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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUN 30 2008

MSC 02 246 61157

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. The file has been returned to the National Benefits Center. 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.

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, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The district director denied the application, finding that the applicant was not an eligible alien, as defined by 8 C.F.R. §254a.10, in that he had been convicted of a felony.

On appeal, counsel for the applicant urges reconsideration and contends that the director's conclusions are erroneous. Specifically, counsel asserts that the applicant is in fact eligible since the applicant's conviction was dismissed pursuant to California Penal Code § 1203.4. Specifically, counsel alleges that contrary to the director's contention, the dismissal was pursuant to the Federal First Offender's Act and Ninth Circuit precedent, and thus is not considered a felony conviction for immigration purposes. Counsel submits a brief and additional evidence in support of this contention.

The regulations at 8 C.F.R. § 245a.10(d)(1) provides in pertinent part that an eligible alien may adjust to legal permanent resident status under LIFE legalization if he or she "has not been convicted of any felony or of three or more misdemeanors committed in the United States."

According to the record, the applicant was charged with the following misdemeanor offense in the State of California on August 6, 1996:

Count 01: 11550(a) H&S MISD – USE/UNDR INFLUENCE CONTROL SUB

The applicant did not enter a plea, and on October 8, 1996, the charge was diverted by the Municipal Court of Van Nuys, California for a period of 24 months. On July 22, 1997, the diversion was terminated and the count was dismissed.

On December 28, 1998, the applicant pled guilty to the following felony in the State of California

Count 01: 11350(A) H&S FEL – POSS NARCOTIC CONTROL SUBSTANC

The applicant was sentenced to three days in jail and placed on probation for a period three years. Various fines were also implemented. (Case No. LA031378).

On February 21, 2006, the applicant's probation was ordered terminated, and his plea of guilty was set aside. A plea of not guilty was entered, and the case was set aside pursuant to section 1203.4 of the California Penal Code.

Under the current 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 by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to

expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

The director relied on the above factors and concluded that that the applicant's vacated conviction still constituted a conviction for immigration purposes. Subsequently, a notice of denial was issued on June 23, 2006.

On appeal, counsel asserts that in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the Ninth Circuit Court reversed *Matter of Roldan* in part and held that "persons who offenses would qualify under the First Offender Act, but who are convicted and have their convictions expunged under state rehabilitative laws may not be removed on account of those offenses." Counsel asserts that since the applicant was convicted for simple possession of cocaine, he is eligible for rehabilitative treatment under the First Offender Act and therefore cannot be removed on account of that offense.

Counsel's assertion regarding the applicant's eligibility for the Federal First Offender Act (FFOA) treatment is persuasive. To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000). In addition, in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) it was held that in cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for FFOA treatment.

The conviction at issue is the applicant's only felony conviction for violating a federal or state law relating to controlled substance. In addition, the applicant resides in and the crime was committed in the 9th Circuit hence *Lujan-Armendariz* is binding. Therefore, the applicant meets the criteria for FFOA.

Finally, on May 3, 2002, the applicant was charged with the following offenses:

Count 01:	4060 B&P MISD – CONTROL SUBST - NONPRESCRIBED
Count 02:	602.1(A) PC MISD – INTENTIONAL INTERFRNCE W/BUSINESS

On May 13, 2002, the applicant pled nolo contendere to Count 02 and was convicted. He was placed on probation for twenty-four months, ordered to perform 180 hours of community service, and fined $100.00 in restitution. Count 01 was dismissed.

This single misdemeanor conviction does not render the applicant ineligible pursuant to 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a). Moreover, the conviction was not for violating a federal or state law relating to controlled substances, thereby preserving his eligibility for relief under the FFOA.

For the foregoing reasons, the decision of the director pertaining to this issue will be withdrawn.

Beyond the decision of the director, the AAO notes additional issues not raised prior to adjudication which pertain to the applicant's eligibility in this matter. First, the applicant has failed to establish that he maintained continuous unlawful residence in the United States from before January 1, 1982 to May 4, 1988.

On the form for determination of class membership, which he signed under penalty of perjury on May 23, 1990, the applicant claimed that he first entered the United States in August 1981 when he crossed the border without inspection. He further claims that he departed the United States on June 22, 1987 to visit family in Canada, and that he returned on July 17, 1987. According to the applicant's Form G-325A, Biographic Information, the applicant claims to have resided at No. 2 – [redacted], Rabat, Morocco, from February 1980 to November 1987. Moreover, the record contains a copy of a B-2 visa issued to the applicant in Rabat on October 22, 1987, and an entrance stamp dated November 3, 1987. Consequently, it appears that the applicant's statements on Form G-325A reflect the true nature of the applicant's residence during the requisite period.

It is noted that the record contains declarations of knowledge from the applicant's brother, [redacted] and acquaintances such as [redacted] and [redacted]. All declarants claim that the applicant first entered the United States in 1980, and that they met him at various points during that year. However, these statements directly contradict the applicant's own statements on the form for determination of class membership in which he claims that his date of first entry was August 1981. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As noted above, the record contains evidence of a visa issued to the applicant in Morocco in October 1987, and an entry stamp dated November 3, 1987. This evidence corroborates the claims of the applicant on Form G-325A in which he claims that he resided in Rabat, Morocco until November 1987. Therefore, the applicant has failed to establish that he continually resided in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. For this reason, the application may not be approved.

Additionally, the record contains evidence that the applicant is legally blind and is a paranoid schizophrenic. The record contains a letter dated September 24, 1998 from [redacted] **Ph.D.**, indicating that the applicant was a patient of the West Valley Mental Health Center in Canoga Park, California and that he was under the care of a psychiatrist. The record also contains a letter dated March 13, 1989 from [redacted], O.D., at the Center for the Partially Sighted in Santa Monica, California, indicating that the applicant is legally blind. The letter further claims that the applicant's vision is not

expected to improve, and the applicant should therefore be entitled to income tax exemptions and any other available benefits for those suffering from the applicant's condition.

Section 212(a)(4) of the Immigration and Nationality Act provides that "Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney general at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible." The regulation at 8 C.F.R. § 245a.18(d)(1) provides:

> In determining whether an alien is ``likely to become a public charge", financial responsibility of the alien is to be established by examining the totality of the alien's circumstance at the time of his or her application for adjustment. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, family status, assets, resources, education and skills.

In this matter, the applicant is legally blind and is currently under the care of a psychiatrist. No affidavit of support is contained in the record, and the applicant's optometrist requested monetary and other forms of relief for the applicant as a result of his vision. Finally, the applicant's Form G-325A shows that he is unemployed, and no record of employment since his arrival in the United States has been submitted. Based on the evidence currently contained in the record, it appears that the applicant is likely to become a public charge and is therefore inadmissible under section 212(a)(4) of the Act. For this additional reason, the application may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies an application on multiple alternative grounds, a plaintiff can succeed on a challenge only if he shows that the AAO abused it discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

Notwithstanding the withdrawal of the director's initial basis for the denial, the application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. Given this, the applicant is ineligible for permanent resident status under Section 1104 of the LIFE Act.

ORDER: The appeal is dismissed