

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



L2

FILE: [REDACTED] Office: Los Angeles Date: **JAN 26 2005**

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by Life Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

ON BEHALF OF APPLICANT: Self-represented

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 the matter 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, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office. The appeal will be dismissed.

The director concluded that the applicant was ineligible for adjustment to legal permanent resident status under 8 C.F.R. § 245a.11(d)(1) because on December 2, 1987, she had been convicted of a felony – transportation, importation, sale or gift of marijuana – in the United States.

On appeal the applicant states:

DHS is in error to deny the LIFE Application. DHS failed to distinguish between arrests and convictions.

DHS did not have proof of any convictions for which records have been purged or destroyed. The drug conviction comes under the exceptio [sic] under Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000). As such the drug conviction [sic] is not a felony conviction. DHS failed to apply the exception under [REDACTED]

Applicant requests the right to be reinterviewed so that the criminal record can be reviewed with the assistance of counsel. The records of DHS-USCIS should be useful to Application [sic] to show her eligibility for the benefit requested.

The applicant appears to be represented. However, the record does not contain Form G-28, Notice of Entry of Appearance as Attorney or Representative. All representations will be considered, but the decision will be furnished only to the applicant.

Under section 1104 of the LIFE Act, an applicant for permanent resident status must establish that he or she has not been convicted of a felony or of three or more misdemeanors committed in the United States. See section 1104(c)(2)(D)(ii) of the LIFE Act, 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(1). There is no waiver provision under the LIFE Act for this ground of inadmissibility to the United States. The applicant was arrested on November 18, 1987 in Los Angeles County, California, and charged with selling or furnishing “marijuana/hashis,” a felony count under section 11360(A) of the California Health and Safety Code. The applicant pleaded guilty on December 2, 1987.

The applicant argues that her felony drug conviction comes under an exception under a court decision issued by the U.S. Court of Appeals for the Ninth Circuit on August 1, 2000, [REDACTED]. INS, 222 F.3d 728 (9th Cir. 2000) [REDACTED]. Under that decision, an applicant could be eligible for special treatment under the Federal First Offender Act (FFOA).

The FFOA, 18 U.S.C. § 3607, provides, in relevant part, as follows:

- (a) . . . If a person found guilty of [simple possession of a controlled substance] (1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to

controlled substances; and (2) has not previously been the subject of a disposition under this subsection; the court may . . . place him on probation for a term of not more than one year without entering a judgment of conviction. [During or a]t the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation . . .

- (b) . . . A disposition under subsection (a) . . . shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

Section 101(a)(48)(A) of the Immigration and Nationality Act (INA) defines the term “conviction” as “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.” The applicant’s felony conviction in December 1997 satisfied all of the statutory criteria, as highlighted.

Lujan, however, holds that the “definition of ‘conviction’ for immigration purposes does not repeal either the [FFOA] or the rule [set forth in *Matter of Manrique*, 21 I & N Dec. 3250 (BIA, 1995)] that no alien may be deported based on an offense that could have been tried under the [FFOA], but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute.” See *Lujan* at 749.

The record indicates that the applicant would not have qualified for treatment under the FFOA. The applicant did not plead guilty to simple possession of a controlled substance, but to the more serious charge of selling or furnishing marijuana and/or hashish. Additionally, there is evidence that the applicant had previously been convicted of a California State controlled substances law as she was convicted of a misdemeanor charge of the possession of “hypo and syringe” based on her guilty plea to that charge on October 29, 1986. Finally, the record does not reflect that the applicant’s felony conviction for selling or furnishing marijuana and/or hashish was expunged pursuant to a rehabilitative statute of the California Penal Code.

Thus, the applicant has been “convicted” of a felony for immigration purposes. Accordingly, the applicant is statutorily barred by section 1104(c)(2)(D)(ii) of the LIFE Act from adjusting to permanent resident status.

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