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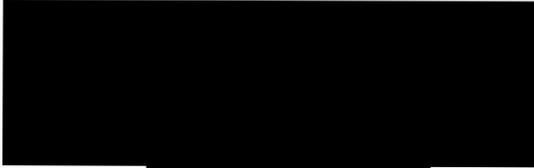
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, D.C. 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
XSC 88 500 06153

Office: CALIFORNIA SERVICE CENTER

Date: NOV 06 2006

IN RE: Applicant: [Redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

ON BEHALF OF APPLICANT: Self-represented

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center. It is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant had been convicted of two felonies and four misdemeanors in the United States.

On appeal the applicant asserts that he did not commit the petty theft offense. The applicant states that all of his family is residing in California and he wishes remain in the United States.

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. § 245a.2(c)(1).

"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).

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 802 Title 21). Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act).

The FBI record dated April 15, 1988 revealed the applicant's criminal history in California as follows:

1. On May 29, 1978, the applicant was arrested by the Yuba City Police Department for battery, a violation of section 242 PC, and disturbing the peace, a violation of section 415 PC, both misdemeanors.
2. On November 2, 1978, the applicant was arrested by the Sheriff's Office in Fairfield for drunk driving on the highway, a violation of section 23102(a) CVC, a misdemeanor and storage of an open container, a violation of section 23123 CVC.
3. On September 2, 1980, the applicant was arrested by the Sheriff's Office in Fairfield and subsequently charged with failure to appear, a violation of section 40508(a) CVC, a misdemeanor. This charge relates to the applicant's arrest on November 2, 1978 for drunk driving on the highway.
4. On October 19, 1983, the applicant was arrested by the Sheriff's Office in Salinas for possession of a narcotic controlled substance for sale, a violation of section 11351 H&S and possession of narcotic controlled substances, a violation of section 11350 H&S, both felonies.

On April 10, 1989, the applicant was requested to submit the court dispositions for *all* arrests, including the offenses mentioned above. The applicant was also requested to submit a Form H-6 from the California

Department of Motor Vehicles. The applicant, in response, requested an extension of 90 days in which to submit the court documentation. Subsequently, the applicant submitted the court dispositions for numbers one through three which reflected the following:

- On June 9, 1978, the applicant was charged in the Sutter County Municipal Court with violating section 415 PC, a misdemeanor. On June 12, 1978, the applicant pled guilty to section 415 PC. On July 3, 1978, the applicant failed to appear for sentencing and his cash bail ordered was forfeited. Case no. [REDACTED]
- On November 3, 1978, the applicant was charged in the Solano County Municipal Court with violating sections 23102(a) VC and 23123 VC. On November 17, 1978, the applicant pled guilty to section 23102(a) VC, a misdemeanor. The remaining charge was dismissed. The applicant was placed on summary probation for one year, ordered to pay a fine, and complete a drinking driving program. Case no. [REDACTED]
- On August 24, 1979, the applicant was charged in the Solano County Municipal Court with violating section 23102(a) VC with a prior. On August 31, 1979, the applicant pled guilty to section 23102(a) VC, a misdemeanor. The applicant was placed on summary probation for three years, ordered to pay a fine and enroll in an alcohol program. The applicant subsequently violated his probation, and on September 3, 1980, the applicant was sentenced to serve 30 days in the county jail and his driver's license was revoked for three years. Case no. [REDACTED]

The applicant, however, failed to submit the court disposition for number four above.

The record also reflects additional offenses in California as follows:

5. According to a security clearance printout dated December 12, 1990, on or about November 17, 1977, the applicant was arrested by the Salinas Police Department for petty theft, a violation of 484 PC, a misdemeanor. The final outcome is unknown.
6. According to a security clearance printout dated December 12, 1990, on or about November 18, 1981, the applicant was arrested by the Sheriff's Office in Salinas for hit and run – property damage, a violation of section 20002(a) VC, a misdemeanor. The applicant was convicted of this offense and sentenced to serve 360 days in jail. Case no. [REDACTED]
7. Regarding number four above, according to the security check printouts dated December 12, 1990 and June 23, 2004, on January 30, 1984, in the Monterey County Superior Court, the applicant was convicted of violating section 11351 H&S, possession of narcotic controlled substance for sale and was sentenced to serve 365 days in jail and placed on probation for five years. The remaining offense, section 11350 H&S, was dismissed. Case no. [REDACTED]
8. On or about January 20, 1990, the applicant was arrested by the El Monte Police Department for carrying a concealed weapon, a violation of section 12025(b) PC and carrying a loaded firearm in a public place, a violation of section 12031 PC, both misdemeanors. On August 27, 1990, the applicant was convicted in the Los Angeles County Superior Court of violating section 12021(a) PC, possession of a firearm by a felon, a felony. The applicant was sentenced to serve 16 months in prison. Case no. [REDACTED]

