U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NATIONAL BENEFITS CENTER Date:
MSC 02 213 61006

JUL 11 2006

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has 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 application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Director, National Benefits Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant had not established that he had applied for class membership in any of the requisite legalization class-action lawsuits prior to October 1, 2000. The director further determined 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. *See* section 1104(c)(2)(D)(ii) of the LIFE Act. In addition, the director determined that the applicant was inadmissible under section 212(a) of the Immigration and Nationality Act (Act) and any ground of inadmissibility had not been waived. Therefore, the district director concluded the applicant was ineligible for permanent resident status under the LIFE Act and denied the application.

On appeal, the applicant asserts that his felony conviction had been expunged after he had completed his probation. The applicant contends that he submitted both a Form I-690, Application of Waiver of Grounds of Inadmissibility under Section 245A or Section 210 of the Act, and Form I-601, Application for Waiver of Ground of Inadmissibility, in an attempt to overcome the finding that he was inadmissible. The applicant submits documentation in support of the appeal.

Although a Notice of Entry of Appearance as Attorney or Representative (Form G-28) has been submitted, the individual is not authorized under 8 C.F.R. § 292.1 or 8 C.F.R. § 292.2 to represent the applicant. Therefore, this decision will be furnished to the applicant only.

An applicant for permanent resident status under the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in any of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*CSS*), *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (*LULAC*), or *Zambrano v. INS, vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993) (*Zambrano*). *See* 8 C.F.R. § 245a.10.

The regulations provide an illustrative list of documents that an applicant may submit to establish that he or she filed a written claim for class membership before October 1, 2000. Those regulations also permit the submission of "[a]ny other relevant document(s)." *See* 8 C.F.R. § 245a.14.

The first issue in this proceeding is whether the applicant had established that he had applied for class membership in any of the requisite legalization class-action lawsuits prior to October 1, 2000. The applicant neither claimed nor documented that he filed a written claim to class membership with his Form I-485 LIFE Act application. Rather, the record shows that the applicant included documents relating to a previously filed request for consideration as a replenishment agricultural worker or RAW. While aliens requesting consideration as replenishment agricultural workers were assigned registration numbers by the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS), these registration numbers are not A-file numbers. Moreover, the RAW program has never been associated with any of the legalization class-action

lawsuits cited above, and the fact that an individual requested consideration as a replenishment agricultural worker cannot be equated with having filed a written claim for class membership in these legalization lawsuits.

Given his failure to either claim or document that he filed a timely written claim for class membership, the applicant is ineligible for permanent residence under section 1104 of the LIFE Act.

The next issue to be examined is whether the applicant's criminal conviction renders him ineligible to adjust to permanent residence under the provisions of the LIFE Act.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible to adjust to permanent resident status under the provisions of the LIFE Act. *See* 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 Act, 8 U.S.C. § 1101(a)(48)(A).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, 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). "State rehabilitative actions which do not vacate a conviction on the merits or on any ground related to the violation of a statutory or constitutional right in the underlying criminal proceeding are of no effect in determining whether an alien is considered convicted for immigration purposes." *Id.* at p. 528.

The BIA has sought to clarify and further expand on this holding as it is asked to review different types of post-conviction relief orders obtained by aliens subject to removal proceedings. In its most recent decision on the issue, the BIA, in *Matter of Pickering,* 23 I&N Dec. 621 (BIA 2003), clarified that it was drawing a distinction between state court actions to vacate a conviction where the reasons were solely related to rehabilitation or to ameliorate immigration hardships, as opposed to state court actions based upon having found procedural or substantive defects in the underlying criminal

proceedings. The BIA found that where the action is taken to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Id.* at p. 624.

The record contains a report from Federal Bureau of Investigation (F.B.I.) that is dated May 29, 2002, which based upon fingerprint comparison reflects that the applicant was arrested by the Visalia, California Police Department on July 26, 1992, as the result of an investigation of a robbery. The F.B.I report reflects that the applicant was subsequently convicted of a violation of section 211, Robbery, of the California Penal Code in the Superior Court of the State of California on an unspecified date and sentenced to a year in jail, thirty-six months probation, and restitution. The record shows that the Service issued an I-72, Request for Additional Evidence, on April 1, 2003 in which the applicant was asked to provide court documents to establish the disposition of the criminal charge brought against him on July 26, 1992.

