



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 8537264

Date: JUNE 11, 2020

Appeal of Texas Service Center Decision

Form I-687, Application for Status as a Temporary Resident

The Applicant seeks status as a temporary resident under section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255a. The Immigration Reform and Control Act of 1986 created a legalization program under that section, which allows eligible aliens who entered the United States before January 1, 1982, and who continuously resided and were physically present in the United States during specified time periods, to adjust status to that of temporary residents if they are admissible to the United States and have not been convicted of a felony or three or more misdemeanors in the United States.

The Director of the Texas Service Center¹ denied the application, concluding that the Applicant was ineligible for temporary resident status, because he was convicted of three or more misdemeanor offenses in the United States between 1982 and 1986. On appeal, the Applicant asserts that the offenses were subsequently dismissed by the court and no longer affect his eligibility for the requested benefit.

The Applicant has the burden to establish eligibility for temporary resident status by a preponderance of the evidence. 8 C.F.R. § 245a.2(d)(5). Upon *de novo* review, we will dismiss the appeal because the Applicant has not met this burden.

I. LAW

An applicant for adjustment to temporary resident status must establish, among other requirements, that he or she has not been convicted of any felony or of three or more misdemeanors committed in the United States. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B).

The regulations at 8 C.F.R. § 245a.1(o) define “misdemeanor” as a crime committed in the United States punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any, except for crimes that are punishable by imprisonment for a maximum term of five days or less. Felony, in turn, means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception for offenses that are defined by the State as misdemeanors and the sentence actually imposed is one year or less

¹ Formerly Southern Regional Processing Facility.

regardless of the term actually served; such offenses are treated as misdemeanors. 8 C.F.R. § 245a.1(p).

Although the term “conviction” was not defined in the Act until 1997, the Board of Immigration Appeals (the Board) has previously held that a conviction exists for the purposes of section 245A(a)(4)(B) of the Act where (1) a judge or a jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere*, and (2) the judge has ordered some form of punishment or penalty, including but not limited to a fine or probation. *Matter of M-*, 19 I&N Dec. 861, 865 (Comm’r 1989).

On September 30, 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was enacted; it became effective on April 1, 1997. Section 322(a) of IIRIRA amended section 101(a) of the Act, 8 U.S.C. § 1101(a) to include two definitions of “conviction.” First, a conviction means a formal judgment of guilt entered by a court. Second, if adjudication of guilt has been withheld, a conviction exists for immigration purposes where 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 the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty. Section 101(a)(48)(A) of the Act.

II. ANALYSIS

The sole issue on appeal is whether the Applicant has established that the criminal grounds of ineligibility for temporary resident status do not apply in his case. We find that he has not.

According to the criminal history record the Applicant previously submitted, he was convicted in New Mexico of the following offenses:

- In [] 1982, he was convicted of driving under the influence of alcohol (DUI), no driver’s license, and accident involving damage to vehicle; he was sentenced to 90 days in jail and a fine payment.
- In [] 1982, he was convicted of driving on a suspended license; he was given a 38-day credit [for time served] and sentenced to a fine payment.
- In [] 1985, he was convicted of driving while intoxicated (DWI), for which he was sentenced to 12 days in jail and a fine payment.
- In [] 1986, he was convicted of disorderly conduct and carrying a concealed weapon, for which he was sentenced to a fine payment.

On appeal, the Applicant does not contest that the four offenses listed above qualify as misdemeanors under the definition in 8 C.F.R. § 245a.1(o). He asserts, nevertheless, that they do not affect his eligibility for temporary resident status because the convictions were ultimately dismissed by the court. In support, he submits a certified municipal court order, which states that “the Court having considered the motion and otherwise sufficiently advised in the premises” ordered that the above “convictions be . . . dismissed with prejudice.” We conclude, however, that the court order alone is insufficient to establish that the Applicant’s convictions are no longer valid for immigration purposes.

A conviction is eliminated for immigration purposes only if it has been vacated based on a ruling that it was legally defective. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23

I&N Dec. 878 (BIA 2006); *see also Matter of Marquez Conde*, 27 I&N Dec. 251 (BIA 2018) (reaffirming that convictions vacated based on procedural and substantive defects in the underlying criminal proceeding are no longer valid for immigration purpose). The Applicant has not provided evidence, such as a copy of the motion filed with the court to show that his convictions were vacated for procedural or substantive defects. He has not therefore established that they are no longer valid for immigration purposes and do not affect his eligibility for temporary resident status.

Furthermore, the record reflects that while the appeal was pending, the Applicant was arrested and/or convicted of multiple additional offenses which may qualify as felonies or misdemeanors under the relevant regulations, but he has not provided certified court dispositions for those offenses or otherwise addressed them. Specifically, the Applicant's fingerprint record obtained from the Federal Bureau of Investigation reveals the following criminal history:

- In [] 1989, the Applicant was arrested in New Mexico and charged with several offenses, including DUI.
- In [] 1996, he was arrested in New Mexico and charged with several offenses, including DUI.
- In [] 1997, he was arrested in New Mexico and charged with several offenses, including driving on a revoked license and DWI.
- In [] 1998, he was arrested in New Mexico and charged with several offenses, including driving on a revoked license and DWI.
- In [] 1998, he was arrested in New Mexico and charged with "court order for DWI." The record indicates that he served 364 days in jail following the arrest.
- In [] 2005, he was arrested in New Mexico, charged with battery on a household member in violation of section 30-3-15 of the New Mexico Statutes, and subsequently incarcerated. At the time of his arrest, the offense was classified as a misdemeanor under New Mexican law, punishable by imprisonment in a county jail for a "definite term of less than one year." N.M. Stat. Ann. §§ 30-3-15(B), 31-19-1 (West 2005).
- In [] 2007, he was arrested in New Mexico and charged with (1) DWI 6th offense in violation of section 66-8-102 of the New Mexico Statutes and (2) driving with suspended license in violation of section 66-5-39 of the New Mexico Statutes. The record indicates that he was incarcerated for these offenses. Under New Mexican law in effect at the time, 6th DWI conviction was classified as a third-degree felony with mandatory sentence of imprisonment for 30 months. N.M. Stat. Ann. § 66-8-102(I) (West 2007). The offense of driving on a suspended license was classified as a misdemeanor punishable by imprisonment for not less than 4 days or more than 364 days. N.M. Stat. Ann. § 66-5-39(A) (West 2007).
- In [] 2007, he was arrested in New Mexico and charged with (1) driving under the influence of drugs and (2) driving while license suspended or revoked (revoked for DWI).
- In [] 2012, he was arrested in New Mexico and charged with aggravated stalking (violation of protection order).
- In [] 2019, he was arrested in Oklahoma and charged with misdemeanor protective order violation. The record indicates that he pled *nolo contendere* to the charge and was sentenced to 7 days in jail for the offense.

The Applicant has not submitted sufficient evidence to show that his 1982-1986 misdemeanor convictions were eliminated for immigration purposes, and he has not addressed his subsequent criminal history. He

therefore has not established that he was not convicted of any felony or three or more misdemeanors in the United States. As such, he is ineligible to adjust status to that of a temporary resident under section 245A of the Act, and his application remains denied.

ORDER: The appeal is dismissed.