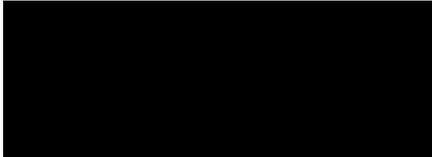


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U.S. Department of Homeland Security
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U.S. Citizenship
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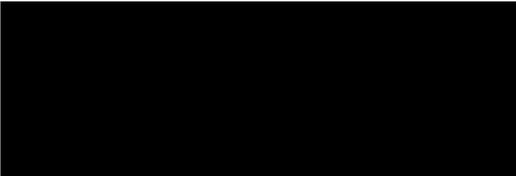
FILE:  Office: Houston

Date: JAN 04 2006

IN RE: Applicant: 

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:



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, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. This matter will be remanded for further action and consideration.

The district director determined that the applicant had pleaded guilty to a violation of 8 U.S.C. § 1324(a)(2)(A), Bringing in and Harboring Certain Aliens, on July 28, 1999. The district director concluded that the applicant had been convicted of an aggravated felony, and, therefore denied the application because he was ineligible to adjust to permanent residence pursuant to 8 C.F.R. 245a.18(a).

On appeal, counsel asserts that the applicant pleaded guilty to violating 8 U.S.C. § 1324(a)(2)(A), an offense that is a Class A misdemeanor rather than a felony. Counsel submits documentation in support of the appeal.

The record contains a copy of a "Judgement In A Criminal Case" that reflects that the applicant was adjudged to be guilty of a violation of 8 U.S.C. § 1324(a)(2)(A) in Case Number 3:98-CR-363-P(09) by Judge Jorge A. Solis of the United States District Court for the Northern District of Texas, Dallas Division on July 28, 1999.

"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).

An alien who has been convicted of a felony or of three or misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(1).

8 U.S.C. § 1324(a)(2) and 8 U.S.C. § 1342(a)(2)(A) read as follows:

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs -

(A) be fined in accordance with title 18, United States Code, or imprisoned not more than one year, or both.

Clearly an individual pleading guilty to a violation of 8 U.S.C. § 1342(a)(2) would be subject to a prison term of not more than one year under 8 U.S.C. § 1342(a)(2)(A). As a result, it must be concluded that the applicant's criminal conviction is for a misdemeanor offense rather than a felony offense. This conclusion is reinforced by the fact that the record contains a "Presentence Report" relating to the applicant's criminal case, which specifically characterized a violation of 8 U.S.C. § 1324(a)(2)(A) as a "Class A misdemeanor." Consequently, the district director's determination that the applicant had been convicted of an aggravated

felony must be considered to be in error. Further, although it appears that the applicant is inadmissible under section 212(a)(6)(E)(i) of the Immigration and Nationality Act (INA), because he had been convicted of an offense involving alien smuggling, such a ground of inadmissibility may be waived pursuant to 8 C.F.R. § 245a.18(c). Therefore, the applicant must be considered to have overcome the basis of the denial cited by the district director.

In addition, the regulations at 8 C.F.R. § 245a.20(a)(2) state, in pertinent part:

Denials. The alien shall be notified in writing of the decision of denial and of the reason(s) therefore. When an adverse decision is proposed, CIS shall notify the applicant of its intent to deny the application and the basis for the proposed denial. The applicant will be granted a period of 30 days from the date of the notice in which to respond to the notice of intent to deny. All relevant material will be considered in making a final decision.

A review of both the electronic and administrative record reveals that a notice of intent to deny was never issued to either counsel or the applicant. Accordingly, the decision of the district director is withdrawn. The case will be remanded for the purpose of the issuance of a notice of intent to deny as well as a new decision to both counsel and the applicant. The new decision, if adverse, shall be certified to this office for review.

ORDER: This matter is remanded for further action and consideration pursuant to the above.