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

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[redacted]

FILE: [redacted] Office: NEW YORK Date: JAN 07 2009

MSC 02 194 61643

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.

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, New York, 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 had not met his burden of proof to establish eligibility to adjust to permanent resident status under the provisions of the LIFE Act. Specifically, the director noted that the applicant had been convicted of at least three misdemeanors in the United States. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel argues that the applicant "is married to a Legal Permanent Resident which makes him eligible for a 601 waiver."

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).

"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 such alien 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).

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-Santoyo*, 22 I. & N. Dec. 512, 521-22 (BIA 1999).

The record contains documents that reflect the applicant has either been arrested and/or convicted of the following misdemeanor offenses in the Criminal Court of the City of New York:

- An arrest on September 3, 1987 for one count of trafficking in cocaine and one count of transportation of cocaine (Case No[redacted] Although the applicant submitted no certified court documents explaining the ultimate disposition of these charges, the Notice of Intent to Deny (NOID) issued by the director dated August 22, 2007 states that the "original case file was unable to be located. Al (sic) evidence disposed."

- A 1989 conviction for *disorderly conduct.* The applicant, using the name of [redacted] was also charged with one count of *professional gambling book with 5 bets totalling $5,000* and one count of *knowing possession of gambling book.* However, the applicant submitted no record of the court's sentence on the disorderly conduct conviction or ultimate disposition of the gambling charges in this case. (Case [redacted]

- A 1992 conviction for second degree *possession of gambling records.* (Case No. [redacted] The applicant was originally charged with one count of *receiving lottery money/pol $500/D* and one count of *possession with knowledge of lottery proceeds/pol REC/500.* The applicant was sentenced to 30 days in jail and ordered to pay a fine. This conviction is considered a misdemeanor under New York law.

- A 1997 conviction for second degree *attempted promotion of gambling.* The applicant, again using the name of [redacted] was originally charged with one count of *promoting gambling* and one count of *possession of gambling records.* (Case No[redacted] The applicant was ordered to pay a fine. The applicant submitted to evidence of the court's sentence.

- A 2000 conviction for second degree *possession of gambling records* (Case No.[redacted] The applicant was sentenced to a term of probation for one year.

In the record before the AAO, the applicant was sentenced variously to pay fines, to periods of court supervised probation, and to 30 days imprisonment for one of the offenses. The applicant's appeal does not address the immigration consequences of his convictions. New York law provides that the conviction for disorderly conduct is considered a "violation" punishable by a maximum sentence of imprisonment of 15 days. *See* New York Penal Code Section 240.20, and New York Penal Code Article 70.15. As the maximum sentence is more than 5 days imprisonment, the crime is considered a misdemeanor under immigration law. 8 C.F.R. § 245a.1(p) & 8 C.F.R. § 245a.1(o). Federal regulations under 8 C.F.R. § 245a.11 do not specify a particular *type* of misdemeanor – any three misdemeanor convictions are an automatic disqualification for adjustment to permanent resident status under the provisions of the LIFE Act.

The Notice of Intent to Deny (NOID) issued by the district adjudications office on August 22, 2007 informed the applicant of the series of arrests and convictions listed above, and requested that the applicant provide certified court documents explaining the final dispositions for these arrests. The applicant did not supply the requested evidence, and thus fails to establish eligibility for permanent residence under the terms of the LIFE Act.

Even if the applicant were to obtain orders vacating, expunging, or otherwise setting aside any of the applicant's four misdemeanor convictions, Congress has not provided any exception for aliens who have been accorded post-conviction rehabilitative treatment under state law. State post-conviction 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-Santoyo, id.* There is no evidence that any of the judgments of conviction have been vacated for underlying procedural or constitutional defects having to do with the merits of the case. *See Saleh v. Gonzales*, 495 F.3d 17 (2nd Cir. 2007), Matter *of Adamiak*, 23 I&N Dec. 878 (BIA 2006). Therefore, the applicant remains "convicted" of the four misdemeanor offenses cited above for immigration purposes.

The only argument the applicant offers in support of his application for permanent resident is that, despite his numerous arrests and convictions, he is married to a lawful permanent resident and is "eligible for a 601 waiver." This argument is without merit. Because the evidence of record indicates a series of arrests and convictions for which the applicant provides no final court dispositions, the applicant is ineligible for adjustment 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.