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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted]
XLT 88 223 1064

Office: NEBRASKA SERVICE CENTER

Date: DEC 19 2008

IN RE: Applicant: [Redacted]

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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the National Benefits Center. 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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a special agricultural worker was initially denied by the Director, Northern Regional Processing Facility. The matter was then reviewed by the Administrative Appeals Office (AAO) on appeal and subsequently remanded. Since then, the Director, Nebraska Service Center has issued a new decision denying the application. The matter is now before the AAO on appeal. The appeal will be dismissed.

In his most recent decision, the director determined that the applicant failed to establish eligibility for temporary resident status under the provisions of the Special Agricultural Worker (SAW) program, because he did not submit sufficient documentation establishing that he had not been convicted of one felony or three misdemeanor offenses.

On appeal, counsel asserts that the applicant was only convicted of two misdemeanors. She provides a supplemental brief explaining the basis for her assertions.

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. § 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).

On April 11, 2007, the director issued a notice of intent to deny, notifying the applicant that a routine fingerprint check resulted in the discovery of adverse information. More specifically, the director noted an arrest dated in the State of Colorado on June 19, 1992 for one traffic offense, one misdemeanor, and one vehicular felony. The director requested that the applicant provide the certified court documents to establish the final dispositions for each of the stated offenses.

The applicant complied with the director's request by submitting court documents, which revealed the following convictions in the State of Colorado:

1. On September 26, 1989, the applicant was convicted of *driving under the influence* in violation of Title 42, Article 4, Section 907. (Case # [REDACTED])
2. On May 5, 1992, the applicant was convicted of *careless driving resulting in injury* in violation of Title 42, Article 4, Section 204.02, and *no proof of insurance* in violation of Title 42, Article 4, Section 1213. (Case # [REDACTED])

The director determined that the applicant failed to provide documentation that clearly defined each offense as a felony or misdemeanor under current stated law, which thereby precluded Citizenship and Immigration Services from being able to conclude that the applicant was not convicted of a felony or three misdemeanors. On this basis, the director concluded that the applicant failed to establish his eligibility for the immigration benefit sought.

On appeal, counsel submits a brief asserting that only two of the applicant's convictions were for offenses that can be deemed to be misdemeanors and that the offense for no proof of insurance is merely a traffic misdemeanor, to be distinguished from criminal misdemeanors. Counsel also provides a letter dated September 11, 2007 from [REDACTED], a Colorado attorney, who asserts that misdemeanor traffic offenses should not be accorded the same weight as criminal misdemeanors. Counsel relies on [REDACTED] opinion in her own brief, where she points out that by the compulsory insurance offense of which the applicant was convicted is termed a misdemeanor traffic offense, thereby clearly distinguishing it from a criminal offense.

Counsel's reasoning, however, is not persuasive in the present matter and under the scope of the relevant legal definition of "misdemeanor," which applies to any offense, traffic or criminal, which may be punished by imprisonment of one year or less. 8 C.F.R. § 245a.1(o). In fact, the same definition clearly states that only those offenses that may be punished by imprisonment for a maximum of five days will not be deemed misdemeanors even if they are termed as such by state code. *Id.*

In the present matter, Title 42, Article 4, Section 1701 states that the applicant's offense regarding compulsory insurance may be punished by a minimum of ten days imprisonment and a maximum of one year imprisonment, not to exclude the possibility of fines. Thus, regardless of whether the severity of the applicant's traffic misdemeanor offenses is less than a criminal misdemeanor offense, the fact that the applicant's offense fits the immigration definition of a misdemeanor leads to the inevitable conclusion that the applicant's compulsory insurance offense is a misdemeanor and will be treated as such in determining whether the applicant is eligible for temporary resident status under the SAW program. Counsel's claim that the applicant was not driving the vehicle at the time of the offense is not corroborated with documentary evidence. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In conclusion, the applicant is ineligible for temporary resident status because he has been convicted of three misdemeanor offenses. 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.