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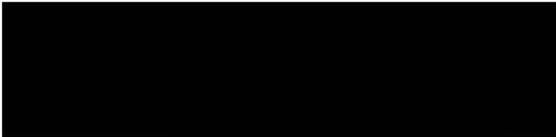
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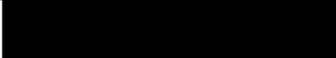
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 21 2008**

XOX-87-046-2015

IN RE:

Applicant:



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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the service center that processed 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.

A handwritten signature in black ink, appearing to read "R. P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Western Service Center (Service Center), terminated the applicant's temporary resident status as a special agricultural worker (the SAW program), and the applicant appealed to the Administrative Appeals Office (AAO) on January 15, 1992. The appeal was dismissed by the AAO on November 7, 2005. The applicant filed a "Motion to Reopen" on April 6, 2006 and provided additional information.¹ In response, the AAO will *sua sponte* reopen and reconsider the matter. The AAO's decision of November 7, 2005 will be withdrawn, and the appeal will be sustained.

The director terminated the applicant's temporary resident status because the applicant had failed to respond to a Notice of Intent to Terminate (NOIT) that was issued on November 21, 1990. The NOIT was issued because the applicant had admitted to a 1987 arrest and had not provided a final court disposition related to the arrest charge. In the NOIT, the Immigration and Naturalization Service (the Service), currently Citizenship and Immigration Services (CIS), requested "certified copies of court records showing the complete disposition" of the 1987 charge of "unlawful taking of [a] vehicle." The record indicates that the NOIT was returned to the Service as "unclaimed." On December 30, 1991, the director terminated the applicant's temporary resident status as a result of his failure to respond to the NOIT, noting that the Service, pursuant to section 210(a)(3)(B) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1160(a)(3)(B), may deny adjustment to permanent status and provide for the termination of temporary status to an applicant who has been convicted of a felony or three misdemeanors committed in the United States. The applicant filed a timely appeal to the AAO.

On appeal, the applicant requested that the decision be reversed because "the information that is in the records is wrong and [he has] never committed a crime in [his] life." He explained the circumstances of his arrest in April 1987, including that when he was arrested and held by the police he told them that he was not involved in any crime. He further explained that he was released before he went to court, that he thought the police believed that he had nothing to do with the theft of the car he was found in when he was arrested, and that "the charges of auto theft were dropped." The AAO dismissed the appeal, noting that the Service had requested that the applicant provide the certified arrest report and the court disposition, but that the applicant had sent in only the arrest report, and that the NOIT emphasized that the applicant had to provide evidence that the charge was in error or that he had been cleared of guilt. The AAO also found that the offense charged by the police of "Unlawful Taking a Vehicle" would be a felony in certain instances.

In response to the AAO's decision of November 7, 2005, the applicant submits the instant "Motion to Reopen," in which he states that he never received the request for additional evidence mentioned by the AAO. He includes "court letters that may be of help." The AAO has reopened the applicant's claim to consider this evidence and to make a *de novo* decision based on the evidence in the record.² The issues now before the

¹ Motions to reopen a proceeding or reconsider a decision on an application for temporary residence are not permitted. 8 C.F.R. § 210.2(g). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 210 and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b), 8 C.F.R. § 210.2(g).

² The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

AAO are whether the applicant's arrest record or previous failure to provide a court disposition rendered him ineligible for adjustment to permanent status and served as a proper ground for the termination of temporary status pursuant to section 210(a)(3)(B) of the Act.

1. The applicant's arrest record

Section 210(a)(2) of the Act, 8 U.S.C. § 1160(a)(2), provides for the adjustment to permanent residence of lawful temporary residents who were granted such status under the SAW program. The applicant was granted such status on November 25, 1987. Section 210(a)(3)(B) of the Act allows the Service to deny adjustment of status to permanent residence and provides for the termination of temporary resident status if the temporary resident is convicted of a felony or three or more misdemeanors committed in the United States. Section 210(a)(3)(B)(ii)(II) of the Act; 8 U.S.C. § 1160(a)(3)(B)(ii)(II).

