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U.S. Citizenship
and Immigration
Services

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LC

FILE: MSC 02 242 62166 Office: LOS ANGELES Date: MAR 27 2008

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: Self-represented

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. Any further inquiry must be made to that office.

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 concluded that the applicant had been convicted of at least three misdemeanors in the United States, and accordingly, denied the application.

On appeal, the applicant asserts that the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) reversed *Matter of Roldan* and reinstated the effectiveness of state rehabilitative relief to eliminate the immigration consequences of first-offense convictions of simple possession of any drug. The applicant asserts that he believes that alcohol is a drug and should be listed in the Federal First Offender Act.

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. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C); 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1).

“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).

According to the interviewing officer’s notes, the applicant was arrested in 1984 in East Los Angeles or Montebello; in July 1988 for driving under the influence in Lakewood; in 1995 for driving under the influence in Bellflower; and in 1998 for driving under the influence in Bellflower/Norwalk.

On November 17, 2004, the director issued a Form I-72 requesting the applicant to submit the final court dispositions for his arrest in 1988 for driving under the influence and for an arrest in 1984 in East Los Angeles/Montebello.

The applicant, in response, submitted court documentation dated December 1, 2004, from the Los Angeles County Superior Court indicating that a search of its misdemeanor and felony records was conducted and no record was found in 1983 through 1984. The applicant also submitted court documentation dated December 1, 2004 from the Los Angeles County Superior Court indicating that a search of its records had been conducted and it was unable to locate any criminal records in 1988 in the applicant’s name. The document also indicated that the Bellflower Superior Court records are destroyed after a ten-year period.

Throughout the application process, the applicant has submitted court dispositions which reflect his criminal history in the state of California as follows:

1. On May 31, 1988, the applicant was convicted of driving under the influence, a violation of section 23152(a) VC, a misdemeanor. Case no. [REDACTED]
2. On August 10, 1989, the applicant was arrested and subsequently charged with driving while license is suspended, a violation of section 14601.1(a) VC, a misdemeanor. On September 14, 1989, the applicant was convicted of this offense and ordered to pay a fine. Case no. [REDACTED]

3. On November 16, 1990, the applicant was convicted of driving while license is suspended with a prior, a violation of section 14601.1(a) VC, a misdemeanor. The applicant was sentenced to serve five days in jail, ordered to pay a fine and was placed on probation for three years. Case no. [REDACTED]
4. On April 21, 1998, the applicant was charged with driving under the influence, a violation of section 23152(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC, both misdemeanors. On June 1, 1998, the applicant was convicted of violating section 23152(b) VC. The applicant was sentenced to serve two days in jail, ordered to pay a fine and was placed on probation for four years. The remaining charge was dismissed. On June 3, 2002, this conviction was expunged in accordance with section 1203.4 PC. Case no. [REDACTED]
5. On February 17, 1995, the applicant was charged with driving under the influence, a violation of section 23152(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC, both misdemeanors. On February 21, 1995, the applicant was convicted of violating section 23152(b) VC. The applicant was sentenced to serve two days in jail, ordered to pay a fine and was placed on probation for four years. The remaining charge was dismissed. Case no. [REDACTED]

On appeal, the applicant asserts that alcohol should be listed as a drug in the Federal First Offender Act. The AAO, however, is not the proper forum for disputing this issue.

The Ninth Circuit's decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 ((9th Cir. 2000) only modifies *Matter of Roldan* as it relates to the Federal First Offender Act, and is irrelevant in this case. 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.

Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant's expungement.

On appeal, the applicant asserts that he was eligible to adjust status prior to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), but because he was misinformed by a Service officer, he did not apply during the May 4, 1987, to May 4, 1988, filing period. The applicant

states during this period he was eligible for a state court action to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction.

It is noted that according to the interviewing officer's notes taken at the time of the applicant's initial interview on October 18, 1994, it was his friends and not a Service officer that informed the applicant that he would not qualify for temporary resident status due to his departure from the United States. The interviewing officer's notes further indicated that the applicant did not visit an immigration office prior to May 4, 1988, and never verified the veracity of his friends' statements.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. *See Matter of Patel*, 19 I&N Dec. 774, 779 (BIA 1998) (citing *Bradley v. Richmond School Board*, 416 U.S. 696, 710-1 (1974)). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. *Matter of George*, 11 I&N Dec. 419 (BIA 1965); *Matter of Leveque*, 12 I&N Dec. 633 (BIA 1968).

The applicant is ineligible for the benefit being sought due to his five misdemeanor convictions. 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a)(1). Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.