In response, the applicant submitted court documents demonstrating that he was arrested by the Visalia, California Police Department and charged with a felony violation of section 211, Robbery, of the California Penal Code on July 26, 1992. The record shows that the applicant entered a plea of nolo contendere to this felony charge in the Superior Court of the State of California in court File No. [redacted] on October 6, 1992, and that he was subsequently sentenced to a year in jail, three months of probation, and restitution on November 3, 1992. The applicant also submitted a "Petition and Order for Early Termination of Probation and Dismissal under PC 1204.3 and PC 1204.3(a)" that is dated May 30, 2003 from the Tulare County Superior Court, Visalia Division. This document contains an acknowledgement by the applicant that he had been convicted for a felony violation of section 211, Robbery, of the California Penal Code in Case No. [redacted] on October 6, 1992 and that he successfully completed all probation requirements. This document further reflects that the Tulare County Superior Court, Visalia Division, ordered that the applicant's previous plea of nolo contendere be withdrawn and set aside on April 10, 2003.

The applicant argues that this order dismisses the original charge and vacates or expunges his prior felony conviction on appeal. However, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan,* 22 I&N Dec. 512. In those cases where a state court acts to address a procedural or substantive defect in the criminal proceedings, the conviction ceases to exist for immigration purposes, but where the underlying purpose is to avoid the effect of the conviction on an alien's immigration status, the court's action does not eliminate the conviction for immigration purposes. *Matter of Pickering,* 23 I&N Dec. 621. Therefore, the applicant remains "convicted" of the felony offense cited above for immigration purposes

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.

Although the director noted that the applicant was inadmissible under one or more of the provisions of section 212(a) of the Act, no determination was made as to the particular ground of inadmissibility applied to the applicant. Therefore, a determination must be made as to which specific ground of inadmissibility contained in section 212(a) of the Act is applicable to the applicant in this case.

An applicant for permanent resident status under the provisions of LIFE Act must establish that he or she is admissible to the United States as an immigrant, except as otherwise provided under section 245A(d)(2) of the Act. Section 1140(c)(2)(D)(i) of the LIFE ACT.

An alien is inadmissible if at the time of application for admission to the United States such alien is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document required by the Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a) of the Act. Section 212(a)(7)(A)(i)(I) of the Act.

Any alien who has been ordered removed under section 235(b)(1) of the Act or at the end of proceedings under section 240 of the Act initiated upon the alien's arrival in the United States and who again seeks admission within five years of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible. Section 212(a)(9)(A)(i) of the Act.

Pursuant to 8 C.F.R. § 245a.18(c)(1), an applicant for adjustment of status under LIFE Legalization who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States, without regard to the normal requirement that a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, be filed prior to embarking or re-embarking for travel to the United States, and without regard to the length of time since the alien's removal or deportation from the United States. Such an alien shall file Form I-690, Application for Waiver of Grounds of Excludability Under Section 245A or Section 210 of the Act, with the district director having jurisdiction over the applicant's case if the application for adjustment of status is pending at a local office, or with the Director of the Missouri Service Center.

The record shows that the applicant applied for admission to the United States at Laredo, Texas on December 27, 2001. The inspecting officer determined that the applicant was inadmissible to the United States under section 212(a)(7)(A)(i)(I) of the Act because he was not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document. The applicant was placed in expedited removal proceedings pursuant to section 235(b)(1) of the Act and ordered removed and excluded from the United States for a period of five years on December 28, 2001. The record shows that the applicant was deported from this country to Mexico on this same date.

The record reflects that the applicant subsequently returned to the United States and filed his Form I-485 LIFE Act application on May 1, 2002. With the Form I-485 LIFE Act application, the applicant included both a Form I-690 waiver application and Form I-601, Application for Waiver of Ground of Inadmissibility, in an attempt to overcome the fact that he is inadmissible under section 212(a)(9)(A)(i) of the Act as he had returned to this country within five years of having been ordered removed and excluded from the United States pursuant to section 235(b)(1) of the Act on December 28, 2001. The record shows that the director subsequently denied both the Form I-690 waiver application and the Form I-601 waiver application on July 17, 2003. Consequently, the applicant remains inadmissible to the United States under section 212(a)(9)(A)(i) of the Act.

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 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 and is ineligible for permanent residence under section 1104 of the LIFE Act on this basis as well.

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