9. On or about April 21, 1993, the applicant was charged with driving under the influence with a prior, a violation of section 23152(a) VC; driving with .08 percent or more alcohol in the blood with a prior, a violation of section 23152(b) VC; and driving while license is suspended for drunk driving with a prior, a violation of section 14601.2(a) VC. On April 22, 1993, the applicant pled guilty to violating sections 23152(a) VC with a prior and 14601.2(a) VC with a prior. For section 23152(a) VC, the applicant was placed on probation for five years, ordered to serve 31 days in jail and ordered to pay a fine. For section 14601.2(a) VC, the applicant was placed on probation for three years. Case no. [REDACTED]
10. On November 12, 1995, the applicant was arrested by the Sheriff's office in Salinas for resist/obstruct peace officer, a violation of section 148(a) PC, and trespassing on occupied property without consent, a violation of section 602(1) PC, both misdemeanors. On January 12, 1996, a charge of disturbing a person by loud unreasonable noise, a violation of section 415 (2) PC was added to the complaint. On January 12, 1996, the applicant pled *nolo contendere* in the Monterey County Superior Court to violating section 415 (2) PC, a misdemeanor. The applicant was sentenced to serve two days in jail and placed on probation for three years. The remaining offenses were dismissed. Case no. [REDACTED]
11. On January 24, 1997, in the Monterey County Superior Court, the applicant pled *nolo contendere* to violating section 14601.5(a) with a prior, driving while license is suspended with a prior, a misdemeanor. The applicant was placed on probation for three years and on condition he serves 30 days in jail. Case no. [REDACTED]
12. On November 22, 1998, the applicant was arrested by the Sheriff's Office in Salinas for possession of a narcotic controlled substance, a violation of section 11351 H&S; transportation/sale of a narcotic controlled substance and conspiracy to transport/sell narcotic controlled substance, a violation of sections 11352 H&S and 182PC/11352 H&S respectively; possession of marijuana over 28 5/10 grams, a violation of section 11357 H&S; possession of marijuana for sale, a violation of section 11359 H&S; and possession of controlled substance for sale, a violation of section 11378 H&S. On January 8, 1998, except for section 11352 H&S, and one count of section 11351 H&S, all of the charges were discharged as the case was compromised. Case no. [REDACTED] On March 11, 1999, in the Monterey County Superior Court, sections 11351 & 11352 H&S were dismissed. Case no. [REDACTED]

The record contains court documents from: 1) Monterey County Superior Court indicating that the court dispositions for case number [REDACTED] for violations of sections 23152(a) VC and 14601.2(a) VC, and for case number [REDACTED] for an unspecified violation had been destroyed pursuant to Government Code section 68152; 2) documentation dated November 22, 2002 from Sutter County Municipal and Superior Court indicating that no criminal records were located between 1995 to the present in the applicant's name; and 3) documentation dated November 22, 2002 from Yuba County Superior Court indicating that a record check in the applicant's name revealed no criminal records from 1981 to the present.

As the courts routinely destroy old records as a matter of administrative procedure; this act does not affect an underlying charge or conviction.

The director, in denying the application, determined that the applicant had been convicted of two felonies and four misdemeanors. The director also found the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the

Act for number four above. The director advised the applicant that no court disposition had been submitted for his November 17, 1977 arrest for petty theft.

The fact that the applicant has not admitted to having committed the drug offense of October 1983 and the record fails to contain the actual court disposition for this offense, it cannot be determined that the applicant was convicted of a felony or that he is inadmissible under 212(a)(2)(A)(i)(II) of the Act.

On appeal, the applicant claims that he did not commit the petty theft offense mentioned in number five above. The applicant, however, has the burden to establish, with *affirmative evidence* that this offense was either dismissed or was in error. A mere statement made by the applicant is not affirmative evidence and fails to meet the applicant's burden.

Declarations by an applicant that he or she has not had a criminal record are subject to verification of facts by Citizenship and Immigration Services (CIS). The applicant must agree to fully cooperate in the verification process. Failure to assist CIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5).

The applicant is ineligible for temporary resident status because of his felony (number eight above) and misdemeanor convictions. 8 C.F.R. § 245a.2(c)(1). Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

Section 101(a)(43)(E)(ii) of the Act states that the term "aggravated felony" means an offense described in section 922(g)(1) . . . of title 18, United States Code (relating to firearms offenses).

Title 18, U.S.C. § 922(g)(1) states, in pertinent part, that it is unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." In the instant case, the applicant is an aggravated felon as he was convicted of possession of a firearm and was sentenced to 16 months in prison. The applicant is therefore ineligible for the benefit being sought.

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.2(d)(5). The applicant has failed to meet this burden.

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