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U.S. Citizenship
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APR 30 2007

FILE: [REDACTED]
XBO 88 158 00005

Office: CALIFORNIA SERVICE CENTER Date:

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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a special agricultural worker was denied by the Director, Northern Regional Processing Facility, remanded by the Legalization Appeals Unit, now the Administrative Appeals Office (AAO). The Director, California Service Center, reopened, and denied the application again. The matter is now before the AAO on appeal. The appeal will be dismissed.

The director denied the application based on the applicant's criminal history.

On appeal, counsel asserts that the applicant has only one misdemeanor conviction.

The regulation at 8 C.F.R. § 210.3(d)(3) states in part that an alien who has been convicted of a felony or three or more misdemeanors committed in the United States is ineligible for temporary resident status.

"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 the term "felony," pursuant to 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).

"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. 8 C.F.R. § 245a.1(p).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 802 Title 21). Section 212(a)(2)(A)(i)(II) of the Act.

Based on the applicant's fingerprint analysis, conducted by the Federal Bureau of Investigations, the record reflects that: 1) on February 4, 2001, the applicant was arrested by the Sheriff's Office in Phoenix, Arizona for possession/use of a narcotic drug; and 2) on April 9, 2003, the applicant was arrested by the Phoenix Police Department for extreme driving under the influence – BAC .15 or more, a violation of A.R.S. 28-1382. The applicant was convicted of this offense and sentenced to serve 30 days in jail.

The regulation at 8 C.F.R. § 103.2(b)(16)(i), provides, in part, if a decision will be adverse to the applicant and is based on derogatory information considered by the Service and of which the applicant is *unaware*, he shall be advised of this fact and offered an opportunity to rebut the information and present information in his own behalf before a decision is rendered. [Emphasis added]. In this particular case, the applicant was arrested and/or convicted of the above mentioned offenses, thus, he was **aware** of the derogatory information.

On September 12, 2006, in a Notice of Decision, the applicant was informed of his criminal offenses and was given 30 days in which to supplement the appeal.

In response, counsel acknowledges the applicant's misdemeanor conviction for driving under the influence. Counsel also acknowledges the applicant's arrest on February 4, 2001, but claims no charges were filed against him. Counsel asserts, "[t]he Sheriff's Office does not issue letters of clearance. As such, we were only able to obtain a letter of no record for the Superior Court of Arizona, which would be the court that would be assigned to this matter." Counsel submits the court disposition, which reflects that the applicant's

conviction for violating section A.R.S. 28-1382 on August 6, 2003. Case no. [REDACTED] Counsel also submits a letter from the deputy clerk of the Maricopa County Superior Court, which indicates that a search of its records was conducted for the period January 1, 1999 through September 11, 2006 and no criminal case was found in the applicant's name.

While the letter from the Maricopa County Superior Court may serve to establish that no conviction had been rendered on the drug offense, it does not establish that the offense has been dismissed. The applicant has the burden to establish, with affirmative evidence that an outstanding charge was dismissed or were in error. 8 C.F.R. § 210.3(b)(1). Counsel asserts that the Sheriff's Office does not issue clearance letters, but provides no statement from said office to support his assertion. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Declarations by an applicant that he has not had a criminal record are subject to verification of facts by Citizenship and Immigration Services. The applicant must agree to fully cooperate in the verification process. 8 C.F.R. § 210.3(b)(3) states all evidence regarding admissibility and eligibility submitted by an applicant for adjustment of status will be subject to verification by the Service. Failure by an applicant to release information may result in the denial of the benefit sought. Additionally, 8 C.F.R. § 210.3(c) states in part: "A complete application for adjustment of status must be accompanied by proof of identity, evidence of qualifying employment, evidence of residence, and such evidence of admissibility or eligibility as may be required by the examining immigration officer in accordance with such requirements specified in this part."

The applicant failed to submit evidence to establish that the FBI report regarding his narcotics arrest was dismissed or in error.

An alien applying for adjustment of status has the burden of proving by a preponderance of evidence that he or she is admissible to the United States under the provisions of section 210(c) of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 210.3(b)(1). The applicant has failed to meet this burden.

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