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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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U.S. Citizenship
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Services

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FEB 02 2010

FILE:

XBA-88-046-03012

Office: CALIFORNIA SERVICE CENTER

Date:

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:

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Application for Temporary Resident Status as a Special Agricultural Worker was denied by the director of the California Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-700, 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 September 11, 2007, the director of the California Service Center denied the application, finding that the applicant is ineligible to adjust to temporary resident status because he has been convicted of a felony and/or of three or more misdemeanors committed in the United States.

On appeal, counsel asserts that there is no evidence that the applicant has been convicted of a felony and/or three or more misdemeanors. Counsel also states that he will file a brief within 30 days of the response to the FOIA request. The record reflects that the applicant's FOIA request, NRC2008039835, was processed on June 16, 2009. The record also reflects that the applicant's FOIA request, WSC95000807, was processed on April 11, 1995. Counsel has not submitted a brief on appeal. The applicant has not submitted any addition evidence on 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 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 term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where - (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. Section 101(a)(48)(A) of the Act; 8 U.S.C. § 1101(a)(48)(A).

The record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses:

- On July 19, 1986, the applicant was charged with the following violations of the California Vehicle Code (VC): section 23152(a), driving under the influence of alcohol or drugs or both, a misdemeanor; section 23152(b), driving with a blood alcohol content (BAC) of 0.08% or higher, a misdemeanor; section 12500(a), unlawful to drive unless licensed, a misdemeanor, and section 2002(a), hit and run resulting in property damage, a misdemeanor. On May 15, 1987, the applicant pled guilty to counts one, three and four. The remaining charge was dismissed. (County of Kern, [REDACTED])
- On November 24, 1986, the applicant was charged with violating section 459 of the California Penal Code (PC), burglary. On January 16, 1987, the case was dismissed for insufficient evidence (County of Kern, [REDACTED])
- On May 14, 1987, the applicant was charged with violating section 2000(a) of the California Vehicle Code (VC), hit and run resulting in property damage. The final disposition of the charge is unknown. (Sheriff's Department Bakersfield).
- On August 20, 1989, the applicant was charged with violating section 11550 of the California Health and Safety Code (HS), to use or be under the influence of a controlled substance. The final disposition of the charge is unknown.
- On May 5, 1999, the applicant was charged with violating the following sections of the California Vehicle Code (VC): section 23152(a), driving under the influence of alcohol or drugs or both, a misdemeanor; section 12500(a), unlawful to drive unless licensed, a misdemeanor, and section 23225, storage of opened container, a misdemeanor. On May 17, 1999, the applicant pled guilty to all three charges (Tulare County Superior Court, [REDACTED])
- On, May 21, 1999, the applicant was charged with violating the following sections of the California Vehicle Code (VC): section 14601.2(A), driving when driver's license suspended or revoked for driving under the influence of alcohol, drug, or combination; section 16028(A), driving without proof of insurance, and section 40508(A), failure to appear. On May 24, 1999 the applicant pled guilty to a violation of section 14601.2(A), driving when driver's license suspended or revoked for driving under the influence of alcohol, drug, or combination, a misdemeanor (Kern County Superior Court, [REDACTED]). The remaining charges were dismissed.
- On December 16, 2001, the applicant was charged with a violation of the California Penal Code (PC), 647 (F), drunk in public. On December 20, 2001, the applicant pled guilty to the charge, a misdemeanor (Kern County Superior Court, [REDACTED])
- On October 19, 2003, the applicant was charged with violating the following sections of the California Vehicle Code (VC): 23152(a), driving under the influence of alcohol or

drugs or both, and 23152(b), driving with a blood alcohol content (BAC) of 0.08% or higher. On February 13, 2004, the applicant pled *nolo contendere* to the charge of 23152(b), driving under the influence of alcohol or drugs or both, a misdemeanor (Kern County Superior Court, [REDACTED]). The remaining charge was dismissed.

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 nine misdemeanors. 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.