



U.S. Citizenship  
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Services

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FILE: [REDACTED]  
XSO 88 512 01084

Office: CALIFORNIA SERVICE CENTER

Date: SEP 03 200

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status as a special agricultural worker was most recently denied by the Director, California Service Center.<sup>1</sup> The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

In the most recent denial, the director determined that the applicant failed to establish that he was not convicted of one felony or three misdemeanors and is therefore ineligible for temporary resident status under the provisions of the Special Agricultural Worker (SAW) program.

On appeal, the applicant provides documentation indicating that the record for three of the applicant's misdemeanor convictions had been cleared and the guilty pleas set aside post judgment.<sup>2</sup> The applicant also asserts that in order to ensure due process compliance, Citizenship and Immigration Services (CIS) must apply the laws that were in effect at the time the applicant filed his application.

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

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<sup>1</sup> The record shows a lengthy procedural history, which includes a number of adverse decisions. The first denial was issued on January 6, 1989. Subsequent to an appeal that was filed by the applicant on January 30, 1989, the Director, Western Service Center, reopened the matter, *sua sponte*, on service motion in a decision dated February 4, 1991. It appears that this was the service center's second attempt to mail the motion to reopen, as the first attempt, which had been issued by the Director, Western Regional Processing Facility, on December 14, 1989, appears to have been sent to an outdated address. The Director, Western Service Center, issued another denial on March 16, 1992. However, the matter was remanded by the Administrative Appeals Office (AAO) to ensure compliance with the applicant's Freedom of Information Act request. The record was subsequently returned to the AAO where the matter was again remanded based on a favorable determination regarding the applicant's agricultural employment. The matter was then reopened on service motion and denied for a third time based on the applicant's failure to appear for fingerprinting within a specified time period. The AAO remanded the matter back to the director, determining that the fingerprint notice was sent to an incorrect address. After the applicant complied with the fingerprinting request, the Director, California Service Center, issued a new decision on the basis of the applicant's criminal record. The current decision will address the director's latest findings.

<sup>2</sup> It appears that \_\_\_\_\_ assisted the applicant with the filing of the appeal. Although this individual claims that he is a licensed attorney and identifies himself as the applicant's attorney of record, his statement is not accompanied by a Form G-28, Notice of Appearance of Entry of Appearance as Attorney or Representative. As a result of this deficiency, Mr. \_\_\_\_\_ will not be recognized as the applicant's attorney of record and a copy of this decision will be sent to the representative whose Form G-28 is on record.

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 a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), formerly section 212(a)(9) of the Act. Pursuant to 8 C.F.R. § 245a.18(c)(2)(i), this ground of inadmissibility, (crimes involving moral turpitude) may *not* be waived.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951).

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, formerly section 212(a)(23) of the Act. An alien is also inadmissible if a consular officer or immigration officer knows or has reason to believe he is or has been an illicit trafficker in any such controlled substance. Section 212(a)(2)(C) of the Act, formerly section 212(a)(23) of the Act.

In the present matter, the record reveals the following offenses:

1. On May 19, 1989, the applicant was arrested and charged with *felony possession of a narcotic control substance use/under the influence and misdemeanor use or being under the influence of a controlled substance*. The record shows that the applicant was convicted of *use under influence of a control substance*, a misdemeanor in violation of section 11550 of the California Health and Safety Code (HSC) and *possession of a narcotic control substance*, a misdemeanor in violation of section 11350 HSC. The applicant was subsequently placed on probation for two years and sentenced to serve 90 days in jail.
2. On December 10, 1989, the applicant was arrested for *burglary in the second degree*. On December 27, 1989, he was convicted of *petty theft of personal property* in violation of section 484/488 of the California Penal Code (PC). The applicant was placed on probation for two years and sentenced to ten days in jail. (Court No. [REDACTED]).
3. On November 23, 1990, the applicant was charged with *possession of a narcotic control substance and use under influence of a control substance*. The final court dispositions for these two offenses are unknown.
4. On February 10, 1991, the applicant was arrested and charged with *felony theft with priors and providing false identification to a peace officer*, a misdemeanor. On February 14, 1991, the applicant's felony charge was reduced to a misdemeanor and the applicant was ultimately convicted of *petty theft with specified priors* in violation of section 666 PC and *providing false*

*identification to a peace officer* in violation of section 148.9 PC. The applicant was subsequently sentenced to a total of 45 days in jail. (Court No. [REDACTED]).

In a notice of intent to deny (NOID) dated October 23, 2007, the director informed the applicant of the above charges and convictions and allowed the applicant 30 days in which to overcome the adverse information. The applicant was also instructed to provide the final court dispositions for the offenses cited above. The record does not show that CIS received a response from the applicant with regard to the previously noted adverse findings.

Accordingly, on January 10, 2008, the director issued a final decision denying the application. The director noted that the applicant failed to provide the requested final court dispositions. The director concluded that the applicant failed to establish that he had not been convicted of one felony or three misdemeanors.

On appeal, the applicant provides court documents dated November 26, 2007, showing that the applicant's criminal record has been cleared of the convictions described in Nos. 2 and 4 above, setting aside any guilty pleas and instead entering pleas of not guilty with regard these offenses.

However, under the current 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 by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003). Therefore, the court's orders setting aside three of the applicant's misdemeanor convictions do not preclude the AAO from taking into account the convictions listed in Nos. 2 and 4 above for the purpose of determining the applicant's eligibility for temporary resident status under provisions of the SAW program.

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). In light of this legal precedent, the applicant's argument that present law does not apply to the previously filed application is erroneous. Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all CIS offices.

The AAO also notes that the regulations do not place any time restriction on the convictions that can be considered. As the regulations must be accepted as validly adopted, the applicant is ineligible for temporary resident status based on his conviction of at least five misdemeanor offenses. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992).

Further, declarations by an applicant that he has not had a criminal record are subject to a verification of facts by the Service. The applicant must agree to fully cooperate in the verification process. 8 C.F.R. § 210.3(b)(3) states all evidence regarding admissibility and eligibility submitted by the applicant for adjustment of status will be subject to verification by Citizenship and Immigration Services. Failure by the applicant to release information may result in the denial of the benefit sought. Additionally, 8 C.F.R. § 210.3(c) states in part: "A complete application for adjustment of status must be accompanied by proof of identity, evidence of qualifying employment, evidence of residence and such evidence of admissibility or eligibility as may be requested by the examining immigration officer in accordance with such requirements specified in this part."

In the present matter, the applicant has failed to provide the final court disposition for the offenses cited in No. 3 above despite the director's prior request for such relevant documentation. Regardless, the applicant's five known misdemeanor convictions render him statutorily ineligible for the immigration benefit sought herein. Within the legalization program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States.

Additionally, within the legalization program, there is no waiver available to an alien who is inadmissible under section 212(a)(2)(A)(i)(I) and section 212(a)(2)(A)(i)(II) of the Act except for a single offense of simple possession of thirty grams or less of marijuana. See section 210(c)(2)(B)(ii) of the Act. The record shows that the applicant has been convicted of two theft-related offenses. Precedent case law has established that theft is a crime involving moral turpitude. See *U.S. v. Esparza-Ponce*, 193 F.3d 1133 (9<sup>th</sup> Cir. 1999) citing *United States v. Lopez-Vasquez*, 1 F.3d 751, 755 n. 8 (9<sup>th</sup> Cir. 1993). The record also shows that the applicant has been convicted of two drug-related offenses. As such, the applicant is inadmissible under sections 212(a)(2)(A)(i)(I) and (II) of the Act.

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.