The following evidence in the record is relevant to a determination on this issue:

- The applicant's Form I-700, Application for Temporary Resident Status as a Special Agricultural Worker, filed on or about June 30, 1987 and approved on November 25, 1987. At Part #27 of the Form I-700, where applicants are asked to indicate whether they have or have not been arrested, convicted or confined in prison, the applicant indicated that he had and added "[i]n April, 1987 in San Diego, CA."
- A letter from the Service issued on October 15, 1987 requesting additional information. The letter included the following instruction: "Please submit the following information by mail to the address noted above within thirty (30) days. Certified arrest report and court disposition of the 4-26-87 vehicle offense. Failure to submit the requested information will result in a decision based on the evidence of record."
- The certified arrest report from the San Diego Police Department, submitted by the applicant in response to the above mentioned letter from the Service. The report included a detailed narrative of the events leading up to the applicant's arrest for auto theft under section 10851 of the California Vehicle Code. The police narrative included a description of a parked vehicle that was determined to be a stolen car and a statement that the applicant and another man were seated in the back seat of the parked vehicle when they were arrested and that the applicant claimed that he was waiting with others for the driver to return and was not aware that they were being transported in a stolen vehicle.
- The applicant's Form I-694, Notice of Appeal, described above, in which the applicant explains the circumstances of his arrest consistent with the information in the San Diego Police Department report. The applicant also noted that he was released after four days in jail and that the police believed that he was innocent and that the charges of auto theft were dropped.
- Copies of responses to the applicant's requests for records from the Superior Court of California, County of San Diego, dated December 2, 2005 and March 21, 2006; the San Diego County Sheriff's Department, dated March 22, 2006; and the State of California Department of Justice, dated January 20, 2006. These documents were submitted by the applicant in support of his April 6, 2006 "Motion to Reopen" along with the applicant's statement that he was not aware previously that such additional evidence had been

requested. All of the documents indicate that the applicant had no criminal history in California and that no charges had been filed in court as a result of the April 1987 arrest.

The evidence submitted by the applicant supports his statements that he was never charged in court in California with any criminal offense, and that the arrest charge at issue in this case, for auto theft under California Vehicle Code 10851 did not result in court charges or a conviction. The applicant's temporary resident status cannot therefore be terminated or adjustment to permanent resident status denied pursuant to section 210(a)(3)(B)(ii)(II) of the Act on the basis of a prior felony conviction. Moreover, the record reflects that even if the applicant had been charged and convicted in court, the resulting conviction under California Vehicle Code 10851 would have been for a misdemeanor, and his arrest record for this charge cannot be used as a basis for the termination of his temporary status or denial of lawful permanent residence under section 210(a)(3)(B)(ii)(II) of the Act.

Despite the AAO's language in its November 7, 2005 decision that the arrest charge for auto theft could have resulted in a felony conviction, all of the evidence in the record points to an arrest charge for a misdemeanor. Although the arrest charge did not specify the relevant section of the statute, the relevant offense in this case would fall under California Vehicle Code 10851(a), which is "punishable by imprisonment for a term of one year or less." A felony theft offense falls under California Vehicle Code 10851(b), in which the theft would have to be of an ambulance, police vehicle or vehicle with an indication that it is for use by a disabled person. The vehicle described in the police report clearly does not refer to those kinds of vehicles. Based on this evidence, the AAO concludes that even if the applicant had been charged in court and convicted, a misdemeanor conviction would have been the result and would not be grounds to terminate temporary residence or deny adjustment to permanent residence.

2. Previous failure to provide a court disposition

An applicant for adjustment of status under section 210 of the Act, 8 U.S.C. § 1160, has the burden of proving by a preponderance of the evidence that he or she is eligible for such adjustment. 8 C.F.R. § 210.3(b). A temporary resident under section 210(a)(2) of the Act, must be given notice and an opportunity to offer evidence in opposition to the grounds alleged for termination of his or her status. 8 C.F.R. § 210.4(d)(3). If the applicant's status is terminated, the director must notify the applicant of the decision and the reasons for the termination, and that decision may be appealed to the AAO. *Id.* Administrative appellate review is based solely on the administrative record established at the time of the determination on the application and upon such additional or newly discovered evidence that may not have been available at the time of the determination. Section 210(e)(2)(B) of the Act.; 8 U.S.C. § 1160(e)(2)(B).

