



U.S. Citizenship
and Immigration
Services

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FILE:

Office: LOS ANGELES FIELD OFFICE

Date: MAY 09 2008

[REDACTED]
consolidated herein

[REDACTED]
MSC 01 311 60263

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 Field Office Director (FO director) in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The FO director denied the application on the ground that the applicant has been convicted of three misdemeanors committed in the United States, and is therefore ineligible for LIFE legalization under 8 C.F.R. § 245a.11(d)(1).

On appeal counsel asserts that the FO director's decision violates the applicant's due process and statutory right to relief.

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, 8 C.F.R. § 245a.11(d)(1), 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 applicant, a native of India, filed his application for permanent resident status under the LIFE Act (Form I-485) on August 7, 2001. On September 7, 2006, the District Director in Los Angeles issued a Notice of Intent to Deny (NOID) advising the applicant that the documentation of record did not establish that he entered the United States before January 1, 1982, and resided in the United States in continuous unlawful status from that date through May 4, 1988. The applicant was granted 30 days to submit additional evidence.

The applicant responded on October 6, 2006 with some additional documentation of his residence in the United States during the requisite years.

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 August 31, 2007, the FO Director denied the application. While stating that the evidence submitted in response to the NOID appeared to indicate that the applicant was “in the United States during the requisite period,” the director determined that the applicant was ineligible for legalization under the LIFE Act because he had been convicted of three misdemeanors committed in the State of California in 1997, 2004, and 2006. The director noted that a criminal conviction can be nullified for immigration purposes only if it is vacated on the merits, not if it is vacated to avoid negative immigration consequences.²

The applicant filed a timely appeal, which was received at the field office on October 1, 2007, and subsequently forwarded to the AAO. On the Form I-290B counsel asserted that the FO director’s decision violates the applicant’s due process and statutory right to relief. Drawing on the director’s language regarding the legal effect of a conviction, counsel contended that “[i]f a case had been dismissed, the conviction should not disqualify the applicant for relief.” Counsel indicated that a brief would be submitted in 120 days to present the applicant’s arguments.

No such brief was received at the AAO in the next 120 days, however, or at any time thereafter. On April 24, 2008, the AAO telefaxed a notice to counsel with the request that a copy of any previously submitted brief or additional evidence be re-submitted to the AAO within five business days, or that counsel confirm within five business days that no such materials were submitted. Counsel has not responded to the notice.

The record includes certified final court dispositions from the Municipal Court of California, County of Los Angeles, Compton Judicial District, dated December 12, 2001, and from the Superior Court of California, County of Los Angeles, Bellflower Courthouse Department, dated August 29, 2007, confirming that the applicant has the following criminal record:

² 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.*

1. On November 26, 1997, the applicant was charged in the Municipal Court of California, County of Los Angeles, Compton Judicial District, with theft of property – a misdemeanor violation under section 484(a) of the California Penal Code (PC). On February 6, 1998, the theft of property charge was dismissed in a plea negotiation as the applicant pleaded nolo contendere to a violation of PC section 602(J) – also a misdemeanor – which reads as follows: “Building fires upon any land owned by another where signs forbidding trespass are displayed at intervals not greater than one mile along the exterior boundaries and at all roads and trails entering the land, without first having obtained written permission from the owner of the lands or the owner’s agent, or the person in lawful possession.” The applicant was sentenced to 12 months probation.
2. On May 6, 2004, the applicant was charged in the Superior Court of California, County of Los Angeles, Bellflower Courthouse Department, with two misdemeanor violations of the California Vehicle (VC) – driving under the influence of alcohol or drugs, in violation of VC section 22152(a), and driving a vehicle with a blood alcohol weight of 0.08 % or more, in violation of VC section 23152(b). On October 1, 2004, the first charge was dismissed in a plea negotiation as the applicant pleaded nolo contendere to the second – a violation of VC section 23152(b). The applicant was sentenced to three years probation.
3. On February 22, 2006, the applicant was charged in the Superior Court of California, County of Los Angeles, Bellflower Courthouse Department, with battery against his former spouse/fiancée – a misdemeanor violation under PC section 243(e)(1). On June 23, 2006, the charge under PC section 243(e)(1) was dismissed in a plea negotiation as the applicant pleaded nolo contendere to simple battery – also a misdemeanor – in violation of PC section 242. The applicant was sentenced to three years probation and three days in jail.

Thus, the applicant has been convicted of three misdemeanors in the State of California. Under California law each of his convictions was punishable by up to six months imprisonment. *See* PC section 19 and VC section 23536(a). Therefore, they also qualify as misdemeanor convictions for immigration purposes under 8 C.F.R. § 245a.1(o).

Because of his three misdemeanor convictions in the United States the applicant is ineligible for permanent resident status under 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(a)(1). There is no waiver available to an alien convicted of a felony, or three or more misdemeanors, committed in the United States. Accordingly, the denial of the application by the FO director will be affirmed.

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 not only that he or she has continuously resided in the United States in an unlawful status from January 1, 1982 to May 4, 1988, but is also

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.

The appeal will be dismissed, and the application denied.

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