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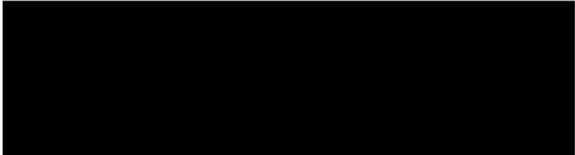
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U.S. Department of Homeland Security  
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Washington, DC 20529-2090



U.S. Citizenship  
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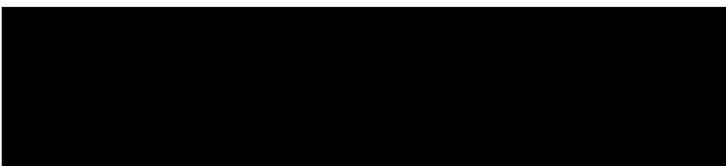
Office: LOS ANGELES

Date: DEC 17 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. 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.

A handwritten signature in black ink, appearing to be "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The 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 a felony in the United States. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel argues that the felony conviction has been successfully vacated under California law on constitutional grounds, and therefore, the applicant remains qualified for adjustment to permanent resident status under the provisions of the LIFE Act.

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. 8 C.F.R. § 245a.18(a)(1). "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. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

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).

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. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The record contains documents that reflect the applicant has been arrested, charged, and/or convicted of the following offenses in California:

- On March 11, 1998, the applicant was charged with ten counts of violating section 470 of the California Penal Code – *Forgery*, section 182(A)(1) of the California Penal Code – *Conspiracy to Commit a Crime*, section 496(A) of the California Penal Code – *Receiving Stolen Property*, and section 487(A) of the California Penal Code – *Grand Theft*. (Docket No. [REDACTED]). All ten counts are listed as felony offenses in the court documents. The applicant pleaded *nolo contendere* to one count of *Receiving Stolen Property* on June 30, 1998. The applicant was sentenced to formal probation for a period of 3 years and ordered to pay restitution and a fine. The applicant's petition

to vacate the conviction, and withdraw the guilty plea was granted on October 9, 2001, pursuant to section 1203.4 of the California Penal Code.

The issue in this proceeding is whether the applicant's felony conviction for *Receiving Stolen Property* remains a valid conviction for immigration consequences. The AAO has reviewed the applicant's brief on appeal and the authorities cited therein. The AAO concludes that the conviction continues to effect immigration consequences, and thus renders the applicant ineligible for lawful permanent resident status. *Matter of Roldan, id.*

The applicant's motion to vacate judgment pursuant to section 1203.4 of the California Penal Code was granted on October 9, 2001. Counsel for the applicant asserts that this conviction is no longer valid for immigration purposes, and thus, leaves the applicant eligible for adjustment to permanent resident status. Counsel cites *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) as controlling authority for this conclusion.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.<sup>1</sup> Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural defect in the merits of the case, and the vacated judgment remains valid for immigration purposes.

The AAO notes that the record contains a letter dated September 8, 2006 from the applicant's prior counsel explaining the reason for filing the motion to vacate the conviction. The letter states that, "the motion in essence, is founded upon the violation of [the applicant's] constitutional rights in that this conviction, as it presently stands, prohibits him from obtaining gainful employment." As there is no constitutional right to "gainful employment", this letter confirms that the applicant's felony conviction was vacated solely to avoid immigration consequences, and thus, remains a valid conviction disqualifying him for permanent resident status.

Counsel's argument on appeal that this case is controlled by *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) is without merit. In that case, the Court held that an alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand "convicted" for immigration purposes, because

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<sup>1</sup> See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9<sup>th</sup> Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9<sup>th</sup> Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

the alien defendant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws. The applicant in this case is not convicted of a controlled substance offense, thus, the ruling in *Lujan-Armendariz v. INS* is not relevant here.

Because of his felony conviction, 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 alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying 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 INA, 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.