As noted above, in this case, the AAO finds it appropriate to consider the additional evidence that the applicant has submitted with his request to reopen his case. The record reflects that the applicant revealed on his I-700 Application, as required, that he had been arrested. When the Service asked on October 15, 1987 for additional information, a "[c]ertified arrest report and court disposition of the 4-26-87 vehicle offense," he responded in a timely manner by submitting the relevant arrest report; there was no court disposition to submit as no charges were ever filed in court. The applicant was granted temporary resident status on November 25, 1987. The Service issued a NOIT on November 21, 1990, explaining for the first time that his status may be terminated unless the applicant proved that he was "cleared of guilt" regarding the prior charge

and requesting that he submit “court records showing the complete disposition” of the charge. However, the record shows that the NOIT was returned to the sender “unclaimed” and that, although it was sent to the applicant’s address of record, it was not sent to his correct address, which was also in the record.³ The first communication the applicant received from the Service regarding termination of his status was a Notice of Termination, issued on December 30, 1991. The Notice of Termination explained that his temporary resident status was being terminated because he had not “presented sufficient evidence to overcome the adverse information found relevant to [his] case as stated in the Notice of Intent to Terminate” and included information that an applicant who is convicted of a felony or three misdemeanors committed in the United States may be denied adjustment to permanent status and have his temporary status terminated. The Notice of Termination did not explain the specific reasons for the termination or refer to the prior arrest or the need for court records. The applicant filed a timely appeal on January 21, 1992, noting that he had never been convicted of a crime and again submitting the police report.

The record reflects that the applicant did not receive actual notice that it was the missing court records that were at issue in his case until he received the AAO’s November 7, 2005 decision dismissing his appeal. He then asked that his case be reopened and provided letters from the relevant jurisdictions that no criminal charges had been filed against him in court and that he has no criminal history.

Despite the delayed submission of proof that his arrest in April 1987 did not lead to a conviction, the AAO finds that the applicant has now provided such proof and that there is no evidence in the record that he has had any conviction that would justify the termination of his temporary resident status or make him ineligible for adjustment to permanent resident status under section 210 of the Act. The AAO also finds that the applicant responded appropriately to the initial request for evidence, a “[c]ertified arrest report and court disposition of the 4-26-87 vehicle offense,” by providing the certified arrest report. No court disposition could have been provided as court records did not exist, and the applicant reasonably concluded that he had provided sufficient evidence in response to the Service’s request. He was not aware of the need to provide proof that his arrest in 1987 did not lead to any charges in court until 2005, when he again responded in a timely and appropriate manner. He revealed his arrest, never tried to cover up his record and provided adequate and reasonable explanations of the circumstances of his arrest and his prior failure to provide court records.

In summary, the AAO finds that the applicant has provided the requested proof that his 1987 arrest did not result in charges being filed in court and that he has consistently made good faith efforts to clarify that he has never had a criminal record and to respond to the Service’s request for evidence beginning in 1987. Given the circumstances noted above, failure to provide evidence in response to the Service’s NOIT should not serve as a reason to terminate his status. Moreover, the record shows that the arrest at issue in this case was for a misdemeanor offence that could not have served as the basis for termination of the applicant’s temporary resident status, and such status was therefore terminated in error. As the applicant has overcome the basis for the termination of his status, his case is being returned to the Service Center for processing of the applicant’s

³ The NOIT was sent to the applicant’s address of record, “ [REDACTED] ” as it was typed on his Forms I-700 and I-705. Other documents in the record of proceedings, including his I-693 Medical Exam and W2s and Income Tax returns for 1982 – 1986, showed his correct address, “ [REDACTED] ”

adjustment to permanent resident under section 210(a)(2) of the Act. The AAO's decision of November 7, 2005 is withdrawn. The appeal is sustained.

ORDER: The AAO's decision of November 7, 2005 is withdrawn. The appeal is sustained.