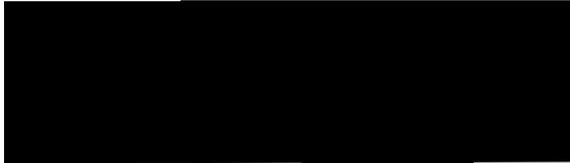




U.S. Citizenship
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Services

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FILE:

MSC 02-246-60628

Office: LOS ANGELES

Date:

NOV 06 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:

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. 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 November 23, 2007. That decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On June 3, 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 October 22, 2007, listing the requirements for eligibility under the LIFE Act and finding that the applicant was ineligible for lawful permanent resident status under the LIFE Act because he had been convicted of two felonies. The director denied the application for the reasons set forth in the NOID.

On appeal, the applicant admits that he was arrested twice for cocaine possession, but that “on the first offense, [he] was not convicted; the sentence was deferred and the case dismissed,” and that on his second arrest, the case was dismissed pursuant to California Penal Code (PC) 1210.1. In rebuttal to the NOID and on appeal the applicant submitted a Form I-690 Application for Waiver, numerous letters of reference, and a copy of the record of proceedings from the Los Angeles County Superior Court of California regarding his two convictions.

The issue before the AAO is whether the applicant’s prior convictions render him ineligible for lawful permanent resident status under the LIFE Act. The AAO finds that the director erred in concluding that the applicant was ineligible based on convictions of two felony offenses. The record shows that for the first offense, the state court ordered that the charge be dismissed, effectively eliminating the conviction for immigration purposes; and that the state’s treatment of both offenses as misdemeanors renders the crimes misdemeanors for all purposes. The AAO concludes that the applicant’s two felony charges resulted in one misdemeanor conviction and would not render him ineligible.

However, the AAO finds that the director failed to note two prior misdemeanor convictions in the applicant’s record. Taking those additional convictions into account, the applicant is ineligible for lawful permanent resident status for having been convicted of three or more misdemeanors. Section 1104(c)(2)(D)(ii) of the LIFE Act. Moreover, the AAO notes that the applicant’s misdemeanor conviction of a crime relating to a controlled substance renders him inadmissible and thus ineligible on that basis under section 1104(c)(2)(D)(i) of the LIFE Act and section 245A(d)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(d)(2).

Ineligibility Based on Conviction of a Felony or Three or More Misdemeanors

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.

The Applicant’s Criminal Record

The director found the applicant ineligible for having been convicted of two felonies. The applicant submitted court transcripts indicating that he was convicted of the following violations of the California Health and Safety Code (Cal. H&S Code):

1. Case # [REDACTED] Violation of Section 11350(a) “H&S Fel - Possession of narcotic controlled substance.” The applicant entered a guilty plea on June 11, 2004, and he was placed on deferred entry of judgment for 18 months and ordered to pay \$200 diversion restitution fee and other fees and to “participate in a program of education, treatment or rehabilitation.” On December 9, 2005, proceedings were terminated with a disposition of “def judgment term/plea set aside/dis 1000.3 PC.”
2. Case # [REDACTED] Violation of Section 11350(a) “H&S Fel - Possession of narcotic controlled substance.” The applicant plead nolo contendere and was convicted on August 10, 2006; imposition of sentence was suspended, and he was placed on three-year probation under the terms of Proposition 36 and ordered to serve two days in the Los Angeles County Jail, less credit for two days. Restitution and other fees were imposed. On December 7, 2007, proceedings were terminated with a disposition of “Proposition 36 program terminate/plea set aside/dismiss (per 1210.1).”

Although not noted by the director, the record shows that the applicant was also convicted of two misdemeanor violations of California Penal Code (Cal. Penal Code) § 647(a) "Disorderly conduct: lewd act" as follows:

1. Case # [REDACTED] The applicant plead nolo contendere and was convicted on November 15, 1993; imposition of sentence was suspended, and he was placed on summary probation for 12 months and ordered to perform community service and attend AIDS class.
2. Case # [REDACTED] The applicant plead nolo contendere and was convicted on June 27, 1996; imposition of sentence was suspended, and he was placed on summary probation for 18 months, ordered to pay fines and/or to serve seven days in the Los Angeles county jail and attend AIDS class. The case was dismissed pursuant to Cal. Penal Code § 1203.4 on July 25, 2002.

