of his misdemeanor convictions have been expunged and therefore, they do not cause him to be inadmissible and ineligible for temporary resident status. The applicant further asserts that Section 212(a)(6)(E)(i) of the Act does not render excludable a person who has been convicted of illegal transport of aliens. The applicant requests a copy of the record of proceedings. This request was processed on June 12, 2010.[1]

An applicant is ineligible for temporary resident status if he/she has been convicted of a felony, or three or more misdemeanors. *See* 8 C.F.R. § 245a.2(u)(1)(iii).

"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 AAO has reviewed all of the documents in the file in their entirety and we conclude that the applicant is not eligible for temporary residence because of his criminal history. The record before the AAO contains a Judgment and Probation Order from United States District Court, Central District of California indicating that the applicant was convicted of violating 8 USC §1324(a)(1)(B), *Illegal Transportation of Aliens*. (Docket No. [redacted]. The applicant was sentenced to 5 years in prison, with a portion of the sentence suspended.

As noted by the director, Section 212(a)(6)(E)(i) of the Act renders aliens inadmissible who have aided, inducted or assisted any other alien entering the United States in violation of the law. The applicant's conviction therefore, renders him ineligible for temporary resident status and

[1] [redacted]

inadmissible to the United States. On appeal, the applicant indicates that his conviction does not render him excludable. As noted above, the applicant's statement is contrary to the law. Furthermore, even if the applicant were deemed admissible to the United States, if the grounds of inadmissibility were waived, he is ineligible for temporary resident status because he has been convicted of a felony since he was sentenced to a crime in the United States punishable by imprisonment for a term of more than one year.

It is further noted that California Department of Motor Vehicle records indicate that the applicant has been convicted of violating California Vehicle Code (CVC) §12500 *Driving without a License* on September 15, 1980, CVC §22101 *Disobeying a Traffic Control Device*, and CVC §23103 *Reckless Driving* on December 8, 1986. Furthermore, the record indicates that the applicant was he applicant has not submitted the final court dispositions for these arrests.

On appeal, the applicant indicates that the two misdemeanor convictions have been expunged. He submits no evidence of the expungements. Furthermore, 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. 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 either of the applicant's convictions for were expunged. Even if they were expunged, there is no record that the expungements were due to an underlying procedural defect in the merits of the case.

Finally, it is noted that the applicant was ordered deported by an immigration judge on February 1, 1990 pursuant to Section 241(a)(2) of the Act. Section 245A(a)(4)(A) of the Act requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for temporary resident status. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A). Section 212(a)(9)(A)(ii)(II) of the Act renders inadmissible aliens who departed the United States while an order of removal was outstanding and who seek admission within 10 years of the date of the alien's departure. Section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II). Though it is unclear from the record whether the applicant actually departed the United States, the burden of establishing admissibility lies with the applicant. Although this ground of inadmissibility may be waived pursuant to section 245A(d)(2)(B) of the Act, the record does not indicate that the applicant ever requested or was granted such a waiver.

Therefore, based upon the foregoing, the applicant is ineligible for temporary residence because of his criminal history and because he is inadmissible to the United States.

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