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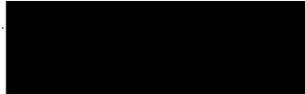


Office: California Service Center

Date: MAY 25 2007

IN RE:

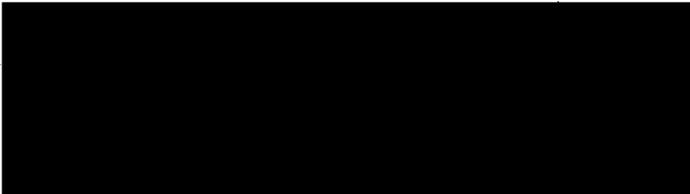
Applicant:



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:



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.

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status was denied by the Director, Western Service Center. A subsequent appeal was dismissed by the Director, Legalization Appeals Unit. The matter is now reopened by the Administrative Appeals Office, and will be remanded to the Director, California Service Center.

In his decision the Director, Western Service Center determined that the applicant had failed to provide evidence that he had been cleared of criminal charges. The director therefore concluded that the applicant had failed to demonstrate his admissibility and eligibility for temporary residence.

The Director, Legalization Appeals Unit dismissed the appeal because it was deemed to be untimely. Pursuant to 8 C.F.R. § 103.5(b), the Administrative Appeals Office will *sua sponte* reopen or reconsider a decision under section 245A of the Immigration and Nationality Act when it determines that manifest injustice would occur if the prior decision were permitted to stand. *Matter of O-*, 19 I&N Dec. 871 (Comm. 1989)

An applicant for temporary resident status under section 245A of the Act has the burden to establish 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...and is otherwise eligible for adjustment of status* under this section. 8 C.F.R. § 245a.2(d). When something is to be established by a preponderance of evidence it is sufficient that the proof only establish that it is probably true. *Matter of E-M-*, 20 I&N Dec.77 (Comm. May 24, 1989).

An alien is *ineligible* for temporary residence if he has been convicted of a felony, or three or more misdemeanors committed in the United States. *See* 8 C.F.R. § 245a.2(c)(1). 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 102 of the Controlled Substances Act, 21 USC 802). Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II).

The Federal Bureau of Investigation report in the record indicates the applicant was charged in Oregon with Criminal Activity in Drugs on January 19, 1978. It further shows a warrant was issued in Albany, California on September 9, 1987, charging the applicant with being a fugitive from justice. According to the notes of the officer who conducted the legalization interview in 1988, the applicant stated that he had been arrested for Driving Under the Influence (DUI) in 1982 in Portland, Oregon and for failing to pay a transit fare in Oakland, California in 1987.

On appeal, counsel states the applicant was not arrested for DUI in 1982, but rather for First Degree Forgery. She provides the dismissal order from the court regarding the forgery charge.

Concerning the claimed failure to pay a transit fare in Oakland in 1987, counsel explains that the applicant believed he might have been arrested for that. She provides letters from the court and police department in Oakland verifying that there are no records of such an arrest. It is noted that the applicant's reference to this incident may relate to the above-referenced September 9, 1987 warrant in nearby Albany naming him as a fugitive. Counsel states the applicant was arrested because of the warrant, which was issued because he had been accused of misusing a public-transit machine. She further explains that the Municipal Court for Albany-Berkeley advised her that the case had been transferred to South San Francisco, and notified her of

the docket number. She provides a "no record" clearance from the [REDACTED], and a letter from the Municipal Court of San Francisco indicating its inability to locate such a docket number regarding the applicant. This last letter indicates:

The charge of fugitive from justice would ordinarily be filed in a division other than the traffic division of the court. The inquiry you requested extends only to the records of the traffic division in room 101.

Thus, it is not entirely clear that the correct division of the Municipal Court of San Francisco was requested to conduct a record check. However, even if the applicant had been convicted of a failure to pay or failure to appear charge, it appears that offense would be a misdemeanor and would not disqualify the applicant.

Regarding the remaining charge, the applicant was convicted of Criminal Activity in Drugs (Possession of Less Than One Ounce of Marijuana) on March 3, 1978 in Oregon. Counsel has established that this is not a crime under Oregon law, but rather a violation. Nevertheless, the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act because that section specifies that a conviction *under any law or regulation relating to a controlled substance* renders one inadmissible.

In summary, counsel has established by a preponderance of evidence that the applicant is not ineligible for temporary residence due to a felony or three or more misdemeanor convictions. However, the applicant is inadmissible due to the marijuana conviction.

Pursuant to 8 C.F.R. § 245a.2(k)(3)(ii), inadmissibility due to a single offense of simple possession of thirty grams or less of marijuana may be waived. Therefore, the director shall accord the opportunity to file an application for waiver of inadmissibility. After adjudicating the waiver application, the director shall complete the adjudication of this temporary residence application.

**ORDER:** The matter is remanded for action consistent with the above.