

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

L2

FILE: [REDACTED] Office: LOS ANGELES
MSC 02 244 60160

Date: **FEB 17 2009**

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act. *Section 1104(c)(2)(D)(ii) of the LIFE Act*. The director noted that the applicant was statutorily ineligible for permanent resident status because of his California felony conviction.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 Lawful Permanent Resident status. 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 Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, 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).

The AAO has reviewed the evidence and documents in the file. The documents in the record include a probation report dated March 13, 2001 and a minute order from the Superior Court of California, County of San Bernardino stamped with a certification by the court on June 8, 2006. The minute order reveals that the applicant was arrested on November 3, 1998, by the Ontario Police Department, and charged with one count of violating section 246 of the California Penal Code – *Shooting at an Inhabited Dwelling/Vehicle* and one count of violating section 246.3 of the California Penal Code – *Willful Discharge of Firearm in Negligent Manner*. Both offenses are listed as felony crimes under California law. The applicant pleaded guilty to one count of willfully discharging a firearm in a negligent manner

¹ The AAO notes that the director's decision erroneously states that the applicant was convicted of *two* felony offenses. We withdraw from that part of the director's decision that denies eligibility on account of not one, but two felony convictions.

on March 18, 1999 (Case no. [REDACTED]). The applicant was sentenced to seven days in jail and three years of supervised probation. The remaining felony charge was dismissed pursuant to the terms of a plea agreement.

Thereafter, the minute order indicates that on March 13, 2001, the applicant's felony conviction was reduced to a misdemeanor, the conviction was set aside, and the case was dismissed pursuant to section 1203.4 of the California Penal Code.

The issue in this proceeding is whether the applicant presently remains ineligible for adjustment of status to one of permanent residence on account of his felony conviction. The applicant is represented by counsel on appeal. The AAO observes that counsel indicated on the Notice of Appeal (I-290B) dated July 27, 2007 that he would submit a supporting brief and requested an additional 90 days to complete the task. To date, counsel has not filed a brief or any additional documents. Therefore, our review is limited to the statements made on the Notice of Appeal.

Counsel states that he needed additional time to "have the underlying (Felony) conviction ... more carefully scrutinized by the original court because ... it appears constitutionally defective." As noted above, no further documents were submitted. Therefore, the applicant's constitutional challenge to his conviction is without merit. Next, counsel argues "even if there did not exist a violation of due process toward [the applicant] in taking that plea it appears the ultimate plea was only as a Misdemeanor."

The AAO has thoroughly examined the California State Superior Court minute order. Nowhere does it identify the applicant's conviction as a misdemeanor offense and counsel has submitted no records on appeal to support his argument. The probation report clearly states that a violation of section 246.3 of the California Penal Code is a felony and the probation report advised the sentencing court that the applicant's conviction *should not* be dismissed because of the violent nature of the charge and because the applicant fired at a vehicle containing a minor child.

It appears that counsel is attempting to argue that because the applicant's conviction was ultimately dismissed pursuant to section 1203.4 of the California Penal Code, the conviction no longer serves as a bar to permanent resident status. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has ruled on the effect of post-conviction expungements pursuant to a state rehabilitative statute.² Generally, expungements or vacatures of a criminal conviction pursuant to the successful completion of some form of rehabilitation or probation are considered valid convictions for immigration purposes unless the conviction was dismissed because of a fundamental procedural or constitutional error in the trial court proceedings. *Matter of Roldan, supra*. Section 1203.4 of the California Penal Code is a state rehabilitative

See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural defect in the trial court proceedings, and the vacated judgment remains valid 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.

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 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 INA, 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.