Cal. Penal Code §1000.3 provides, in pertinent part: "If a defendant has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period, the criminal charge or charges shall be dismissed." Cal. Penal Code § 1210.1 provides in subdivision (a): "Notwithstanding any other provision of law, and except as provided in subdivision (b) [relating to prior convictions], any person convicted of a nonviolent drug possession offense shall receive probation;" subdivision (e)(1) adds: "[I]f the court finds that the defendant successfully completed drug treatment and substantially complied with the conditions of probation . . . the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment, complaint, or information against the defendant. . . . both the arrest and the conviction shall be deemed never to have occurred." Similarly, Cal. Penal Code § 1203.4 provides that charges may be dismissed upon successful completion of the terms of probation.

State Action to Remove a Conviction

In denying the Form I-485 LIFE Act application, the director determined that the applicant had two felony convictions. The director noted that unless a conviction is vacated for a reason related to the merits of the underlying case, "[n]o effect is to be given in immigration proceedings to an action which purports to expunge, dismiss, cancel, vacate or otherwise remove a guilty plea or other record of guilt or conviction," citing to *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The director correctly noted that 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 (9th Cir. 2000).

However, the director erred in failing to recognize that, as the present case arises in the Ninth Circuit, the decision reached in *Lujan* is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002). The Ninth Circuit Court of Appeals stated in *Lujan* that “if the person’s crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation.” *Lujan*, 222 F.3d at 738. The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offense, is applicable only in the Ninth Circuit, and is a *limited* exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” under the Act.

Lujan holds that the definition of “conviction” at section 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA) or the rule that an individual may not be deported based on an offense that could have been tried under the FFOA, but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute. *Lujan*, 222 F.3d at 749. *Lujan* further explained that rehabilitative laws included “vacatur” or “set-aside” laws – where a formal judgment of conviction is entered after a finding of guilt, but then erased after the defendant has served a period of probation or imprisonment. In addition, rehabilitative laws included “deferred adjudication” laws – where no formal judgment of conviction or guilt is entered. *Lujan*, 222 F.3d at 735.

The *Lujan* decision further explained that:

The [FFOA] allows the court to sentence the defendant in a manner that prevents him from suffering *any* disability imposed by law on account of the finding of guilt. Under the [FFOA], the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant’s having committed the offense. The [FFOA’s] ameliorative provisions apply for *all* purposes. *Id.*

To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation. *Cardenas-Urriarte v. INS*, 227 F.3d 1132, 1136 (9th Cir. 2000).

In the present case, regarding the applicant’s first offense noted above, the applicant has established that he qualified for treatment under the FFOA. The applicant entered a guilty plea for a deferred entry of judgment for felony possession of a narcotic controlled substance. The evidence in the record shows that the applicant had, prior to the commission of the offense, not been convicted of violating a federal or state law relating to controlled substances and that he had not previously been accorded first offender treatment under any law. He successfully completed his diversion program, and the court terminated the deferred entry of judgment, set aside the plea and dismissed the criminal charge pursuant to Cal. Penal Code § 1000.3. Therefore, the applicant’s first offense did not result in a “conviction” for immigration purposes, as he established that he qualified for treatment under the FFOA and that his conviction was dismissed pursuant to a state rehabilitative statute. *Lujan*, 222 F.3d at 735.

The second conviction noted above was also expunged pursuant to a California rehabilitative statute. However, the Ninth Circuit continues to hold that “persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law.” *Lujan*, 222 F.3d at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 812 (9th Cir. 1994)). In the present case, although the applicant’s conviction of a second offense was expunged under state law, the applicant would not have qualified for treatment under the FFOA at that time. *Lujan* does not apply, and the conviction remains for immigration purposes. Under the applicable rule in such circumstances, if 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).

The two misdemeanor convictions noted above for violation of Cal. Penal Code § 647(a), though not at issue in the director’s decision, are relevant to this analysis. There is no indication in the record that the 1993 conviction was dismissed or otherwise expunged. The 1996 conviction was dismissed pursuant to a state rehabilitative statute. As the court vacated that 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). Thus, in addition to the two felony charges that are the basis for the director’s decision, the applicant was also convicted of two misdemeanors.

