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U.S. Citizenship
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Services

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[Redacted]

FILE: [Redacted]
MSC 02 219 62208

Office: LOS ANGELES

Date: **MAY 23 2008**

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.

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 determined that the applicant had been convicted of three misdemeanors and therefore, pursuant to 8 C.F.R. § 245a.11(d)(1), was ineligible for adjustment of status under the LIFE Act. Accordingly, the director denied the application for adjustment of status as a permanent resident.

The applicant's criminal record history reveals that on August 29, 1997, the applicant was convicted in the Superior Court of California, County of San Bernardino, of the following misdemeanor offenses: driving under the influence of alcohol or drugs in violation of California Vehicle Code section 23152(a); driving under the influence with an alcohol content of .08% or more in violation of California Vehicle Code section 23152(b); and failure to appear in violation of California Vehicle Code section 40508(a).

In response to the director's Notice of Intent to Deny (NOID) dated July 7, 2005, and again on appeal, counsel asserts that the director was "legally incorrect" in determining that the applicant had been convicted of violating both sections 23152(a) and 23152(b) of the California Vehicle Code. Counsel argues that, pursuant to *People v. Duarte*, 161 Cal.App.3d 439 (1984), judgment of conviction can be entered only on one of the convictions. Counsel also stated that the applicant had not been represented by counsel when he pled to the two charges, and that as a result, he had petitioned the court to set aside one of the convictions.

Duarte holds that when a defendant has been convicted of two driving offenses arising from the same occurrence, use of the second conviction for sentence enhancement or for administrative purposes, will be stayed pending completion of the sentenced imposed, at which time the stay will become permanent.

On appeal, counsel submits a copy of a July 26, 2005, minute order from the Superior Court of California, County of San Bernardino, dismissing the applicant's convictions for violation of sections 23152(b) and 40508(a) pursuant to California Penal Code section 1385. Section 1385 provides, in part:

- (a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

The copy of the court order submitted by counsel indicates that the charges were dismissed on the People's motion and in accordance with a plea bargain. Counsel did not submit a copy of the plea bargain, a copy of the motion or of the applicant's petition. State 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*, 22 I&N Dec. 512 (BIA 1999); *In re Chavez-Martinez*, 24 I&N Dec. 272 (BIA 2007). Counsel provided no documentation indicating that the applicant's convictions were set aside on the merits of the case.

Counsel also asserts that "there is no evidence to support [the director's] assertion that [the applicant pled] guilty to violating Vehicle Code Section 40508." Counsel based this assertion on the fact that the charges on the Advisement of Rights, Waiver and Plea Form waiver included only those under sections 23152. Counsel further asserts that not only did the applicant appear at his arraignment, he pled guilty to the

above charges and that it is clear from the sentence imposed that the applicant was only being sentenced for violation of section 23152 of the vehicle code.

Counsel's argument is clearly without merit, as the certified record of the court clearly shows that the complaint was amended on August 29, 1997, to include a violation of section 40508(a)VC. The applicant pled guilty to "all counts." Further, counsel undermined his own argument when he presented, on appeal, a copy of the minute order indicating that the conviction of this offense was set aside pursuant to California Penal Code section 1385. However, as discussed above, counsel submitted no evidence that the charge was set aside based on the merits of the case.

Accordingly, the record reflects that the applicant has been convicted of three misdemeanors committed in the United States. Therefore, as the applicant has been convicted of three misdemeanors, he is ineligible for adjustment of status to that of permanent resident under section 1104 of the LIFE Act.

Additionally, the applicant's evidence does not demonstrate that he has continuously resided in the United States in an unlawful status since before January 1, 1982, through May 4, 1988, as required by Section 1104(c)(2)(B) of the LIFE Act; 8 C.F.R. § 245a.11(b). For this additional reason, the application must be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the district office does not identify all of the grounds for denial in the initial decision. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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