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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: [Redacted]
MSC 02 240 62557

Office: Los Angeles

Date: APR 25 2008

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. The file has been returned to the National Benefits Center. 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, Chief
Administrative Appeals Office

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

The district director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had been convicted of three misdemeanors in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act. The district director also denied the application because the applicant failed to establish that he had been illegally and physically present in the United States from January 1, 1982, through May 4, 1998.

On appeal, counsel asserts that the applicant was not convicted of more than 3 misdemeanors or 1 felony and that the applicant is in the process of setting aside the convictions pursuant to section 1203.4 of the California Penal Code¹.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status under the provisions of the LIFE Act. Section 1104(c)(2)(D)(ii) of the LIFE Act; 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1). The regulations provide relevant definitions at 8 C.F.R. § 245a.

“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 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 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.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The record contains court documents that reflect the applicant was convicted of the following offenses in the Superior Court of California, County of San Bernardino, San Bernardino District:

- On October 22, 2002, in case [REDACTED], for public drunkenness, in violation of California Penal Code § 647(F).

¹ Counsel asserts that the applicant is in the process of having his convictions set aside, but submits no documentation to indicate that the convictions have, in fact, been set aside.

- On July 31, 2001, in case [REDACTED] for driving under the influence (DUI), in violation of California Vehicle Code § 23152(A); and,
- On July 31, 2001, in case [REDACTED] for driving under the influence (DUI), in violation of California Vehicle Code § 23152(B).

In California, a conviction for public drunkenness under California Penal Code § 647(f) is categorized as a misdemeanor and is punishable by a maximum of 45 days imprisonment. The applicant's conviction for public drunkenness is a misdemeanor for purposes of determining LIFE Act eligibility, regardless of the actual penalty imposed.

DUI convictions under California Vehicle Code §§ 23152(a) and (b) are also categorized as misdemeanors, punishable by a maximum of six months imprisonment. California VC § 23536. The applicant's two DUI convictions are misdemeanors for purposes of determining LIFE Act eligibility, regardless of the actual penalty imposed.

Because of his three misdemeanor convictions, the applicant is ineligible for adjust to permanent resident status under the LIFE Act pursuant to 8 C.F.R. § 245a.18(a)(1). Within the provisions of the LIFE Act, there is no waiver available to an applicant convicted of a felony or three or more misdemeanors committed in the United States.

An applicant for adjustment of status under the provisions of section 1140 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 Act, and is otherwise eligible for adjustment of status. 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.