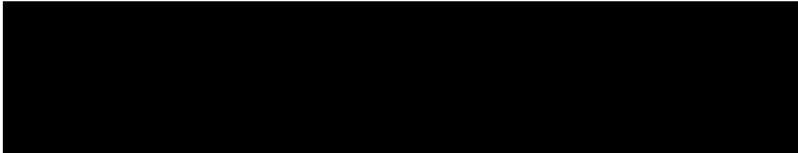


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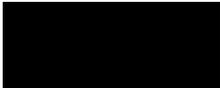
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**U.S. Citizenship  
and Immigration  
Services**



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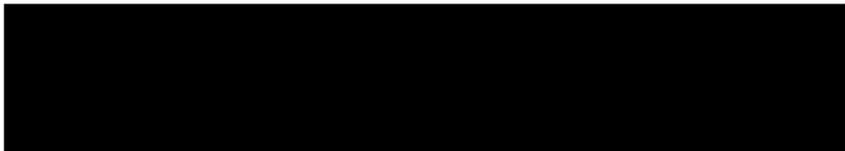
Office: CALIFORNIA SERVICE CENTER

Date: **MAY 23 2007**

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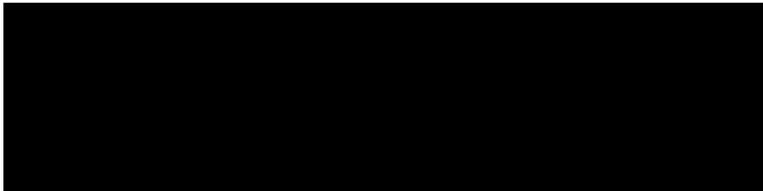
Applicant:



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. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wieman".

Robert P. Wieman, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status as a special agricultural worker was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director concluded that the applicant had been convicted of a felony in the United States, and accordingly, denied the application.

On appeal, counsel asserts that the denial of the application was based on the applicant's failure to file a rebuttal to the Notice of Intent to Deny. Counsel asserts that former counsel, [REDACTED] failed to inform the applicant that he had resigned from the California State bar on August 15, 1990 and withdrawn from the case. Counsel requested a 30-day extension in which to supplement the appeal.

Subsequently, counsel put forth evidence of [REDACTED] voluntary resignation from the California State Bar dated May 2, 1990, along with an affidavit from the applicant, which explained the agreement with his prior counsel.

The regulation at 8 C.F.R. § 210.3(d)(3) states in part that an alien who has been convicted of a felony or three or more misdemeanors committed in the United States is ineligible for temporary resident status.

"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. 8 C.F.R. § 245a.1(p).

The record reflects that on June 24, 1991 in the United States District Court of Arizona, the applicant was convicted of false declarations before a grand jury or court, a violation of Title 18 U.S.C. § 1623. The applicant was sentenced to the bureau of prisons for ten months and placed on probation for three years. Case no. [REDACTED]

On September 14, 2006, the director issued a Notice of Intent to Deny, which advised the applicant of his felony conviction and that said conviction rendered him ineligible for the benefit being sought. The applicant was also advised that there was no waiver available to an alien convicted of a felony offense, despite humanitarian factors. The applicant was given 30 days in which to submit a rebuttal to the notice. The applicant, however, failed to respond to the notice. Accordingly, on November 20, 2006, the director denied the application.

On appeal, counsel contends that the director should reopened the proceedings because the applicant's "failure to respond timely to the Notice of Intent to Deny was due to his attorney's neglect and unauthorized practice of law." Counsel argues the applicant thought that he was competently represented by former counsel and relied on counsel's competence to respond to the Notice of Intent to Deny. Counsel asserts that the applicant would have been able to respond on time had he been notified of former counsel's resignation.

An appeal based upon a claim of ineffective assistance of the representative requires (1) that the appeal be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with the representative with respect to the actions to be taken and what representations the representative did or did not make to the respondent in this regard, (2) that the representative whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal reflect whether a complaint has been filed with appropriate

disciplinary authorities with respect to any violation of the representative's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).

Counsel asserts that it is impossible to comply with the requirement of *Lozada* since the applicant's former counsel is no longer a member of the California State Bar after having resigned on May 2, 1990, without informing his client. Counsel contends that the applicant was relying on former counsel's competent and timely representation in responding to the Notice of Intent to Deny, and that former counsel's failure to notify the applicant of his resignation, his failure to formally withdraw as the applicant's counsel and his failure to respond to the notice constitutes ineffective assistance of counsel.

The applicant, in his affidavit, asserts that he was relying on former counsel to respond to the Notice of Intent to Deny in a timely manner. The applicant states that once he received the Notice of Decision, he immediately went to counsel's office; however, said office was no longer there.

The record reflects that former counsel first represented the applicant at the time of his rescheduled interview on March 8, 1989.<sup>1</sup> The applicant makes no mention of any communication between him and former counsel since his interview. As such, it is implausible that after 17 years the applicant did not attempt to contact former counsel once he received the notice that outlined the director's intention to deny the application.

Further, it is unclear how the applicant expected counsel to respond to the Notice of Intent to Deny as the record reflects that the director only sent the notice to the applicant. It was not until the Notice of Decision was issued that a copy was sent to former counsel.

Counsel asserts that the basis for the denial of the application was due to the applicant's failure to respond to the Notice of Intent to Deny. Although the director noted in his decision that the applicant did not respond to the notice, the basis for the denial of the application was due to the applicant's felony conviction. This conviction renders the applicant statutorily ineligible for the benefit being sought. As such, even if former counsel had advised the applicant of his resignation or his withdrawal from his case, obtaining new representation would not have change the outcome of the director's decision.

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intent to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as

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<sup>1</sup> Former counsel filed a Form EOIR-28 on June 9, 1989 in attempt to represent the applicant in his deportation proceedings; however, it does not appear that counsel was acknowledged in this proceeding as said form was not signed by the applicant.

rehabilitation or immigration hardships. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains “convicted” for immigration purposes.

Although these precedent decisions were finalized after the applicant applied for temporary residence, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices.

Therefore, pursuant to the above precedent decisions, no effect would have been given to the applicant if he had obtained an expungement.

The applicant is ineligible for the benefit being sought due to his felony conviction. 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 evidence that he or she is admissible to the United States under the provisions of section 210(c) of the Act, and is otherwise eligible for adjustment of status. 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.