

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

L2

[REDACTED]

FILE:

[REDACTED]

MSC 03 253 60214

Office: LOS ANGELES

Date:

MAY 28 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director denied the application because the applicant was ineligible for lawful permanent resident status under the LIFE Act due to four misdemeanor convictions between November 1992 and March 1997.

On appeal, counsel asserts that the applicant's convictions are to be vacated for constitutional reasons. Counsel contends that any conviction, which is later vacated because of a violation of due process, shall be given full faith and credit.

The issue before the AAO is whether the applicant's prior convictions render him ineligible for lawful permanent resident status under the LIFE Act in light of subsequent state actions ordering that prior convictions be expunged.

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).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception 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 actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

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.

In the Notice of Intent to Deny (NOID), dated on August 5, 2006, the director stated that the applicant had been convicted of four misdemeanors and, therefore, not eligible to adjust status to lawful permanent resident status under the LIFE Act. The director provided the applicant with 30 days from the date of the NOID to explain discrepancies or to rebut any adverse information.

In rebuttal to the NOID, the applicant submitted his own declaration, dated on September 3, 2006. The applicant stated that for two of the convictions he was not aware of the immigration consequences of pleading guilty. He stated that he would seek nullification of the two convictions in order for his application for adjustment of status to be considered favorably.

In the Notice of Decision, dated on September 16, 2006, the director stated that all original convictions are used for immigration purposes even if the convictions are nullified, vacated or expunged. The director determined that the applicant failed to overcome his ineligibility and denied the application.

Based on the record, the applicant was convicted of the following offenses:

1. On November 14, 1992, the applicant was arrested and charged with *disturb peace at college/university*, in violation of section 415.5 of the California Penal Code in Van Nuys, California. On February 16, 1993, the applicant was convicted of *disturb peace at college/university*, a misdemeanor, and sentenced to 24 months probation and a fine. (Case No. [REDACTED])
2. On March 25, 1995, the applicant was charged with driving under the influence of alcohol/drugs in violation of section 23152(a) and .08% more weight alcohol while driving in violation of section 23152(b) of the California Vehicle Code (VC). The court ordered the complaint amended to add a violation of section 23103 VC – reckless driving/no injury. The applicant was convicted on May 12, 1995 on the reckless driving charge, and sentenced to 36 months probation and a fine of \$390.00. (Case No. [REDACTED])
3. On March 18, 1997, the applicant was charged with *giving false information to police officer*, in violation of section 31 of the California Vehicle Code in the Westminister County, California. The applicant was convicted of *giving false information to police officer*, a misdemeanor, and sentenced to 7 days confinement. (Case No. [REDACTED])
4. On March 18, 1997, the applicant was charged with *driving without license*, in violation of section 12500(a) of the California Vehicle Code in Westminister County, California. The applicant was convicted of *driving without license*, a misdemeanor, and sentenced to 7 days confinement (served simultaneously with the above conviction). (Case No. [REDACTED])

Under the current 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 by operation of a state rehabilitative statute. *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 addition, 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. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

In *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th Cir. 2002), the Ninth Circuit further clarified that California PC § 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. *Ramirez-Castro*, 287 F.3d at 1175.

On appeal, counsel asserts that the applicant’s convictions are to be vacated on a nunc pro tunc basis for constitutional reasons. However, counsel has failed to provide any documentary evidence that the applicant’s convictions have been vacated. The applicant has failed to overcome the director’s grounds for denial as stated in the NOD. Therefore, the applicant 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). Given this, he 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.