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

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FILE:

Office: SAN DIEGO, CALIFORNIA

Date: **APR 08 2008**

[REDACTED]
consolidated herein]
MSC 03 249 64400

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

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 District Director in San Diego, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant had been convicted of three misdemeanor crimes in California, which made him ineligible for LIFE legalization.

On appeal the applicant acknowledges that he was previously convicted of four misdemeanors, but asserts that court orders have reduced one his convictions to an infraction and vacated another, thus leaving him with just two misdemeanor convictions. As such, the applicant contends that he is not ineligible for legalization under the LIFE Act.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. See section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a)(1).

As defined in 8 C.F.R. § 245a.1(o):

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).¹ 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.

The record includes certified final court dispositions from the Superior Court of California, County of San Diego, confirming that the applicant was convicted of four misdemeanors under the California Vehicle Code (VC) and one infraction under the San Diego Municipal Code during a 22-year period from 1981 to 2003. They included the following:

- On July 22, 1981, the applicant was convicted of driving under the influence of alcohol or drugs, a misdemeanor, in violation of VC section 23102(A), and sentenced to two years probation. [Case no. ██████████]

¹ The regulation at 8 C.F.R. § 245a.1(p) defines “felony” generally as a crime punishable by imprisonment for more than one year, but makes an exception if such an offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less.

- On May 21, 1991, the applicant was again convicted of driving under the influence of alcohol or drugs, a misdemeanor, in violation of VC section 23102(A), and sentenced to five years summary probation, 365 days confinement, 363 days suspended, as well as a fine and an alcohol-related special program. On April 5, 2000, the applicant's motion to vacate judgment was denied and he was sentenced to serve 364 days in custody of the sheriff, suspended for five years while the applicant was placed on summary probation. [Case no. ██████████]
- On November 8, 1994, the applicant was convicted of driving with a suspended license, a misdemeanor, in violation of VC section 14601.2(A), and sentenced to three years probation as well as a fine and a special program. [Case no. ██████████]
- On December 8, 1997, the applicant was convicted of an infraction under section SCC62.620A of the San Diego Municipal Code, and sentenced to one year probation and a fine. [Case no. ██████████]

On December 18, 2003, the applicant was convicted of driving under the influence of alcohol or drugs, a misdemeanor, in violation of VC section 23152(B), and sentenced to 180 days incarceration, suspended for five years, with special classes and a fine. [Case no. ██████████]

On appeal the applicant states that the court has reduced his first misdemeanor conviction to an infraction and vacated his third misdemeanor conviction, which means that he no longer stands convicted of three misdemeanors. As evidence thereof certified copies have been submitted of two orders by the San Diego County Superior Court Judge. The first order, dated November 1, 2005, vacated the applicant's 1981 misdemeanor conviction (Case no. ██████████) pursuant to California Penal Code (PC) section 1016.5. That code section authorizes California courts to vacate judgments against non-citizens if they were not advised of the negative consequences that a plea of guilty or nolo contendere could have on their admissibility to the United States under U.S. immigration laws. The second court order, dated February 14, 2006, reduced the applicant's 1994 misdemeanor conviction (Case no. ██████████) to an infraction. As provided in PC section 19.6, an infraction is not punishable by any jail time. According to the applicant, therefore, he has only two misdemeanor convictions and is therefore eligible for legalization under the LIFE Act.

Section 101(a)(48)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(48)(A), defines "conviction" as follows:

The term 'conviction' means, with respect to an alien, 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.

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *See Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. Unless it vacates a conviction on the merits, a state rehabilitative action is of no effect in determining whether an alien is considered convicted for immigration purposes. *See Matter of Roldan, id.* The record does not indicate that either of the court orders in 2005 and 2006, vacating and reducing two of the applicant's earlier misdemeanor convictions, was based on the merits of the case. For immigration purposes, therefore, the applicant has been convicted of four misdemeanors.

Because of his four misdemeanor convictions, the applicant is ineligible under the LIFE Act and 8 C.F.R. § 245a.18(a)(1) for adjustment to permanent resident status. Accordingly, the director's denial of the application for LIFE legalization will be affirmed on this ground.

An alien applying for adjustment of status under the provisions of section 1104 of the LIFE Act has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from January 1, 1982 to May 4, 1988, is admissible to the United States under the provisions of section 212(a) of the Immigration and Nationality Act, and is otherwise eligible for adjustment of status. *See* 8 C.F.R. § 245a.11. The applicant has failed to meet this burden.

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