



U.S. Citizenship
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FILE: [REDACTED]
MSC 02-243-62001

Office: LOS ANGELES Date: **MAY 13 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).

IN 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. If your appeal was sustained, or if your case 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, denied the application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act on October 31, 2005. That decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On May 31, 2002 the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, pursuant to section 1104 of the Life Act (I-485 LIFE Legalization Application) with the Immigration and Naturalization Service (or Service, now U.S. Citizenship and Immigration Services or CIS). The director issued a Notice of Intent to Deny (NOID) on December 17, 2004, listing five convictions in the applicant's record and finding that the applicant was ineligible for lawful permanent resident status under the LIFE Act because he had been convicted "of ONE (1) or more felon[ies] committed within the United States." The applicant, through counsel, submitted a request for additional time to respond and indicated that a Freedom of Information Act Request was being filed. The director subsequently denied the application "for the reasons contained in the NOID."

The applicant filed a Form I-290B, Notice of Appeal to the AAO, on December 1, 2005, in which he stated that he was convicted of one felony and two misdemeanors, but that his application for lawful permanent residence should be granted because, "on November 17, 2005 Orders and Petitions pursuant to Penal Code Section 1203.4 were submitted to the Los Angeles [courts] for processing [expungements]." On October 5, 2007, the applicant submitted proof to CIS that three of the four convictions listed as the basis for the denial of his application had been expunged pursuant to California Penal Code § 1203.4, and that the expungement request for the fourth conviction was pending final processing.

The issue before the AAO is whether the applicant's prior convictions render him ineligible for lawful permanent resident status under the LIFE Act in light of subsequent state actions ordering that prior convictions be expunged.

Ineligibility Based on Criminal History

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 245a.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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term “conviction” for immigration purposes:

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.

The Applicant’s Criminal Record

The administrative record includes the result of an FBI fingerprint search in March 2003 and the district director’s list of convictions. The applicant has also submitted court transcripts and relevant expungement orders. The FBI search results do not include all of the arrests or convictions on the transcripts provided by the applicant, and the list provided by the district director is not consistent with either the FBI record or the record provided by the applicant. Given these inconsistencies, this decision is based on the court records provided by the relevant jurisdictions and submitted by the applicant, but does not rule out the existence of additional convictions.

Based on the applicant’s submissions of court records, he was convicted of the following offenses of the California Vehicle Code (VC) or Penal Code (PC):

1. Case # [REDACTED], Violation of PC 273.5(A)¹, a felony, willful infliction of corporal injury on a spouse; and PC 245(A)(1), a felony, assault with a deadly weapon or instrument other than a firearm. The applicant was convicted on August 13, 1992; both convictions were expunged on September 11, 2007.
2. Case # [REDACTED], Violation of VC 23152(B), a misdemeanor, driving under the influence of alcohol (.08% or more blood alcohol). **The applicant was convicted on August 9, 1996;** imposition of sentence was suspended, and he was placed on 3-year summary probation and fined. The conviction was expunged on February 10, 2006.
3. Case # [REDACTED] Violation of PC 245(A), a misdemeanor, assault with a deadly weapon or instrument other than a firearm. The applicant was convicted on April 30, 1999; imposition of

¹ The AAO notes that willful injury of one’s spouse under California PC § 273.5(a) is considered to be a crime of moral turpitude. *Grageda v. U.S. I.N.S.*, 12 F.3d 919, 922 (9th Cir. 1993). Individuals convicted of a crime involving moral turpitude are inadmissible to the United States, with limited exceptions, under section 212(a)(2)(A)(i)(I) of the Act and are thus ineligible for permanent resident status under section 1104(c)(2)(D)(i) of the LIFE Act.

sentence was suspended, and he was placed on 3-year summary probation and fined. The conviction was expunged on February 10, 2006.

4. Case # [REDACTED] Violation of PC 273.5(A), a felony (listed as a misdemeanor in the court's expungement order) willful infliction of corporal injury on a spouse. The applicant was convicted on October 18, 2000; he was placed on probation for five years and sentenced to 180 days in jail. The conviction was expunged on February 16, 2006.

On appeal the applicant provided proof that the convictions noted above were expunged pursuant to California PC § 1203.4, which provides, in pertinent part, that a court may order that a plea, verdict, or finding of guilt be set aside and vacated in "any case in which a defendant has fulfilled the conditions of probation . . . or in any other case in which a court, in its discretion and the interests of justice" determines that a defendant should be granted such relief. California PC § 1203.4(a).

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, 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 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, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000); *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999), *vacated sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).²

In *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit further clarified that California PC § 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. *Ramirez-Castro*, 287 F.3d at 1175.

Conclusion

In this case, the applicant does not claim any defect in the underlying criminal proceedings. It is clear that the applicant's convictions were expunged in the court's discretion pursuant to a rehabilitative statute, California PC § 1203.4. As the court vacated the applicant's convictions for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. An applicant who has been convicted of a felony or three or more misdemeanors committed 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). In light of the

² While applicable to cases arising in the Ninth Circuit, as does the case before us, the rule set forth in *Lujan* applies only to first-time simple possession of a controlled substance offense. It is a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a "conviction" under the Act.

applicant's record of at least two felonies and two or three misdemeanors, described above, he 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.