

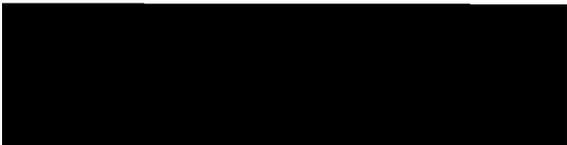
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W. MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



L1

Date: **APR 20 2012** Office: CALIFORNIA SERVICE CENTER

FILE:



IN RE: Applicant:



APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

SELF-REPRESENTED<sup>1</sup>

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the office that originally decided your case. 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.



Perry Rhew  
Chief, Administrative Appeals Office

<sup>1</sup> Prior counsel withdrew as attorney of record in 1997.

**DISCUSSION:** The director of the California Service Center terminated the temporary resident status of the applicant, finding the applicant to be ineligible for temporary resident status based upon a disqualifying criminal conviction. The case will be remanded for further consideration and action.

The director terminated the applicant's temporary resident status, finding that the applicant was inadmissible and thus ineligible for such status because of his conviction for possession of a controlled substance, based upon the following: the applicant violated a law relating to a controlled substance, pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II); and, the applicant was convicted of a felony, pursuant to section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255(a)(4)(B), and 8 C.F.R. § 245a.2(c)(1). The AAO initially remanded the file to the field for the inclusion of the Form I-694 into the record. The AAO hereby withdraws its decision of April 17, 1997 and remands the matter for a different reason.

On appeal, the applicant asserts that the termination of his temporary resident status was in error because he was not convicted of a felony, but of an undesignated offense. Therefore, the applicant asserts that he is not ineligible for temporary resident status on this basis. In addition, the applicant asserts that, if he is determined to be inadmissible on the basis of a violation relating to a controlled substance, he is waiver eligible.<sup>2</sup> The applicant has not submitted any further documents in support of the appeal.<sup>3</sup> The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.<sup>4</sup>

The temporary resident status of an alien may be terminated upon the determination that the alien was ineligible for temporary residence. Section 245A(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1255a(b)(2)(A), and 8 C.F.R. § 245a.2(u)(i).

An alien is ineligible for temporary residence if he has been convicted of a felony, or three or more misdemeanors committed in the United States. *See* 8 C.F.R. § 245a.2(c)(1).

"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).

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<sup>2</sup>The AAO notes that the record contains a pending Form I-690, application for waiver.

<sup>3</sup>The AAO notes that the applicant's FOIA request, number [REDACTED] was processed on February 10, 1993. The AAO also notes that the applicant's FOIA request, number [REDACTED] was processed on June 8, 1998.

<sup>4</sup>The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

“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).

Section 212(a)(2) of the Act provides, in pertinent part, that:

(A) *Conviction of certain crimes.*—

(i) In General.—Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of —

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or (II) a violation of (or a conspiracy or attempt 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 U.S.C. 802)),

is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

(h) The Attorney General [now, Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) and of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .

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

- On July 7, 1986, the applicant was charged with violating sections 13-1805(a)(1) and 13-702(h), of the Arizona Revised Statutes (A.R.S.), *shoplifting property of a value of one thousand dollars or less*. On the same date, the applicant was adjudged guilty of the charge, a class one misdemeanor, and was ordered to pay a fine. (City of Phoenix Municipal Court, Maricopa County, Arizona, complaint number 8442164)
- On May 13, 1989, the applicant was charged with the following: Count I: violating sections 13-3102, 13-3101, 13-701, 13-702, 13-801 and 13-812 (A.R.S.), *knowingly*

*manufactured, possessed, transported, sold or transferred a prohibited weapon; and, Count II: violating sections 13-3405, 13-3401, 13-701, 13-702, 13-707, 13-801, 13-802 and 13-812 (A.R.S.), knowingly possessed or used an amount of marijuana having a weight of less than one pound.* The record contains, as part of the applicant's court documents, a Request for Scientific Analysis, stating that the amount of marijuana the applicant was found to have possessed was 1.1 grams. On June 21, 1989, the applicant pleaded guilty to the Count II offense, a class six undesignated offense, and was sentenced to three years of probation and ordered to pay a fine. Also on that date, Count I was dismissed. On September 25, 1992, the applicant was discharged from probation. On January 14, 1993, the class six undesignated offense was designated as a misdemeanor, based upon the applicant's successful completion of the terms of his probation. (Superior Court of Arizona, Maricopa County, case number [REDACTED])

The first issue to address is whether the applicant is ineligible for temporary resident status for having been convicted of a felony. According to court documents in the record, the applicant was convicted of a class six felony. A class six felony is considered an "open" offense because the trial court is conferred discretion by the terms of Arizona Revised Statutes section 13-702(H),<sup>5</sup> in determining the appropriate point at which to classify the offense as a class six felony or a class one misdemeanor. *State v. Shlionsky*, 184 Ariz. 631, 632, 911 P.2d 637, 638 (App. 1996). Here, the record shows that the trial court placed the applicant on probation for a class six felony and designated his offense as a misdemeanor after the probation terminated. As noted above, section 13-707 (ARS) states that the maximum term of imprisonment for a class one misdemeanor is six months.

With regard to a sentence modification, in *In re Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005), the Board of Immigration Appeals gave for immigration purposes "full and faith and credit to the decision of California Superior Court modifying the respondent's sentence, *nunc pro tunc*, from 365 days to 240 days," even though the modification was not to correct any substantive or procedural defect in the original judgment. In view of the holding in *Cota-Vargas*, the AAO will give full faith and credit to the trial court's designation of the applicant's offense as a misdemeanor rather than a class six undesignated felony. The applicant has overcome one basis for the director's decision to terminate his temporary resident status.

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<sup>5</sup>Arizona Revised Statutes section 13-702(H) acts as a sentence-reducing or sentence-enhancing statute, and it provides that:

Notwithstanding any other provision of this title, if a person is convicted of any class 6 felony . . . and if the court . . . is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this title and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor . . .

The next issue to address is whether the applicant established he is admissible to the United States, as required by section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255(a)(4)(B).

Section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1181(a)(2)(A)(i)(II), provides that any alien convicted of, or who admits having committed a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance is inadmissible.

The record contains court documents indicating that the applicant was convicted for possession of a controlled substance, marijuana. The AAO finds the applicant is inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1181(a)(2)(A)(i)(II), for having violated a law relating to a controlled substance, on the basis of his misdemeanor conviction for possession of marijuana. As stated above, no waiver of the ground of inadmissibility under section 212(a)(2)(A)(i)(II) of the Act is available to an alien found inadmissible under this section, except for a single offense of simple possession of thirty grams or less of marijuana. As noted above, the court documents in the record reveal that the applicant was found to have been in possession of 1.1 grams of marijuana. As such, the AAO finds that the applicant, although inadmissible under section 212(a)(2)(A)(i)(II) of the Act for possession of a controlled substance, is eligible for waiver consideration.

Therefore, the case will be remanded to permit the director to adjudicate the Form I-690, application for a waiver. If the waiver application is approved, the director will reopen the instant application and withdraw its prior decision. If the director denies the waiver application, and/or again terminates the applicant's temporary resident status, the director shall certify its decision(s) to the AAO.

**ORDER:** The case is remanded for further consideration and action.