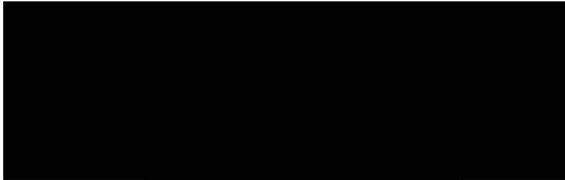


**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



**U.S. Citizenship  
and Immigration  
Services**

**PUBLIC COPY**



42

FILE: [REDACTED]  
MSC 02-236-63469

Office: LOS ANGELES

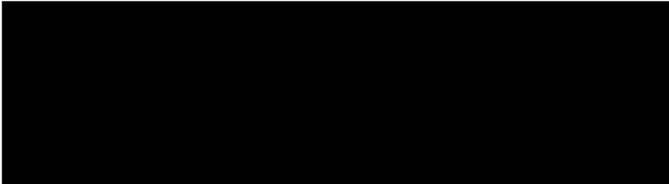
Date: **MAY 23 2008**

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).

IN 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 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, Chief  
Administrative Appeals Office

**DISCUSSION:** The District Director, Los Angeles, denied the application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act on September 23, 2005. That decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On May 24, 2002 the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, pursuant to section 1104 of the Life Act (I-485 LIFE Legalization Application) with the Immigration and Naturalization Service (or Service, now U.S. Citizenship and Immigration Services or CIS). The director issued a Notice of Intent to Deny (NOID) on June 17, 2005, finding that the applicant was ineligible for lawful permanent resident status under the LIFE Act because she had been convicted of three misdemeanors. In her rebuttal dated August 2, 2005 the applicant, through counsel, submitted a Minute Order and printout of the transcript from the Superior Court of California, County of Riverside, indicating that the applicant had withdrawn her guilty plea and one of the applicant's misdemeanor convictions had been dismissed on July 18, 2005. The director subsequently denied the application, noting that "a conviction may be nullified on *legal merits* . . . [but] there is no indication found in the court disposition that the conviction took place due to error," citing to *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). The director also found that the applicant sought to have the conviction dismissed to avoid the denial of immigration benefits, and that the Service need not honor pleas vacated for that purpose, citing to *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

The applicant filed a Form I-290B, Notice of Appeal to the AAO, on October 19, 2005, in which she again stated, through counsel, that one of her misdemeanor convictions had been vacated pursuant to California Penal Code § 1385 because her guilty plea had been entered into in error, and not pursuant to a rehabilitative statute. Counsel asserted that "dismissals 'in furtherance of justice' pursuant to PC 1385 are treated as dismissals for a lack of prosecution. *In Re Gary W.*, 5 Cal. 3d 296 (1971)."

The issue before the AAO is whether the applicant's prior convictions render her ineligible for lawful permanent resident status under the LIFE Act in light of subsequent state action granting a motion to withdraw a guilty plea and dismiss a prior conviction in the interest of justice under California Penal Code § 1385.

#### Ineligibility Based on Criminal History

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 245a.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).

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines the term “conviction” for immigration purposes:

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.

### The Applicant’s Criminal Record

The applicant submitted court dispositions showing that she was convicted of the following offenses under the California Vehicle Code (VC):

1. On November 11, 1995 (Case # [REDACTED]), violation of VC 23103, reckless driving, alcohol related, a misdemeanor punishable by imprisonment in a county jail for not less than five days nor more than 90 days and/or a fine. The applicant pled guilty on February 8, 1996 and was ordered to pay a fine.

2. On December 14, 2002 (Case # [REDACTED]), count 1 – violation of VC 23152(A), driving under the influence of alcohol; and count 2 – violation of VC 23152(B), driving under the influence of alcohol with .08% or more blood alcohol, both misdemeanors punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both. The applicant pled guilty to both counts and was placed on three-year summary probation and fined.

On appeal the applicant provided proof that count two above, conviction of violation of VC 23152(B), was dismissed in the interest of justice pursuant to California Penal Code § 1385. Section 1385 provides, in pertinent part, that a judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed. California Penal Code § 1385(a).

### Vacated or Expunged Convictions

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, 624 (BIA 2003); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000); *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999), *vacated sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000).<sup>1</sup>

Courts have also found that a conviction vacated for equitable reasons is still deemed to be a conviction for immigration purposes. *Renteria-Gonzalez v. INS*, 322 F.3d 804, 812-14 (5<sup>th</sup> Cir. 2002). Where an order vacating a conviction was issued “in the interest of justice and equity and to avoid a manifest injustice,” the court found that it was still a conviction under *Pickering* because there was no evidence that the conviction was withdrawn from legal defect. *Pequeno-Martinez v. Trominski*, 281 F.Supp.2d 902, 926-27 (S.D. Tex. 2003).

### Conclusion

In this case, the only evidence submitted regarding the basis for the judge’s dismissal of one of the applicant’s misdemeanor convictions is the Minute Order of the Superior Court of California and accompanying court transcript, noted above. The Minute Order refers to the proceeding, on July 18, 2005, as a “Probation Hearing RE: request to modify sentence,” and grants the underlying motion (which is not included in the record), stating, “Defendant Withdraws Plea of Guilty as to count(s) 2. Count(s) 2 dismissed in the interest of justice. (1385 PC).” Although the applicant’s counsel asserts in his rebuttal to the NOID and in his appeal brief that “the criminal court had made a mistake in convicting [the applicant] of two separate DUI misdemeanors when she had only been arrested for one,” the record reflects that the applicant pled guilty to both of those misdemeanor charges, and contains no evidence of procedural or substantive defect in the underlying proceedings. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also mistakenly relies on a 1971 decision of the Supreme Court of California, *In Re Gary W.*, 5 Cal.3d 296, for the proposition that “dismissals ‘in furtherance of justice’ pursuant to PC 1385 are treated as dismissals for lack of prosecution,” distinguishing such dismissals from those granted pursuant to a rehabilitative statute, California Penal Code § 1203.4. *In Re Gary W.*, however, has no relevance to this issue. Instead, it addressed the civil commitment procedures for individuals who were being considered for discharge from the California Youth Authority and did not include any reference to California Penal Code § 1385 or § 1203.4.

It is clear that the applicant’s misdemeanor conviction at issue here was dismissed in the court’s discretion pursuant to California Penal Code § 1385 “in the interest of justice.” Absent any evidence that the court vacated the conviction for reasons related to the merits of the underlying criminal proceedings, the applicant remains “convicted” for immigration purposes. *Matter of Pickering*, 23 I&N Dec. at 624. An

---

<sup>1</sup> While applicable to cases arising in the Ninth Circuit, as does the case before us, the rule set forth in *Lujan* applies only to first-time simple possession of a controlled substance offense. It is a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act.

applicant who has been convicted of a felony or three or more misdemeanors committed 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). In light of the applicant's record of three misdemeanors, described above, she 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.