U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Applicant: [redacted]

JAN 25 2005

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]

PUBLIC COPY

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. 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.

Ellen C. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, Western Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to furnish the dispositions of the criminal charges that had been lodged against him.

On appeal, counsel asserts that, because the applicant's convictions occurred prior to the enactment of the "one felony/three misdemeanor rule," they cannot be considered in this proceeding.

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 applicant was arrested for Aggravated Assault on a Police Officer, a felony, on April 20, 1986. The director denied the application because the applicant did not provide the disposition for this charge, and for a 1986 Driving Under the Influence charge. The applicant was also arrested for the same assault charge on December 25, 1989. It is not clear that the applicant was convicted of this charge on either occasion. However, the applicant has not established that the charges were withdrawn, or that he was found not guilty.

The applicant was convicted of Driving Under the Influence on June 18, 1982, July 11, 1986, and January 8, 1990. He was also convicted on January 8, 1990 of Failure to Provide Proof of Financial Responsibility. On September 14, 1992, he was convicted of Driving Under the Influence of Alcohol, Drugs, Vapors or Combination.

In addition, the applicant was convicted on August 10, 1988 of Aiding and Abetting Illegal Entry into the United States in violation of 18 U.S.C. § 2 and 8 U.S.C. § 1325. This conviction also renders him inadmissible under section 212(a)(6)(E) of the Act as an alien who aided and abetted other aliens to enter the United States in violation of law.

Section 212(a)(6)(C) of the Act states in part that an alien is inadmissible if he, by fraud or willful misrepresentation of a material fact, sought to procure a benefit provided under the Act. The applicant has

admitted to having entered into a sham marriage in order to acquire an immigration benefit. He is therefore inadmissible under this section as well.

The applicant has been convicted of more than three misdemeanors. Counsel argues that only misdemeanor convictions occurring after the December 1989 passage of the Immigration Nursing Relief Act of 1989, which brought forth the "one felony/three misdemeanor" rule, may be considered in determining the applicant's eligibility. It is noted that such arguments were made in a class-action lawsuit. The district court in *Naranjo-Aguilera v. INS*, Civ. No. S-91-1462 EJG/GGS (E.D. Cal. June 30, 1992), agreed with the arguments presented by counsel in the instant matter. The district court's decision, however, was subsequently overturned by the court of appeals in *Naranjo-Aguilera v. INS*, 30 F.3d 1106 (9th Cir. 1994).

The regulations must be accepted as validly adopted. *See Matter of C-*, 20 I&N Dec. 529, 532 (BIA 1992). The regulation in this case, stating that an alien who has been convicted of three misdemeanors is ineligible for temporary residence, does not specify that the convictions had to have occurred prior to the passage of the underlying 1989 law amendment. Therefore, the applicant's multiple misdemeanor convictions render him ineligible for temporary resident status. Within the legalization program, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying for adjustment of status has the burden of proving 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.