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

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FILE:

XSI 88 264.1067

Office: CALIFORNIA SERVICE CENTER

Date: APR 20 2007

IN RE:

Applicant:



APPLICATION:

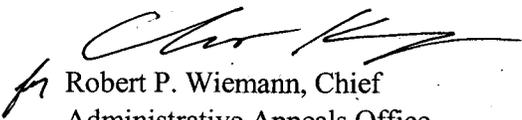
Application for Status as a Temporary Resident pursuant to Section 210 of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1160

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided 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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center. The matter was remanded by the Administrative Appeals Office (AAO).¹ The director reopened the matter and issued a new decision. The matter is now before the AAO on appeal. The appeal will be dismissed.

The application was initially denied because the applicant failed to demonstrate that he had performed sufficient qualifying agricultural employment during the 12-month period ending May 1, 1986. Subsequent to the remand, the director reopened proceedings and requested additional evidence, i.e., court dispositions for certain criminal charges. The director denied the application, finding that the applicant failed to provide evidence requested, the dispositions of his arrests, necessary for the adjudication of the application.

In response to the second notice of denial, counsel submits court records and a letter from the Watsonville Police Department. Counsel asserts that the applicant does not have a felony conviction. Counsel further asserts that she was given an open extension of time in which to submit the court dispositions in response to the director's request for additional evidence.

An applicant is ineligible for temporary residence if he or she has been convicted of any felony or three or more misdemeanors in the United States. 8 C.F.R. § 210.3(d)(3).

As defined by the regulation at 8 C.F.R. § 245a.1(p), *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. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor.

"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 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 evidence in the record indicates that the applicant has the following criminal record:

- On May 21, 1995, the Watsonville, California Police Department arrested the applicant and charged him with violating section 242 of the California Penal Code (PC), *battery*. Prosecution was declined.

¹ On November 13, 1992, the AAO remanded the file to permit the director to request to the applicant's request for a copy of his record of proceeding. This request was honored on March 1, 1993. On January 30, 2001, the AAO remanded the matter again for further consideration and action.

- On August 22, 1995, the applicant was charged with violating section 23152(a) of the California Vehicle Code (VC), *driving under the influence (DUI)*. On August 30, 1995, the court dismissed the *DUI* charge and the applicant pled guilty to the amended charge of violating VC § 23103.5, *wet reckless*, a misdemeanor. On April 16, 1996, the applicant was also convicted of the amended charge of violating VC § 40508(B), *failure to pay fine*, an infraction (Superior Court of California, Santa Cruz County, case number [REDACTED]).
- On March 6, 1999, the Watsonville, California Police Department arrested the applicant and charged him with violating section 242 PC, *battery*. Prosecution was declined.
- On May 20, 2003, the applicant was charged with one count of violating VC § 23153(a), *causing bodily injury to another person while driving under the influence*, a felony, and one count of VC § 23153(b), *causing bodily injury to another person while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle*, a felony. The applicant pled guilty to the latter charge and on August 18, 2003, he was sentenced to serve 5 months in county jail. Superior Court of California, Santa Clara County, case number [REDACTED]. The court disposition clearly indicates that this is a felony conviction.
- According to a report based upon the applicant's fingerprints, the San Jose Department of Corrections arrested the applicant on September 29, 2003, and charged him with *causing bodily injury to another person while driving under the influence*. On appeal, the applicant submits a typed letter from the Santa Clara County Department of Correction captioned "in-custody verification." The letter is annotated with the language: "no record of arrest in Sept. of 2003."

The applicant is ineligible for temporary residence due to his felony conviction. Counsel's assertion to the contrary is not persuasive.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she is admissible to the United States under the provisions of section 210(c) of the Act, 8 U.S.C. § 1160, and is otherwise eligible for adjustment of status under this section. 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.