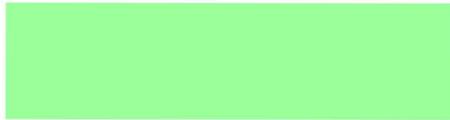




U.S. Citizenship
and Immigration
Services

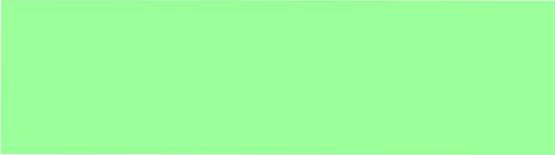
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Date: Office: CALIFORNIA SERVICE CENTER

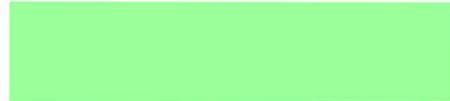
FILE: 

JUN 03 2013

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.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The applicant's temporary resident status as a special agricultural worker was terminated by Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-700, Application for Temporary Resident Status as a Special Agricultural Worker under section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160. On November 4, 1987, the I-700 application was approved. On March 5, 2009, the director of the California Service Center terminated the temporary resident status of the applicant, finding the applicant had failed to establish his eligibility for temporary resident status. Specifically, the applicant failed to provide the director with final court dispositions for all charges.

On appeal, counsel asserts that there is no evidence that the applicant has been convicted of three or more misdemeanors. On appeal counsel submits additional documentary evidence.

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, and must be otherwise admissible under section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).

"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. 8 C.F.R. § 245a.1(p).

"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 term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act; 8 U.S.C. § 1101(a)(48)(A).

Section 210(a)(3)(B)(ii) of the Act, 8 U.S.C. § 1160(a)(3)(B)(ii), provides for the termination of status of a special agricultural worker if the alien has been convicted of a felony or three or more misdemeanors committed in the United States.

The record contains court documents that reflect the applicant has the following criminal record:

- On April 3, 1981, the applicant was convicted of violations of the California Vehicle Code (VC) as follows: section 23102(a) (VC), *driving under the influence of alcohol or drugs or both*, a misdemeanor; and section 12951a (VC), *driving without a license*, an infraction. The applicant was placed on court probation for two years and ordered to pay a fine. (West Kern Municipal Court District, County of Kern, State of California, docket number [REDACTED])
- On May 14, 1985, the applicant was charged with violations of the California Penal Code (PC) and the California Vehicle Code (VC) as follows: section 12090 (PC), *altering firearm markings*; section 12025a (PC), *carrying concealed weapon*; 12031a (PC), *carrying a loaded firearm*; 23152a (VC), *driving under the influence*; and 23152b (VC), *driving with 0.1 percent or more, by weight, of alcohol*. On May 29, 1985, the applicant pleaded guilty to a violation of section 12025a (PC), a misdemeanor, and a violation of 23152a (VC), a misdemeanor, with a prior, and was sentenced to 25 days in jail, was placed on probation for three years and ordered to pay a fine. The remaining three counts against the applicant were dismissed. (West Kern Municipal Court District, County of Kern, State of California, case number [REDACTED]).
- On February 10, 1986, the applicant was arrested under the name Manuel Mendibil Osegeda and charged with violations of the California Penal Code, *receipt of stolen property* and *carrying a concealed weapon*. (Sheriff's Office, Bakersfield, California) The final disposition of this arrest is not known.
- On June 21, 1988, the applicant was charged with violations of the California Penal Code (PC) as follows: section 647f (PC), *drunk in public*; and 853.7 (PC), *failure to appear*. On appeal, counsel has submitted documentary evidence that on December 26, 1997, the charges against the applicant were dismissed in furtherance of justice. (Superior Court, State of California, County of Kern, Metropolitan Division, case number [REDACTED])

On November 28, 1990 the director of the Bakersfield office issued a notice of intent to terminate (NOIT) the applicant's temporary residence based upon his criminal record. The applicant responded by providing additional documentary evidence, including a copy of his California DMV record containing his misdemeanor conviction in 1981, and documentary evidence regarding his misdemeanors in 1985.

In addition, in the applicant's rebuttal to the NOIT, the applicant stated regarding his arrest in 1986 "the court records show nothing." This statement from the applicant is not sufficient to establish eligibility for temporary residence if other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications or petitions for immigration benefits (temporary resident status in this case) the applicant must show that the requested evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. In addition, in the absence of primary evidence, the applicant must then submit relevant "secondary evidence." If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. *See* 8 C.F.R. § 103.2(b)(2)(i) and (ii). The AAO notes that, despite the request for evidence contained in the NOIT, the applicant failed to provide final dispositions for the arrest listed in February 1986 and this deficiency has not been overcome on appeal. Thus, the applicant has not met his burden of proof and his application must be denied on that additional ground.¹

The applicant has not met his burden of proof in establishing his eligibility for temporary resident status pursuant to 8 C.F.R. § 210.3(b). The record reveals that the applicant has been convicted of three misdemeanors. The applicant is, therefore, ineligible for temporary resident status under section 210 of the Act. 8 C.F.R. § 210.3(d)(3). No waiver of such ineligibility is available.

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

¹ On appeal counsel also submitted a certification from the Clerk, Superior Court of California, County of Kern, certifying that misdemeanor criminal division records prior to 1988 have been destroyed pursuant to statute. As the courts routinely destroy old records as a matter of administrative procedure, this act does not affect an underlying charge or conviction.