

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

[REDACTED]

L1

Date: **AUG 31 2011** Office: IMPERIAL

FILE: [REDACTED]

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 termination of the applicant's temporary resident status by director of the Imperial office is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reveals that on April 13, 2011, the director terminated the applicant's temporary resident status, based on the applicant's felony conviction for transporting or selling a controlled substance, finding that the applicant was inadmissible and thus not eligible for such status as follows: the applicant violated a law relating to a controlled substance, pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II); the applicant is one who there is "reason to believe" has been an illicit trafficker in a controlled substance, pursuant to section 212(a)(2)(C)(i) of the Act, 8 U.S.C. § 1182(a)(2)(C)(i); and, the applicant was convicted of a felony, pursuant to section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255(a)(4)(B), and 8 C.F.R. § 245a.2(c)(1).

On appeal, counsel for the applicant asserts that the termination of the applicant's temporary resident status was in error because the applicant was not convicted of a felony. Counsel asserts that the applicant no longer has a criminal conviction for purposes of establishing eligibility for temporary resident status, because the applicant's conviction was subsequently expunged pursuant to section 1203.4 of the California Penal Code, and that expungement is the equivalent of treatment under the Federal First Offender's Act (FFOA). Counsel cites *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) in support of his position. The applicant has not submitted any further evidence on appeal. 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.<sup>1</sup>

The temporary resident status of an alien may be terminated upon the determination that the alien was ineligible for temporary residence. Section 245A(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1255a(b)(2)(A), and 8 C.F.R. § 245a.2(u)(i).

An alien is ineligible for temporary residence if he has been convicted of a felony, or three or more misdemeanors committed in the United States. See 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

---

<sup>1</sup>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).

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 Act, 8 U.S.C. § 1101(a)(48)(A).

Under the statutory definition of “conviction” provided at section 101(a)(48)(A) of the INA, 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. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6<sup>th</sup> Cir. 2006); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

Section 212(a)(2) of the Act provides, in pertinent part, that:

(A) *Conviction of certain crimes.*—

(i) In General.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)),

is inadmissible.

In addition, an applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, as there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. In order for an applicant to be inadmissible under section 212(a)(2)(C)(i) of the Act, the only

requirement is that an immigration officer “knows or has reason to believe” that the applicant is or has been an illicit trafficker in a controlled substance, or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled substance, or endeavored to do so. *Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9<sup>th</sup> Cir. 2000). In order for an immigration officer to have sufficient “reason to believe” that an applicant has engaged in conduct that renders him inadmissible under section 212(a)(2)(C)(i) of the Act, the conclusion must be supported by “reasonable, substantial, and probative evidence.” *Id.* (citing *Hamid v. INS*, 538 F.2d 1389, 1390-91 (9th Cir.1976)). Moreover, an applicant may be deemed inadmissible under section 212(a)(2)(C)(i) of the Act even where there has been no admission and no conviction, so long as there is “reason to believe” that the applicant engaged in the proscribed conduct relating to trafficking in a controlled substance.

The AAO finds that the applicant is ineligible for temporary resident status because he is inadmissible based upon his felony conviction for transporting or selling a controlled substance. The AAO has reviewed all of the documents in the file, including the criminal records and the statutes under which the applicant was arrested and/or convicted. The record contains evidence of the following criminal history:

- On September 9, 1983, the applicant was charged with a violation of section 594(a)(1) the California penal code (PC), *maliciously deface with paint*. On September 12, 1983, the applicant was convicted of a violation of section 594(PC), *malicious mischief/vandalism*, a misdemeanor. The applicant was sentenced to three days in jail and twelve months probation. (Superior Court of California, City of Van Nuys, [REDACTED])
- On December 3, 1985, the applicant was charged with a violation of section 16028(a) of the California vehicle code (VC), *no evidence of financial responsibility*. On April 24, 1986, the applicant was convicted of the offense, an infraction. (Court number [REDACTED])
- On March 3, 1986, the applicant was charged with violations of sections 22101(d) and 23222(b) of the California vehicle code (VC), *required or prohibited turn, failure to obey official sign and marijuana, possession of less than one ounce while driving a motor vehicle*.<sup>2</sup> On March 27, 1987, the applicant was convicted of section 22101(d)(VC), an infraction, and 23222(b), a misdemeanor. (Court number [REDACTED])
- On June 18, 1986, the applicant was charged with a violation of section 21658(a) of the California vehicle code (VC), *laned roadways, straddling or changing when unsafe*. On July 8, 1986, the applicant was convicted of the offense, an infraction. [REDACTED]

---

<sup>2</sup> The AAO notes that one ounce equals 28.3495231 grams.

