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FILE:



Office: LOS ANGELES

Date: SEP 08 2008

MSC 02 248 63098

IN RE:

Applicant:



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. All documents have been returned to the office that originally decided your case. 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director stated in his denial decision that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.15(c)(1)(i).

On appeal, counsel for the applicant requests that the decision be reconsidered and correctly points out that the director erroneously based the denial on incorrect information. Specifically, although the director stated in her denial that the applicant had returned to Guatemala in 1980 and stayed there for 8 years, and had failed to respond to the director's notice of intent to deny (NOID), the record reflects that the applicant is Mexican and there is no indication that he had departed the United States for Guatemala (or Mexico) for 8 years, and, the record also reflects that the applicant responded to the NOID. Therefore, this portion of the director's decision is withdrawn.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

The AAO will consider the matter, *de novo*, and issue a new decision.

In the Notice of Intent to Deny (NOID), dated April 27, 2006, the director notified the applicant of her intention to deny the application because the applicant was ineligible due to his three convictions, on June 1, 1990, on August 9, 1991, and on May 6, 1993. The director granted the applicant thirty (30) days to submit rebuttal evidence.

The record reflects that the applicant's response, through counsel, to the NOID consisted of court dispositions for the three arrests. It is noted that counsel does not dispute that the applicant has had three misdemeanor convictions. Specifically, the court dispositions reflect that the applicant has been convicted of the following offenses:

1. On June 1, 1990, the applicant was convicted, on a guilty plea, in the Municipal Court of Long Beach Courthouse Judicial District, County of Los Angeles, California, of a violation

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of Section 23152 (A) VC MISD – UND INFLNCE ALCHL/DRUG IN VEH 14601.1 (A), a misdemeanor, (Case No. [REDACTED]) The court sentenced the applicant to 3 years probation, plus fines and other restrictions;

2. On August 9, 1991, the applicant was convicted, on a nolo contendere plea, in the Municipal Court of San Pedro Courthouse Judicial District, County of Los Angeles, California, of a violation of Section 14601.1 (A) VC MISD – DRIVING WITH SUSPENDED LICENSE, a misdemeanor, (Case No. [REDACTED]) The court sentenced the applicant to 24 months probation, plus fines, costs, and other restrictions; and,
3. On May 6, 1993, the applicant was convicted, on a nolo contendere plea, in the Municipal Court of Long Beach Courthouse Judicial District, County of Los Angeles, California, of a violation of Section 23152 (B) VC MISD – .08% MORE WGHT ALCHL DRIVE VEH, a misdemeanor, (Case No. [REDACTED]) The court sentenced the applicant to 3 years probation, 60 days jail, plus fines and other restrictions.

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)..

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 (BIA 2003);

Matter of Roldan, 22 I&N Dec. 512 (BIA 1999). In this case, the applicant does not claim any defect in the underlying criminal proceedings.

The record is clear that the applicant has been convicted of the three misdemeanor offenses, described above, for immigration purposes.

The AAO finds that the applicant is 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. 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.