Crimes Treated as Misdemeanors

Under the LIFE Act, a “felony” is defined as 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. As noted above, 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; and under this exception, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

Under California law, 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 if the judgment imposed is punishment other than imprisonment in the state prison. Cal. Penal Code § 17(b); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003).

The record shows that the applicant was convicted in 2006 of a violation of Cal. H&S Code § 11350(a), “Fel - Possession of narcotic controlled substance.” That conviction, though expunged by the state, remains a conviction for immigration purposes, as per the AAO’s analysis above. The punishment under section 11350(a) is “imprisonment in the state prison.” Although the statute allows for a maximum penalty of more than one-year imprisonment,¹ it is a “wobbler” offense that the court may sentence as a

¹ In California, felonies are punishable by imprisonment in state prison for up to three years. Cal. Penal Code § 18. Misdemeanors are punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both. Cal. Penal Code § 19.

misdemeanor. See *Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045, 1051 (9th Cir. 2004) (referring to possession of a controlled substance under Cal. H&S Code § 11377(a)). In *Oliveira*, the Ninth Circuit noted that the “F” for “felony” designation of the conviction for possession of a controlled substance in that case was not dispositive because a person who pleads guilty to a wobbler acquires the provisional status of a felon until sentenced to something other than confinement in a state prison, at which point the offense is automatically converted for all purposes into a misdemeanor. *Oliveira*, 382 F.3d at 1051 & n.3 (citing *Garcia-Lopez*, 334 F.3d at 844 & n.5)). Thus, the “Fel” designation of the offense in the present case is also not dispositive.

In the present case, the judge imposed three-year probation, fees and two days confinement in the Los Angeles County Jail, less credit for two days. As the judgment imposed a punishment other than confinement in the state prison, the offense is a misdemeanor for all purposes. Cal. Penal Code § 17(b); *Oliveira*, 382 F.3d at 1051; *Garcia-Lopez*, 334 F.3d at 844.

Inadmissibility

An applicant for permanent resident status under the LIFE Act must be admissible to the United States as an immigrant, except as otherwise provided under section 245A(d)(2) of the Act. Section 1104(c)(2)(D)(i) of the LIFE Act. The grounds of inadmissibility that are applicable to LIFE Act applicants and which grounds may be waived and which may not be waived are enumerated at section 245A(d)(2) of the Act. Among the grounds of inadmissibility that may not be waived is conviction of a violation of any law or regulation relating to a controlled substance. Section 212(a)(2)(A) of the Act.

As the applicant has been convicted of possession of a controlled substance, he is inadmissible as an immigrant and thus ineligible for permanent resident status under the LIFE Act.²

Conclusion

Based on the analysis above, the applicant has overcome the basis for denial in the director’s decision and is not ineligible for permanent resident status under the LIFE Act for having been convicted of two felonies, the reason set forth by the director. Contrary to the director’s conclusion, those convictions resulted in misdemeanor convictions, one of which was vacated pursuant to Ninth Circuit precedent.

However, the record reflects that the applicant has been convicted of three misdemeanors, rendering him ineligible for permanent resident status on that basis under Section 1104(c)(2)(D)(ii) of the LIFE Act.

¹ The record also reflects that the applicant may be inadmissible for health reasons as he has tested positive for HIV. An individual is inadmissible who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, including infection with HIV, “the etiologic agent for acquired immune deficiency syndrome.” Section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i). A discretionary waiver of this ground of inadmissibility is available “for humanitarian purposes, to assure family unity or when it is otherwise in the public interest.” Section 245A(d)(2)(B)(i) of the Act; 8 U.S.C. § 1255a(d)(2)(B)(i); 8 C.F.R. § 245a.18(c). It would serve no purpose, however, for the applicant to seek a waiver in this case as he also falls within one of the specified nonwaivable grounds of inadmissibility.

Moreover, because one of his misdemeanor convictions was for possession of a controlled substance, the applicant is inadmissible to the United States under section 245A(d)(2) of the Act, 8 U.S.C. § 1182(a)(2)(A), and thus ineligible for adjustment to permanent resident status on that basis under Section 1104(c)(2)(D)(i) of the LIFE Act.

ORDER: The appeal is dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. This decision constitutes a final notice of ineligibility.