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

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUN 18 2008

MSC 02 219 60383

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:

[redacted]

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

The district director determined that the applicant had been convicted of a felony and three or more misdemeanors and therefore, pursuant to 8 C.F.R. § 245a.18(a), was ineligible for adjustment to lawful permanent residence status under the LIFE Act.

Counsel for the applicant timely filed a Form I-290B, Notice of Appeal to the Administrative Appeals Office, in which he asserted that applicant has not been convicted of acts which constitute the elements of a violation involving controlled substances, and that the "subject conviction" belongs to someone other than the applicant. Counsel indicated on the Form I-290B that a brief and/or additional evidence would be submitted within 30 days of filing the appeal. As of the date of this decision, however, more than 29 months after the appeal was filed, no further documentation has been received by the AAO. Therefore, the record will be considered complete as presently constituted.

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. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C).

"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).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). Section 212(a)(2)(A)(i)(II) of the Act.

The Federal Bureau of Investigation (FBI) Report of the applicant's criminal history reveals the following arrests and convictions:

1. On October 29, 1982, the applicant was arrested by the Santa Ana, California Sheriff's Office for possession of a narcotic substance for sale. The report indicates that the applicant was convicted of possession of a narcotic substance on October 27, 1983, and was sentenced to 210 days confinement.

2. On February 4, 1983, the U. S. Border Patrol apprehended the applicant for forgery of a government check, deportation processing, and illegal entry. The report indicates that he was deported to Mexico on June 10, 1987.

3. On August 2, 1983, the applicant was arrested by the Santa Ana Sheriff's Office for burglary and petty theft. The report indicates that the applicant was convicted of receiving stolen property in violation of section 496 of the California Penal Code and sentenced to 30 days confinement.

4. On September 23, 1983, the applicant was arrested by the Santa Ana Sheriff's Office for being under the influence of a controlled substance, failure to appear and under a warrant for petty theft. The report indicates that on November 3, 1983, the applicant was convicted of a violation of section 11550 of the California Health and Safety Code (use or under the influence of a controlled substance) and sentenced to 90 days confinement.

5. On July 12, 1984, the applicant was arrested by the Santa Ana Sheriff's Office for burglary and receiving or possessing stolen property. The report indicates that the applicant was convicted of burglary in violation of section 459 of the California Penal code, and was sentenced to jail and given probation.

6. On February 6, 1985, the applicant was arrested by the Santa Ana Sheriff's Office for petty theft, tampering with an automobile, and under warrants for burglary and receiving or possessing stolen property. The report indicates that the applicant was convicted of petty theft in violation of section 488 of the California Penal Code, and giving false identification to a peace officer, in violation of section 148.9 of the California Penal Code. He was sentenced to jail and placed on probation.

7. On June 21, 1985, the applicant was arrested for burglary in violation of section 459 of the California Penal Code, and possession of a hypodermic needle/syringe in violation of section 4143a of the California Business and Professional Code. He was convicted and sentenced to jail and placed on probation.

8. On June 21, 1985, the applicant was arrested by the Santa Ana Sheriff's Office for attempted petty theft and giving false identification to a peace officer.

9. On March 19, 1989, the applicant was arrested for giving false identification to a peace officer. The report indicates that he was cited and released.

10. On March 20, 1989, the applicant was arrested for tampering with a vehicle and under a warrant for burglary. The report indicates that he was cited and released.

The record contains a copy of a court record from the Superior Court of California, County of Orange, indicating that on October 27, 1983, the applicant was convicted of possession of a useable amount of heroin, a felony, in violation of section 11350 of the California Health and Safety Code. He was sentenced to seven months in the county jail. The court record indicates that a charge for violation of section 11550 and the applicant's probation were to run current with the sentence for violation of section 11350. Case no. [redacted]

In a Notice of Intent to Deny (NOID) dated May 3, 2005, the director notified the applicant of the various charges appearing on his FBI report, and advised the applicant that he had 30 days in which to submit evidence to rebut the evidence provided in the report. The director also noted a December 20, 1994, conviction for transportation or sale of a controlled substance in violation of section 11352(a) of the California Health and Safety Code.

In response, the applicant submitted a copy of an order from the Superior Court of California, County of Orange, dated on September 9 2002, approving the applicant's petition under section 1203.4 of the California Penal Code, setting aside his conviction of August 21, 1985, for violating section 148.9 of the Penal Code. The applicant also submitted a copy of an order from the court setting aside his October 7, 1992, conviction under section 11550 of the Health and Safety Code. However, an administrative action that allows a defendant to have the charge dismissed after he has successfully completed probation is still a conviction for immigration purposes. 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*, I.D. 3377 (BIA 1999).

Counsel also provided documentation that the December 20, 1994, conviction did not pertain to the applicant. This conviction does not appear on the applicant's FBI report. However, the applicant submitted no other documentation regarding the other charges and convictions listed on his FBI report or otherwise contained in the record.

The record, therefore, reflects that the applicant has been convicted of at least one felony in the United States. The regulation at 8 C.F.R. § 245a.18 provides:

> (a) *Ineligible aliens.* (1) 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 LPR status under this Subpart B.

Therefore, as the applicant has been convicted of a felony and at least three misdemeanors, he is ineligible for permanent resident status under section 1104 of the LIFE Act.

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 USC § 802). Section 212(a)(2)(A)(i)(II) of the Act. The applicant was convicted of possession of heroin. Therefore, he is inadmissible into the United States. Further, this ground for inadmissibility cannot be waived. 8 C.F.R. § 245a.18(c)(2)(ii).

The AAO maintains plenary power to review each appeal 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 AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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