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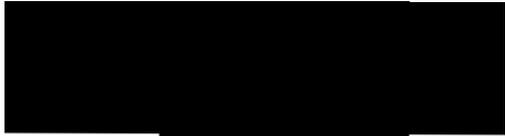
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
*Office of Administrative Appeals* MS2090  
Washington, DC 20529-2090



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

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**JAN 08 2010**

FILE:   
XOX-88-511-3091

Office: CALIFORNIA SERVICE CENTER

Date:

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:



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 applicant's temporary resident status as a special agricultural worker was terminated by the Director, Western Service Center. The applicant appealed the denial to the Administrative Appeals Office (AAO) and requested a copy of the record of proceedings under the Freedom of Information Act (FOIA). The record indicates that the FOIA request was processed on April 28, 2009. The file is now before the AAO for resolution of the appeal. The appeal will be dismissed.

The applicant's temporary resident status was terminated because the director noted that the applicant was arrested on November 4, 1987 and charged with violating California Penal Code (CPC) §288A *Lewd & Lascivious Acts with Child under 14*; and CPC §245(a)(1) *Assault with Deadly Weapon*. The director noted that the applicant failed to submit the final court dispositions for these arrests after being notified of the director's intent to terminate (NOIT) the applicant's status on November 14, 1990.

The director notified the applicant of these arrests and requested the applicant to submit evidence of the court dispositions. The director further noted that since the applicant failed to submit the requested evidence, he has not established that he is eligible for temporary residence. Section 210(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1160(a)(3)(B)(ii) provides that the alien may not adjust status to permanent residence, or that USCIS may terminate the temporary residence of any alien who has been convicted of any felony or of three or more misdemeanors committed in the United States.

On appeal, the applicant indicated that he was in the process of expunging all convictions listed in the NOIT. On November 23, 1991, the applicant submitted a brief indicating that on September 13, 1991 he received expungement under CPC § 1203.4 for the convictions listed in the NOIT.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.<sup>1</sup> Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, it is unclear from the record of proceedings whether the applicant was convicted in the two arrest violations listed in the NOIT.

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<sup>1</sup> See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

The applicant has indicated on appeal that he was convicted, however, the record contains a letter from the Superior Court of California, County of Santa Barbara indicating that the criminal records were destroyed in 2001. In either case, the applicant has not met his burden of proving that he has not been convicted of the crimes for which he was charged. Furthermore, even if he was convicted and the convictions were expunged there is no evidence in the record to suggest that either of the applicant's convictions were expunged because of an underlying procedural defect in the merits of the case. Therefore, the director's decision to terminate the applicant's status is upheld.

Furthermore, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). In this case, the applicant has also been convicted of a controlled substance violation, causing him to be inadmissible to the United States and ineligible for temporary resident status as a special agricultural worker.

The record indicates that on August 26, 2002, the applicant was arrested and charged with violating CPC §11377, *Possession of a Controlled Substance*, a felony. The applicant pled guilty and was sentenced to seven days in jail and three years probation. 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 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act, formerly section 212(a)(23) of the Act. Thus, the AAO finds that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act based on his admission to having committed a crime involving a controlled substance. For this additional reason, the appeal shall be dismissed.

Based upon the foregoing, the applicant has not established that he is eligible for temporary residence. Section 210(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1160(a)(3)(B)(ii) provides that the alien may not adjust status to permanent residence, or that USCIS may terminate the temporary residence of any alien who has been convicted of any felony or of three or more misdemeanors committed in the United States. The applicant has one felony conviction. The alien has failed to establish by a preponderance of the evidence that he is eligible for legalization as a special agricultural worker. 8 C.F.R. § 210.3(d)(3) or that he is admissible to the United States.

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