- On June 22, 1988 and August 2, 1988, the applicant was charged with violations of the California Health and Safety Code (HS), as follows: section 11351(HS), *possession for sale of a controlled substance*, and section 11352(HS), *transporting or selling a controlled substance*. On August 2, 1988, the applicant pleaded guilty to 11352(HS), *transporting or selling a controlled substance*, a felony. Also on that date, the court dismissed the remaining charge. The applicant was sentenced to 180 days in jail and 36 months probation, which sentence was suspended. On September 12, 1994, the applicant's probation was terminated. On March 3, 2006, pursuant to section 1203.4(PC), the applicant's conviction was set aside and dismissed. (Superior Court of California, City of Los Angeles, case [REDACTED])

At issue is whether the applicant has established that he met his burden of establishing that he is otherwise admissible to the United States, that he does not have a disqualifying criminal conviction, and that he is eligible to adjust to temporary resident status. Here, the applicant has failed to demonstrate admissibility on account of his felony conviction for transporting or selling a controlled substance.

First, declarations by an applicant regarding his criminal record are subject to verification of facts by United States Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5). On March 1, 2011, United States Immigration and Customs Enforcement (USICE) requested the applicant to submit final court dispositions for his convictions for *malicious mischief/vandalism* and *transporting or selling a controlled substance*. In response, the applicant submitted a "No Record" statement from the Superior Court of California, County of Los Angeles. The applicant failed to submit a final court disposition for the convictions. This is one basis to deny the application.

Second, counsel for the applicant asserts that the applicant's felony conviction has been expunged and is no longer a valid conviction for immigration purposes, and cites *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) in support. The record contains evidence to suggest that the applicant's felony drug conviction was dismissed under section 1203.4 of the California Penal. However, the AAO finds that the expungement of the applicant's conviction in this case does not fit within the parameters outlined in *Lujan-Armendariz*. In that case, the Ninth Circuit held that an alien defendant who had been convicted as a first-time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand "convicted" for immigration purposes, because the alien defendant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a "conviction" for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, have not previously been the subject of a disposition under FFOA, and were placed on probation for a term of not more than one year without entering a judgment of conviction. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, (9<sup>th</sup> Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law.

Unlike the alien defendant in *Lujan-Armendariz*, the applicant in the matter presently before the AAO would not have qualified for disposition under the provisions of the FFOA. The AAO observes that the crime for which the applicant stands convicted is not a first time offense for "simple possession of a controlled substance." The applicant was convicted for a trafficking offense, which is a much more serious felony than a first time simple possession conviction. The section of the California Health and Safety Code described in the statute and under which the applicant was convicted contemplates a term of imprisonment in the state penitentiary for three to five years. See section 11352 of the California Health and Safety Code. In addition, the applicant was ordered to serve a term of probation of 36 months and 180 days in jail. Thus, had the applicant been convicted of violating a different subsection of the California Health and Safety Code instead of subsection 11352, and had he been ordered to serve a term of imprisonment or probation for one year or less with no jail time, the applicant may have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses.<sup>3</sup> See also *Fernandez-Bernal v. Attorney General*, 257 F.3d 1304 (11<sup>th</sup> Cir. 2001)(stating that Relief under the FFOA § 3607(b) is not available to an individual sentenced to a term of probation that exceeds one year, nor is it available to anyone sentenced to jail time.) However, this is not the case here.

Therefore, the expungement of the applicant's conviction under section 1203.4 would not be the equivalent of treatment under the FFOA, because the statute under which the applicant was convicted is not for simple possession of a controlled substance. The conviction remains a valid felony conviction for immigration purposes. An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for temporary resident status. 8 C.F.R. § 245a.2(c)(1). In addition, the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime involving a controlled substance. Further, based upon the applicant's conviction, there is reasonable, substantial, and probative evidence to support the belief that he has been an illicit trafficker in a controlled substance, and is inadmissible on this basis pursuant to sections 212(a)(2)(C)(i) of the

<sup>3</sup> In addition, the AAO notes that the applicant has a prior drug offense conviction in 1986 for *marijuana, possession of less than one ounce while driving a motor vehicle*, a misdemeanor.

Act. *See Alarcon-Serrano v. I.N.S.* at 1119. There is no waiver available to the applicant for his inadmissibility under sections 212(a)(2)(C)(i), 212(a)(2)(A)(i)(II)<sup>4</sup>, or 245A(a)(4)(B) of the Act.

The record indicates that on February 24, 2011, removal proceedings were instituted against the applicant as an alien present in the United States without having been admitted, pursuant section 212(a)(6)(A)(i) of the Act, and as an alien being inadmissible to the United States and excludable as an immigrant without an immigrant visa, pursuant to section 212(a)(7)(A)(i)(I) of the Act. These proceedings are pending.

Based on the foregoing, the AAO finds that there is sufficient reason to believe that the applicant has been an illicit trafficker in a controlled substance, and he is inadmissible under section 212(a)(2)(C)(i) of the Act. In addition, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for violating a law relating to a controlled substance. Further, the applicant has been convicted of a felony, which renders him ineligible for temporary resident status under section 245A(a)(4)(B) of the Act. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the dismissal. The applicant is, therefore, ineligible for adjustment to temporary resident status under section 245A of the Act on each of the grounds noted. As the applicant has not overcome the basis for the termination of status, the appeal must be dismissed.

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

---

<sup>4</sup> Pursuant to section 212(h) of the Act, the Attorney General may, in his discretion, waive the application of section 212(a)(2)(A)(i)(II) only insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana.