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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:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUL 24 2006

XSI-89-085-1036

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. 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The first denial was based on adverse evidence acquired by the Immigration and Naturalization Service, or the "Service", now Citizenship and Immigration Services, or "CIS," regarding the applicant's claimed employment for [REDACTED]. The application was finally denied because of the applicant's criminal record.

On appeal from the initial denial, the applicant requested a copy of his legalization file. CIS complied with the request on August 11, 1995. In response to the final denial, counsel contends that the applicant's convictions should not count in this matter.

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 record reveals that the applicant was arrested on January 13, 1995, and ultimately convicted of Carrying A Concealed Weapon, in Las Vegas, Nevada, Agency Case No. [REDACTED]. The applicant was also arrested on September 1, 2002, charged with and ultimately convicted of [REDACTED] and Harassment [REDACTED] in Las Vegas, Nevada. An additional charge of Obstructing A Public Officer was dismissed.

On appeal, counsel misinterpreted the intent of Section 210(a)(3)(B) of the Act by implying that an applicant must have convictions to become ineligible for temporary resident status. Counsel's contention that the applicant became eligible for temporary resident status at the time the case was remanded back to the director is incorrect. The case was remanded back to the director for the further determination of the applicant's eligibility. The director of the LAU did not conclude that the applicant was eligible for temporary resident status.

Counsel's conclusion that the applicant committed two misdemeanor offenses after such time as he should have had status and therefore, the convictions would not have counted against the applicant is conjecture. At no point in the application process was it determined that the applicant was eligible for temporary resident status. Counsel's conclusion that the applicant has been eligible for temporary resident status throughout the adjudication process is not supported by the record. Therefore, there is no evidence to suggest that, had the application been adjudicated at an earlier date, the applicant would have been granted temporary resident status.

The applicant is ineligible for temporary resident status because of his three 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.

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.