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

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FILE:



Office: LOS ANGELES

Date:

JUN 03 2009

XSM 89 038 03073

IN RE:

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: 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status as a special agricultural worker was denied by the Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The director denied the application because it was determined that the applicant had been convicted of at least three felonies in the United States, and was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act).

On appeal, the applicant requests that his application be reconsidered as he has paid his debt to society for his theft conviction. The applicant asserts that he never went to court for the alien smugglings arrests.

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.

"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 the term "felony," pursuant to 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).

"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).

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 Act.

The record reflects that on March 5, 1987, the applicant was arrested by the Los Angeles Police Department for forgery. On April 16, 1987, the applicant was convicted of petty theft, a violation of section 484 PC, a misdemeanor. The applicant was sentenced to serve five days in jail and placed on probation for one year. [REDACTED]

The FBI report dated December 12, 2007, reveals that on May 4, 1990, and March 24, 1992, the applicant was arrested by the Border Patrol in San Ysidro Chula Vista, California for alien smuggling.

The director, in issuing his Notice of Intent to Deny of December 18, 2007, advised the applicant of his alien smuggling arrests and of his theft conviction, and that it appeared he was inadmissible under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(E) of the Act as the alien smuggling offenses and

the theft conviction were crimes involving moral turpitude. The applicant was also advised that it appeared that he was ineligible to adjust to temporary resident status due to the aggravated felonies and three crimes involving moral turpitude. The applicant was given 30 days in which to submit a rebuttal. The applicant, however, failed to respond to the notice.

Section 212(a)(2)(A)(ii)(II) of the Act provides for an exception to inadmissibility of an alien convicted of only one crime of moral turpitude if:

the *maximum* penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year *and*, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months (regardless of the extent to which the sentence was ultimately executed).

(Emphasis added).

Petty theft is a crime involving moral turpitude. *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979). The maximum sentence for a misdemeanor offense under section 484 of the California Penal Code is imprisonment in a county jail for a period not exceeding six months. The applicant qualifies under the petty offense exception as the maximum sentence for the crime of which he was convicted did not exceed imprisonment for one year, and he was not sentenced to a term of imprisonment in excess of six months. The applicant is, therefore, not inadmissible under section 212(a)(2)(A)(i)(I) of the Act for the theft conviction of a crime involving moral turpitude.

Regarding the alien smuggling offenses, the applicant asserts that he never went to jail or to court and "it still does not show on my criminal record." The applicant asserts that he was only interrogated and released because he was assisting a family member to illegally enter the United States.

A search of the database inquiries for the convictions of the alien smuggling offenses was conducted and there is no evidence in the databases of the applicant being convicted of these offenses.

Accordingly, the director's findings that the applicant had been convicted of felonies and was inadmissible under section 212(a)(6)(E) of the Act are withdrawn.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In order to be eligible for temporary resident status as a special agricultural worker, an alien must have engaged in qualifying agricultural employment for at least 90 man-days during the twelve-month period ending May 1, 1986, provided he is otherwise admissible under section 210(c) of the Immigration and Nationality Act and is not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a).

The inference to be drawn from the documentation shall depend on the extent of the documentation, its credibility and amenability to verification. If an applicant establishes that he has in fact performed the requisite qualifying agricultural employment by producing sufficient evidence to show the extent of that employment as a matter of just and reasonable inference, the burden then shifts to the Service to disprove the applicant's evidence by showing that the inference drawn from the evidence is not reasonable. 8 C.F.R. 210.3(b)(1).

There is no mandatory type of documentation required with respect to the applicant's burden of proof; however, the documentation must be credible. All documents submitted must have an appearance of reliability, i.e., if the documents appear to have been forged, or otherwise deceitfully created or obtained, the documents are not credible... if the Service has not obtained information which would refute the applicant's evidence, the applicant satisfies the requirements for the SAW program with respect to the work eligibility criteria. *United Farm Workers (AFL-CIO) v. INS*, Civil No. S-87-1064-JFM (E.D. Cal.).

The applicant has submitted sufficient evidence to establish as a matter of just and reasonable inference the performance of at least 90 man-days of qualifying agricultural employment during the twelve-month statutory period ending May 1, 1986. Consequently, the applicant is eligible for adjustment to temporary resident status as a special agricultural worker.

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 met this burden.

ORDER: The appeal is sustained.