U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 05 2007

XSI-88-119-1020

IN RE: Applicant: [redacted]

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]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The applicant's temporary resident status was terminated by the Director, Western Service Center. An appeal was dismissed by the Administrative Appeals Office (AAO). The AAO now reopens the matter. The appeal will be dismissed.

The director terminated the applicant's status because the applicant had been convicted of at least three misdemeanors.

On appeal, prior counsel pointed out that the convictions were expunged. The AAO found that the expungements under state law had no effect in this federal proceeding, and dismissed the appeal.

Pursuant to 8 C.F.R. 103.5(b), the Administrative Appeals Office will *sua sponte* reopen or reconsider a decision under section 210 of the Immigration and Nationality Act when it determines that manifest injustice would occur if the prior decision were permitted to stand. *Matter of O--*, 19 I&N Dec. 871 (Comm. Feb. 14, 1989)

Prior to the dismissal of the appeal, current counsel submitted a statement that was not incorporated into the record in a timely fashion. In light of that, the matter will be reopened.

The status of an alien lawfully admitted for temporary residence under section 210(a)(2) of the Act may be terminated if he or she is convicted of any felony or three or more misdemeanors in the United States. 8 C.F.R. § 210.4(d)(2)(iii). Furthermore, an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary residence. 8 C.F.R. § 210.3(d)(3).

According to 8 C.F.R. § 210.5, an alien who has been granted temporary resident status before November 30, 1988 under section 210(a)(1) of the Act, and has maintained that status satisfactorily, shall be adjusted to lawful permanent resident status as of December 1, 1990. Termination proceedings must be commenced before the alien becomes eligible for the adjustment to lawful permanent resident status. 8 C.F.R. § 210.4(d)(3)(ii).

In this case, the applicant was granted temporary resident status on October 30, 1988. He was notified by a letter dated November 27, 1990 of the director's intent to terminate his temporary resident status because of his misdemeanor convictions. The applicant was allowed 30 days in which to submit sufficient evidence to overcome the ground of ineligibility. After the applicant failed to overcome his ineligibility, the director terminated the applicant's temporary resident status. By notifying the applicant on November 27, 1990 of his intent to terminate, the director met the statutory requirement of commencing termination proceedings prior to December 1, 1990.

Prior counsel conceded the applicant was convicted of *Drunk Driving* on August 20, 1975 and February 16, 1978, and of *Hit and Run*, and *Driving Without a License*, on September 11, 1981. These are the convictions referred to by the director in his decision. Prior counsel also pointed out that the applicant was convicted of *Driving With a Revoked or Suspended License*, and *Drunk Driving on Highway*, on October 14, 1979. He furnished orders from the court setting aside and dismissing the convictions under section 1203.4 of the California Penal Code.

discharge, or otherwise remove a guilty plea or other record of guilt or conviction. Any subsequent action which overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

Thus, as the applicant remained convicted of the six misdemeanor offenses shown above, his appeal was dismissed.

In this reopened proceeding counsel asserts these convictions should not be considered in the adjudication of the appeal, as they occurred prior to December 19, 1989, the effective date of the "three misdemeanor" ineligibility rule. He does not dispute the fact of the convictions. Counsel points out that the law itself, at section 210(a)(3)(B) of the Act, states the Attorney General may deny adjustment to permanent status and provide for termination of temporary resident status if the alien *is* convicted of a felony or three or more misdemeanors committed in the United States. (emphasis added) Counsel maintains the use of the word "is" means the law is intended to apply only to misdemeanor and felony convictions which take place after an alien becomes a temporary resident, and after December 19, 1989, the date the law section became effective.

The court of appeals in *Naranjo-Aguilera v. INS*, 30 F.3d 1106 (9th Cir. 1994) ruled that the district court had no jurisdiction to rule on the "one felony, three misdemeanor" regulation and its implementation by the legacy Immigration and Naturalization Service. It left intact the Service's determination that conviction(s) of a felony or three or more misdemeanors committed in the United States support a denial of an application for temporary residence as a special agricultural worker as well as a termination of temporary residence, regardless of when the convictions occurred. Further, it is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992).

Counsel asserts, without explanation, that the applicant's temporary resident status was adjusted to that of a lawful permanent resident on December 1, 1988 pursuant to 8 C.F.R. § 210.5. As stated above, that regulation states that an alien whose adjustment to temporary resident status occurred prior to November 30, 1988, and who maintained such status satisfactorily, shall be adjusted to lawful permanent residence as of December 1, 1990. Counsel's assertion that the applicant obtained permanent resident status on December 1, 1988 is unfounded. The director commenced termination proceedings in a timely manner prior to December 1, 1990, as explained above, and the applicant, therefore, never obtained lawful permanent resident status.

Finally, counsel points out both the statute and regulation state the director *may* terminate status. Counsel contends that Citizenship and Immigration Services should, therefore, exercise discretion in matters of termination of status. However, in matters relating to criminal convictions, foregoing termination of status would result in an incongruous situation of allowing an alien who is statutorily ineligible for lawful status to retain such status.

The applicant's misdemeanor convictions render him ineligible for temporary resident status. An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence 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.