



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
XPW 879 358 0020

Office: California Service Center

Date: MAY 09 2007

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Adjustment from Temporary to Permanent Resident Status 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.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Western Service Center, denied the application for adjustment from temporary to permanent resident status. An appeal was dismissed by the Director, Legalization Appeals Unit (LAU). The applicant then filed a Petition for Review of an Order of the Board of Immigration Appeals with the United States Court of Appeals for the Ninth Circuit, San Francisco. *Jose Catalino Guzman-Andrade v. Alberto Gonzales, Attorney General*, Case No. 03-70765 (filed May 19, 2005). The court remanded the matter to the LAU (now Administrative Appeals Office, or AAO) for further consideration. The matter will be reopened, and the appeal will be dismissed.

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 applicant was convicted of the following misdemeanors under the California Vehicle Code (CVC):

1. Hit and Run Causing Death or Injury, section 20001 of the CVC, docket # [REDACTED] September 25, 1984, Ventura County, California;
2. Failure to Appear, section 40508(a) of the CVC, VLN CA/2W7912, June 20, 1986, San Francisco, California;
3. Driving When Privilege Suspended or Revoked, July 14, 1986, section 14601.1a of the CVC, docket # [REDACTED] San Francisco, California;
4. Failure to Appear, section 40508(a) of the CVC, docket # [REDACTED] October 24, 1989, Contra Costa County, California;
5. Willfully Fail to Pay Fine, section 40508(b), docket # [REDACTED] November 28, 1994, California;
6. Driving Under the Influence, section 23152(a) of the CVC, docket # [REDACTED], January 29, 1999, Pittsburg, California;
7. Driving When Privilege Suspended or Revoked, section 146015 of the CVC, docket # [REDACTED] January 29, 1999, Pittsburg, California.
8. Driving With .08% Blood Alcohol Content, section 23152(b) of the CVC, docket # [REDACTED] January 29, 1999, Pittsburg, California.

The Director, Legalization Appeals Unit, noted in her April 27, 1995 decision that the applicant had four misdemeanor convictions at that time, shown as numbers 1 – 4 above, and that the third and fourth

convictions were expunged. In light of the expungements, the director did not find the applicant to be ineligible for permanent residence due to having been convicted of three or more misdemeanors, but rather found the applicant to be ineligible because he had failed to establish that he was not convicted of another charge of "No Driver's License" that he alluded to on his adjustment application. However, the court of appeals found that the LAU abused its discretion in finding that the applicant failed to provide documentation regarding that charge. The court also stated that it was clear that the applicant was not convicted of that offense.

It is noted that the LAU did not cite the conviction listed as #5 above. Combined with the other four convictions the director cited, as of 1985 the applicant had five convictions, and two expungements.

Under the *current* statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Any subsequent action that overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

In response to a July 7, 2005 letter from the AAO, counsel asked that he be provided with documentation that substantiates the 1994 Willfully Fail to Pay Fine offense. On October 10, 2006, the AAO sent to counsel the California Department of Motor Vehicles Information Request printout, showing the conviction. Also included was evidence of the June 20, 1986 Failure to Appear conviction.

Counsel opines that the law that must apply to the applicant in this proceeding is the law in effect at the time of the Immigration and Naturalization Service's (INS) error. He contends that a change in the law subsequent to the agency error that may adversely affect an applicant's eligibility, in this case the new definition of "conviction" that gives no effect to expungements, cannot be retroactively applied to impair the applicant's rights. Counsel cites *Otarola v. INS*, 270 F.3d 1272 (9<sup>th</sup> Cir. 2001) in support of the premise that the law to apply in a remand is to be the law that was in force at the time the violation occurred.

Counsel's assertion is well-founded. At the time the expungements were acquired and submitted to INS (now Citizenship and Immigration Services, or CIS), they did have the effect of vacating convictions for immigration purposes. We find that the two expungements submitted in this proceeding vacate the convictions, leaving the applicant with three other misdemeanor convictions as of the date of the LAU's April 27, 1995 decision. Therefore, the applicant was ineligible for permanent residence in 1995, and remains ineligible, on the basis of having been convicted of three or more misdemeanors.

Subsequent to the 1995 dismissal of the appeal by the LAU, prior counsel, in conjunction with an attempt to file a motion to reconsider with the director, furnished an expungement for the 1984 conviction shown as #1 above. The motion was rejected, as motions to reopen permanent resident applications within the legalization program are prohibited. See 8 C.F.R. § 103.5(b). Furthermore, the expungement order is dated

January 10, 1996, which means the applicant still had three unexpunged convictions when the LAU dismissed his appeal in April 1995.

Counsel states: "At the time of applicant's initial appeal process with the LAU, he had no convictions that would make him ineligible since all convictions had been expunged pursuant to applicable law at that time." As shown above, this is simply not the case.

On January 29, 1999, in Pittsburg, California, the applicant was convicted of the three misdemeanor offenses of Driving Under the Influence, Driving With .08% Blood Alcohol Content, and Driving When Privilege Suspended or Revoked. Counsel points out that these later activities occurred outside of the LAU review that resulted in a remand. He therefore contends that these later convictions should not be considered in the AAO's current determination of the applicant's eligibility. Counsel again refers to *Otarola, supra*, in stating that CIS should not benefit from delays that resulted in harsh changes in the law. However, there has been no change in the law regarding the ineligibility of an applicant who has been convicted of at least three misdemeanors. While the usage of a change in the law that took place years after an application was filed may not always be justified in the adjudication of such application, actions taken by an applicant which render him ineligible for a benefit cannot be viewed in the same light. In this case, counsel's contention that the applicant's 1999 convictions should not be considered is not persuasive.

In summary, the applicant had been convicted of five misdemeanors at the time of the dismissal of his appeal by this office in 1995. Two of the convictions had been expunged. Thus, the applicant had three convictions not expunged, and was ineligible for permanent residence in 1995. He remains ineligible because of those convictions and the convictions that occurred in 1999.

**ORDER:** The appeal is dismissed.