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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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FILE: [REDACTED]
XAL-89-014-02017

Office: TEXAS SERVICE CENTER

Date: **MAY 13 2009**

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

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, Texas Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that on October 21, 1988, the applicant filed an Application for Temporary Resident Status as a Special Agricultural Worker under section 210 of the Immigration and Nationality Act, 8 U.S.C. § 1160. On May 10, 1991, the Director, Southern Service Center (now the Texas Service Center), denied the application because the applicant failed to file a Form I-690 application for waiver of grounds of excludability. The director determined that the applicant was excludable (inadmissible) under former section 212(a)(17) of the Immigration and Nationality Act (Act) because he reentered the United States within 5 years from the date of deportation without permission from the Attorney General.¹

The applicant filed a notice of appeal with the Administrative Appeals Unit (AAU). The appeal notice was blank and failed to provide the basis for the appeal. On April 9, 2005, the Director, Texas Service Center, *sua sponte* reopened the application and issued a request for additional evidence. The application was then forwarded to the AAO. On May 16, 2006, the AAO remanded the applicant's case to the Texas Service Center for a decision on the merits of the application. The AAO instructed that if the application is denied, it should be certified to the AAO. On May 8, 2007, the director issued a notice to deny the application based on the applicant's criminal convictions for *driving while license suspended or revoked* and a 3rd offense of *driving while intoxicated*. The director then forwarded the matter to the AAO.

On March 18, 2009, the AAO sent a notice to the applicant informing him that his case is now before the AAO to consider the initial appeal of the director's decision. The AAO notified the applicant that according to a Federal Bureau of Investigation (FBI) report based upon his fingerprints he was also convicted of *aggravated assault against a household member* and sentenced to 18 months probation. The AAO noted that the record of proceedings did not contain any court dispositions related to this offense. The applicant was afforded the opportunity to respond to the director's decision and the AAO's finding by submitting a brief and additional evidence (i.e. court dispositions) in support of his appeal within 30 days. As of the date of this decision, the applicant has not furnished a brief or any additional evidence, or otherwise responded to the notice. Therefore, the record will be considered complete for purposes of rendering a decision on the appeal.

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, and must be otherwise admissible under section 210(c) of the Act and not ineligible under 8 C.F.R. § 210.3(d). 8 C.F.R. § 210.3(a). An

¹ This ground of inadmissibility can now be found at section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii).

applicant has the burden of proving the above by a preponderance of the evidence. 8 C.F.R. § 210.3(b).

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. Part 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).

The record contains a court disposition that reveals on May 24, 2005, the applicant pled guilty to *driving under the influence of liquor/drugs (3rd offense)* in violation of section 66-8-102(F)(2) of the New Mexico Statutes and *driving while license suspended or revoked* in violation of section 66-5-39 of the New Mexico Statutes (Santa Fe Magistrate Court, Case No. M-49-DR-200500131). The maximum term of imprisonment for both offenses is not more than 364 days. N.M. Stat. Ann. §§ 66-8-102(F)(2), 66-5-39 (West 2005). Therefore, they are considered misdemeanors pursuant to 8 C.F.R. § 245a.1(o).

As previously stated, an FBI report based upon the applicant's fingerprints reveals that on December 1, 2000, the applicant was arrested in Santa Fe, New Mexico and charged with *Aggravated Assault Against a Household Member*. The AAO requested the applicant to submit a certified court disposition related to his arrest for this offense. However, the applicant failed to submit such documentation, and has not otherwise responded to the notice. According to the FBI report, on February 16, 2001, the applicant was convicted of *Aggravated Assault Against a Household Member* and sentenced to 18 months probation. This offense is fourth degree felony under New Mexico law. **N.M. Stat. Ann § 30-3-13 (West 2001)**. The basic sentence of imprisonment for a fourth degree felony is 18 months. N.M. Stat. Ann § 31-18-15 (West 2001). As such, the offense also constitutes a felony under immigration law. 8 C.F.R. § 245a.1(p). The AAO finds that the applicant's felony conviction renders him ineligible for temporary resident status. 8 C.F.R. § 210.3(d)(3).²

² The AAO notes that the applicant's conviction for *Aggravated Assault Against a Household Member* could also render him inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude.

The FBI report based upon the applicant's fingerprints reveals that in addition to the aforementioned offenses, the applicant has been arrested for the following violations:

- On May 3, 1991, the applicant was arrested by the Santa Fe Police Department and charged with *Driving While Intoxicated* and *Reckless Driving* in violation of respective sections 66-8-102 and 66-8-113 of the New Mexico Statutes. Both of these offenses are misdemeanors pursuant to section 8 C.F.R. § 245a.1(o).
- On March 15, 1994, the applicant was arrested by the Santa Fe Sheriff's Office and charged with *Driving While Intoxicated* and *Contributing to Delinquency of Minor* in violation of respective sections 66-8-102 and 30-6-3 of the New Mexico Statutes. As stated, *Driving While Intoxicated* is a misdemeanor offense. See 8 C.F.R. § 245a.1(o). *Contributing to Delinquency of Minor* is a felony pursuant to 8 C.F.R. § 245a.1(p).
- On June 9, 1994, the applicant was arrested by the Santa Fe Police Department and charged with *Driving While Intoxicated*, *Careless Driving* and *Driving While License Revoked* in violation of respective sections 66-8-102, 66-8-114 and 66-5-39 of the New Mexico Statutes. These offenses are misdemeanors pursuant to 8 C.F.R. § 245a.1(o).
- On June 24, 1994, the applicant was arrested by the Santa Fe State Police Department and charged with the misdemeanor offenses *Driving While Intoxicated* and *Driving While License Revoked* in violation of respective sections 66-8-102 and 66-5-39 of the New Mexico Statutes.
- On March 15, 2000, the applicant was arrested by the Santa Fe Sheriff's Office and charged with the misdemeanor offenses *Aggravated Driving While Intoxicated* and *Driving While License Suspended or Revoked* in violation of respective sections 66-8-102 and 66-5-39 of the New Mexico Statutes.
- On July 8, 2000, the applicant was arrested and charged with *Reckless Driving*, *Fleeing or Eluding Police Officer* and *Driving While Intoxicated* in violation of respective sections 66-8-113, 30-22-1 and 66-8-102 of the New Mexico Statutes. These offenses are misdemeanors pursuant to 8 C.F.R. § 245a.1(o).
- On August 28, 1994, the applicant was arrested by the Eagle County Sheriff's Office and charged with a *Disorderly Conduct* misdemeanor in violation of section 18-9-106 of the Colorado Revised Statutes. This offense is a misdemeanor pursuant to 8 C.F.R. § 245a.1(o).

In conclusion, the applicant has not met his burden of proof in establishing his eligibility for temporary resident status pursuant to 8 C.F.R. § 210.3(b). The record reveals that the applicant has been convicted of two misdemeanors and one felony, and charged with 14 misdemeanors and one felony. There is no documentation in the record to show that he has not been convicted

of these offenses. The applicant is therefore ineligible for temporary resident status under section 210 of the Act. 8 C.F.R. § 210.3(d)(3). No waiver of such ineligibility is available.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.