



U.S. Citizenship
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FILE:



MSC 03 196 61466

Office: LOS ANGELES

Date:

MAY 21 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:



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.

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 (director) in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant had been convicted of a felony and two misdemeanors in the State of California, which made him ineligible for LIFE legalization.

On appeal counsel asserts that one of the applicant's two misdemeanor convictions was vacated, and the charge dismissed, and that his felony conviction was reduced to a misdemeanor, thus leaving the applicant with just two misdemeanor convictions. As such, counsel contends that the applicant is not ineligible for legalization under the LIFE Act.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

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. See section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a)(1).

As defined in 8 C.F.R. § 245a.1(o):

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.

As defined in 8 C.F.R. § 245a.1(p):

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 CFR part 245a, the crime shall be treated as a misdemeanor.

In the denial decision on September 30, 2006, the director relied on certified court records confirming that the applicant had been convicted of the following crimes under the California Penal Code (PC):

- On February 27, 1997, in the Municipal Court of Huntington Park, Los Angeles County: **two misdemeanors** under (1) PC section 273.5(a) – infliction of corporal injury on his spouse, and (2) PC section 472 – forging an official seal. The applicant was placed on probation for three years. (Case No. [REDACTED])
- On February 13, 2001, in the Superior Court of California, Los Angeles County, **one felony** under PC section 245(a)(1) – assault with a deadly weapon. The court sentenced the applicant to two years in state prison, but suspended the sentence and placed the applicant on probation for three years. (Case No. [REDACTED])

Based on this criminal record, the director determined that the applicant was ineligible for lawful permanent resident status under section 1104(c)(2)(D)(ii) of the LIFE Act.

On appeal counsel asserts that the applicant now has only two misdemeanor convictions, which makes him eligible for LIFE legalization.

Counsel indicates that the applicant petitioned the court to vacate his misdemeanor conviction under PC section 472 pursuant to PC section 1016.5, which provides, in pertinent part, as follows:

- a. Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant:

If you are not a citizen, you are hereby advised that a conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

- b. . . . If . . . the court fails to advise the defendant as required by this section . . . the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw his plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

Counsel states that the court granted the applicant's motion to vacate his conviction under PC section 472 and subsequently dismissed the charge under PC section 1385.

As for the applicant's felony conviction under PC section 245(a)(1), counsel states that the felony was reduced to a misdemeanor pursuant to PC section 17(b)(4), which provides as follows:

When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

According to counsel, since the applicant now stands convicted of only two misdemeanors in the State of California, he is eligible to adjust his status to lawful permanent resident. The AAO does not agree.

Counsel suggests that the applicant did not receive the requisite advisement in PC section 1605 about the immigration-related ramifications of pleading guilty or nolo contendere to his misdemeanor charge under PC section 472. While the certified court records explicitly state that the applicant received that advisement from the court with respect to both of his misdemeanor charges in 1997 (as well as his felony charge in 2001), updated court records submitted on appeal confirm, as counsel contends, that on May 17, 2007 the court granted a motion by the applicant to vacate his conviction in accordance with PC section 1016.5, and dismissed the charge under PC section 472 (of forging an official seal) in accordance with PC section 1385 (which gives judges the discretion "in furtherance of justice" to order an action dismissed). The updated court records indicate that the conviction on the other misdemeanor charge under PC section 273.5 remains undisturbed.

As for the applicant's felony conviction in 2001, updated court records submitted on appeal confirm that on April 12, 2007 the court granted a motion by the state to allege the charge under PC section 245(a)(1) as a misdemeanor, pursuant to PC section 17(b)(4). The court vacated the suspended sentence of two years in state prison imposed on February 13, 2001, *nunc pro tunc* as of that date, and reduced the applicant's conviction to a misdemeanor.

Section 101(a)(48)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(48)(A), defines "conviction" as follows:

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.

Under the statutory definition of "conviction" 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 reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

The applicant was convicted in 2001 of assault with a deadly weapon under PC section 245(a)(1), which reads as follows:

Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding \$10,000, or by both the fine and imprisonment.

In California an offense with this type of alternate punishment remains a "felony" unless the defendant is, in fact, merely fined or sentenced to county jail, in which case the state considers the offense a "misdemeanor." See *MacFarlane v. Department of Alcoholic Beverage Control*, 326 P.2d 165, 167 (1958), 330 P.2d 769, 772 (1958). The court disposition provided by the applicant in this case specifies that he was charged with, and convicted of, a felony. In addition, the sentence issued in 2001 (two years in state prison, suspended) was consistent with a felony conviction, since the judge did not impose a county jail sentence of one year or less, or simply fine the applicant. See *People v. Banks*, 338 P.2d 214, 215 (1959), 348 P.2d 102, 113 (1959). (In *Banks*, the defendant pled guilty, the proceedings were suspended, and the defendant was placed on probation for a period of three years. The court held that the defendant had been convicted of a felony, not a misdemeanor.) In this case as well, we find that the applicant was convicted of a felony, not a misdemeanor.

Because of his felony conviction in the State of California, the applicant is ineligible for permanent resident status under section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a)(1). Accordingly, the director's denial of the application will be affirmed on this ground.

While the issue of the applicant's admissibility to the United States was not raised by the director, section 212(a)(2)(i)(I) of the INA provides that an alien is inadmissible if he or she has been

convicted of a crime involving moral turpitude (other than a purely political offense), or if he or she admits having committed such a crime, or admits committing an act which constitutes the essential elements of such a crime.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. See *Jordan v. DeGeorge*, 341 U.S. 223, reh'g denied, 341 U.S. 956 (1951). The crime of assault with a deadly weapon involves moral turpitude. See *Matter of Medina*, 18 I&N Dec. 611 (BIA 1976). The applicant's conviction of this crime makes him inadmissible to the United States under section 212(a)(2)(i)(I) of the INA. There is no waiver available for inadmissibility under this section of the statute.

Since the applicant has been convicted of a crime involving moral turpitude, his application for LIFE legalization must be denied on this ground as well.

An alien applying for adjustment of status under the provisions of section 1104 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 Immigration and Nationality Act, and is otherwise eligible for adjustment of status. See 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.