U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: LOS ANGELES Date: MAR 06 2009

XSI 89 016 01018

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The Director, Western Service Center initially denied the application on June 1, 1992, because the applicant failed to submit the requested court disposition.

The case was forwarded to the AAO for consideration. On September 16, 1998, the case was remanded as the applicant submitted three expungement orders for his misdemeanor convictions and, therefore, the applicant was no longer ineligible for the benefit being sought.

On November 15, 2007, on the basis of a new interpretation the Director, Los Angeles, California, concluded that the applicant had been convicted of at least three misdemeanors in the United States, and accordingly, denied the application.

On appeal, counsel argues that at no time during the applicant's interview on September 27, 2007, was he questioned with respect to his criminal record or asked clarify his criminal history. Counsel requested an extension of 30 days in which to supplement the appeal. However, more than a year later, no further correspondence has been presented by counsel or the applicant.

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).

The record contains court dispositions which reflect the applicant's criminal history in the state of California as follows:

- On August 25, 1980, the applicant was arrested for petty theft, a violation of section 484 PC. On September 15, 1980, the applicant pled guilty to the misdemeanor offense. On December 23, 1992, this conviction was expunged in accordance with section 1203.4 PC. [redacted]
- On September 28, 1980, the applicant was arrested and subsequently charged with drunk driving on the highway with a prior, a violation of section 23102(a) VC. On October 23, 1980, the applicant was convicted of this misdemeanor offense. The applicant was sentenced to serve two days in jail and ordered to pay a fine. On December 23, 1992, this conviction was expunged in accordance with section 1203.4 PC. [redacted]

- On February 22, 1981, the applicant was arrested and subsequently charged with drunk driving on the highway with a prior, a violation of section 23102(a) VC, and driving while license is suspended or revoked, a violation of section 14601(a) VC. On March 13, 1981, the applicant pled guilty to both misdemeanor offenses. The applicant was sentenced to service 12 days in jail and ordered to pay a fine. On August 28, 1991, these convictions were expunged in accordance with section 1203.4 PC. [redacted]

On May 29, 1998, the AAO sent a notice to the applicant requesting the court disposition for his driving under the influence that occurred prior to September 1980 along with a current Form H-6 from the California Department of Motor Vehicles (DMV), arrest reports and final courts dispositions for any other arrests or convictions.

The applicant, in response, submitted a letter from the Monterey County Municipal Court, which indicated that the records for Case no. [redacted] had been destroyed pursuant to Government Code section 68152. The applicant also submitted a Form H-6 from the California DMV, which revealed no additional convictions.

In issuing the remand notice, the AAO determined that even if the applicant had been convicted of driving under the influence prior to September 1980, because the subsequent convictions had been set aside, this offense would constitute only a single misdemeanor conviction. The director was advised to scrutinize the applicant's criminal history and agricultural employment prior to issuing a new decision.

On September 12, 2007, a Form G-56 was sent to the applicant advising him of his interview on September 27, 2007. The notice requested the applicant to submit proof of his agricultural employment, four photos and court dispositions for all arrests in the United States. In regards to the court disposition, the applicant submitted a letter from the Ventura County Superior Court in California, which indicated that no criminal record was found and that misdemeanor criminal records over five years have been destroyed pursuant to Government Code section 68152.

On the basis of a new interpretation, the director found the convictions were disqualifying and on November 15, 2007, the director denied the application. The applicant was informed that under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Immigration and Nationality Act (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. 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).

While not mentioned in the director's decision, it is noted that in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction

events, such as rehabilitation or immigration hardships. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains "convicted" for immigration purposes.

Although these precedent decisions were finalized after the applicant applied for temporary residence, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all U.S. Citizenship and Immigration Services offices.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungements.

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 USCIS 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 convicted of the above mentioned offenses, thus, he was *aware* of the derogatory information.

The applicant is ineligible for the benefit being sought due to his four misdemeanor convictions. 8 C.F.R. § 210.3(d)(3). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

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).

The FBI report, via a fingerprint analysis, dated October 3, 2007, reflects that on August 25, 2006, the applicant was arrested by the Sheriff's Office in Ventura, California for force/assault with a deadly weapon not firearm, great bodily injury. The final outcome of this offense is unknown as the applicant did not provide the requested court disposition.

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 USCIS. 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 August 25, 2006 arrests was dismissed or in error.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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.