

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

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, D.C. 20529



U.S. Citizenship
and Immigration
Services

L2

PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: NATIONAL BENEFITS CENTER

Date:

MAY 04 2006

MSC 03 227 60278

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:

[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. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Director, National Benefits Center and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director concluded that the applicant had been convicted of at least three misdemeanors in the United States, and accordingly, denied the application.

On appeal, counsel asserts that the applicant's misdemeanor convictions had been expunged.

The regulation at 8 C.F.R. § 245a.18(a) states in part that an alien who has been convicted of a felony or three or more misdemeanors committed in the United States is ineligible for adjustment to lawful permanent resident status.

"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 the term "felony," pursuant to 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)

"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. 8 C.F.R. § 245a.1(p).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy 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 802 of Title 21). Section 212(a)(2)(A)(i)(II) of the Act.

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Act.

The record reflects the applicant's criminal history in the State of California:

1. On May 18, 1985 the applicant was arrested by the Los Angeles Police Department and charged with theft of personal property, a violation of 484(a) PC, a misdemeanor. On June 3, 1985, the applicant was convicted of this offense. [REDACTED]
2. On January 22, 1988, the applicant was arrested by the Los Angeles Police Department for sale/furnish of marijuana, a violation of 11360(a) H&S. On February 18, 1988, the applicant was charged with possession of marijuana for sale, a violation of section 11359 H&S, and sale/furnish of marijuana. On August 24, 1988, the applicant was convicted in the Los Angeles County Superior Court of possession of marijuana for sale, a felony offense. On October 14, 1988, the applicant was sentenced to serve 90 days in jail and placed on probation for three years. The remaining charge was dismissed. On March 25, 2003, the conviction was reduced to a misdemeanor and expunged in accordance with sections 17(b)(3) PC and 1203.4 PC, respectively. [REDACTED]

3. On June 7, 1990, the applicant was arrested by the Los Angeles Police Department for shoplifting, a violation of section 484(a) PC. On June 8, 1990, the applicant was charged with petty theft with a prior, a violation of section 666-484(a) PC and burglary, a violation of section 459 PC. On July 11, 1990, the applicant was convicted of petty theft with a prior, a misdemeanor. The applicant was placed on probation for two years on the condition he served a day in jail and paid a fine or in lieu of jail or fine, served 50 hours of community service. The remaining charge was dismissed. On March 12, 2003, the conviction was expunged in accordance with section 1203.4 PC.
4. On August 9, 1994, the applicant was arrested by the Los Angeles Police Department and subsequently charged with petty theft with a prior, a violation of section 666-484(a) PC. On August 11, 1994, the applicant was convicted of this misdemeanor offense. The applicant was placed on probation for two years. On March 12, 2003, the conviction was expunged in accordance with section 1203.4 PC.
5. On November 26, 1997, the applicant was arrested under the alias by the Burbank Police Department for petty theft, a misdemeanor. The final outcome is not known as the requested court disposition was not made available to the Citizenship and Immigration Services.

The director's finding that the applicant's drug conviction was a misdemeanor is not supported by the record. The case was prosecuted in the Los Angeles County Superior Court, which handles felony violations, and the court disposition presented does not indicate that the charge had been reduced to a misdemeanor pursuant to sections 17 (b)(4) or (5) PC. The court disposition submitted clearly indicates that the applicant was charged with and subsequently convicted of a felony offense.

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. The Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act. If, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Therefore, despite the reduction of the drug conviction and the expungements of the convictions, the applicant remains convicted, for immigration purposes, of the felony and misdemeanor offenses noted above.

Petty theft is a crime involving moral turpitude. *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966). Therefore, the applicant's convictions for these offenses render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. Because the applicant was convicted of a crime involving a controlled substance, the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

On appeal, counsel asserts, "if he [the applicant] had committed the same unlawful acts and had been charged in federal court, he could have been eligible to have his convictions expunged under the Federal First Offender Act."

To qualify for first offender treatment under federal laws, the applicant must show that he has been found guilty of *simple possession* of a controlled substance. In the instant case, the applicant has not establish the essential requirement as he was convicted of possession of marijuana for sale and, therefore, the expungement is ineffective for immigration purposes.

The applicant is ineligible for the benefit being sought due to his one felony and three misdemeanor convictions. 8 C.F.R. §§ 245a.11(d)(1) and 245a.18(a). The applicant is also ineligible due to his inadmissibility under sections 212(a)(2)(A)(i)(I) and (II) of the Act. There is no waiver available to an applicant found inadmissible under these sections pursuant to 8 C.F.R. §§ 245a.18(c)(2)(i) and (ii). Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

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