



U.S. Citizenship
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Office: Los Angeles

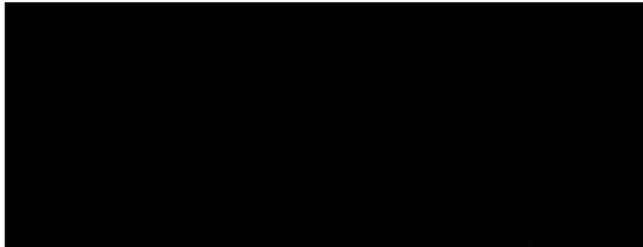
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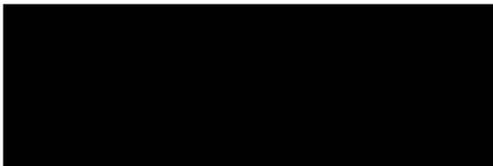
IN RE:

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. All documents have been returned to the office that originally decided your case. 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.

A handwritten signature in cursive script, appearing to read "R. Wiemann".

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 denied the application because she determined that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had been convicted of three misdemeanors in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act.

On appeal, counsel declares that he is attempting to vacate the applicant's three misdemeanor convictions.

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 under the provisions of the LIFE Act. Section 1104(c)(2)(D)(ii) of the LIFE Act; 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"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).

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)..

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In this case, the applicant does not claim any defect in the underlying criminal proceedings.

In the Notice of Intent to Deny (NOID), dated September 15, 2006, the director notified the applicant of her intention to deny the application because the applicant was ineligible due to his three misdemeanor convictions. The director granted the applicant thirty (30) days to submit rebuttal evidence.

In response to the NOID, the applicant stated that he has petitioned for expungements of his three misdemeanor convictions. He submitted copies of petitions and proposed orders for expungements which were stamped "Received" on October 13, 2006, by the Superior Court of California, County of Orange, Central Justice Center. The applicant states that he anticipated a response from the Court within four to six weeks. According to the record, the applicant sought expungements for the following:

1. On January 8 1991, the applicant was convicted, in case # [REDACTED] of a violation of ~~273D-PC~~ - INFLICT INJURY UPON CHILD, a misdemeanor. The court sentenced the applicant to 3 years probation.
2. On January 11, 1993, the applicant was convicted, in case # [REDACTED] of a violation of: Count 1: [REDACTED] ASSAULT, a misdemeanor. The applicant was sentenced to 15 days jail, and 36 months probation; Count [REDACTED] BATTERY, a misdemeanor; and, Count [REDACTED] INFLICT INJURY ON SPOUSE / COHAB, A MISDEMEANOR. The court imposed suspended sentences on counts 2, and 3.
3. On February 5, 1992, the applicant was convicted, in case # [REDACTED] of a violation of Count 1: [REDACTED] THEFT/PETTY THEFT, a misdemeanor; and, Count 2: 148.9(A) PC – FALSE IDENTIFICATION TO PEACE OFFICER, A MISDEMEANOR. The court sentenced the applicant to 3 years probation, plus fines and costs.

On appeal, counsel does not dispute that the applicant has three misdemeanor convictions and states that she will motion the court to vacate his convictions. Counsel references the petitions for expungement listed above, and states that she believes that the misdemeanors will be dismissed, vacated, or expunged. Therefore, counsel requests that a final decision be abated until the California Court decides the applicant's request for post-conviction relief. Counsel has not provided any additional evidence. The petitions for expungement provided by the applicant do not indicate any procedural or substantive defect in the underlying proceedings and the sole basis for requesting expungement is that the applicant had fulfilled, for the entire period, the conditions of probation imposed for his convictions. The record does not reflect that the court granted any of the petitions.

The court records show that the applicant was convicted of three or more misdemeanors, described above. Citizenship and Immigration Services (CIS) is required to rely on the court record as it stands, and cannot make determinations of guilt or innocence based on that record. Furthermore, CIS may only look to the judicial records to determine whether the person has been convicted of the crime, and may not look behind the conviction to reach an independent determination concerning guilt or innocence. *Pablo v. INS*, 72 F.3d 110, 113 (9th Cir. 1995); *Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992); and *Matter of Roberts*, 20 I&N Dec. 294 (BIA 1991).

Even if the applicant were to obtain orders vacating the applicant's three misdemeanor convictions, Congress has not provided any exception for applicants who have been accorded rehabilitative treatment under state law. Any rehabilitative action that overturns a state conviction is ineffective to expunge a conviction for immigration purposes. *Matter of Roldan*, 22 I&N Dec. at 523, 528.

In addition, under the 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. 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 Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains "convicted" for immigration purposes.

It is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices.

Therefore, the applicant remains "convicted" of the three misdemeanor offenses cited above for immigration purposes.

Because the applicant has three or more misdemeanor convictions, the applicant is ineligible to 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 applicant convicted of a felony or three or more misdemeanors committed in the United States.

An applicant 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 Act, 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.