

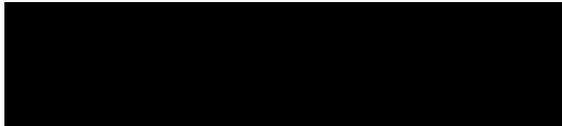


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FILE: [REDACTED] Office: LOS ANGELES  
MSC 02 250 64875

Date: NOV 06 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:



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 denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had been convicted of four misdemeanors in the United States. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel argues that two convictions have been vacated, and therefore, his two remaining convictions do not disqualify him from adjustment to permanent resident status under the provisions of the LIFE Act.

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. 8 C.F.R. § 245a.18(a)(1). "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 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"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. 8 C.F.R. § 245a.1(o).

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.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

Under the statutory definition of "conviction" provided 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 expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses in the Municipal Court of Los Angeles, California:

- A 1989 conviction for a violation of section 23152(A) of the California Vehicle Code, *Unlawfully Drive a Vehicle while under the Influence of Intoxicating Liquor*. The applicant was placed on 5 years probation, and his driving privileges were restricted for 90 days (Case No. [REDACTED]). The applicant violated the terms of probation and was ordered to serve 45 days in the Los Angeles County jail (Case No. [REDACTED]).

A 1990 conviction for a violation of section 23152(A) of the California Vehicle Code, *Unlawfully Drive a Vehicle while under the Influence of Intoxicating Liquor*; and for a violation of section 14601.2(A) of the California Vehicle Code, *Driving with a Suspended License*. The applicant was placed on 5 years probation, and his driving license was suspended for 18 months.

- A 1993 conviction for a violation of 14601.2(A) of the California Vehicle Code, *Driving with a Suspended License*. The applicant was placed on 5 years probation, and was ordered to serve 30 days in the Los Angeles County jail (Case No. [REDACTED]).

The issue in this proceeding is whether the applicant's three misdemeanor convictions, two of which were successfully vacated, remain valid convictions for immigration consequences. The AAO has reviewed the applicant's brief on appeal and the authorities cited therein, and concludes that the convictions continue to effect immigration consequences, and thus render the applicant ineligible for lawful permanent resident status.

Of the three convictions noted above, the record before the AAO indicates that the applicant's 1990 conviction for one count of driving under the influence of alcohol was subject to a motion to vacate judgment pursuant to section 1016.5 of the California Penal Code. This particular section states that an alien defendant in criminal proceedings must be advised of the immigration consequences of a guilty plea before the trial court may accept such a plea. The applicant's motion to vacate judgment pursuant to section 1016.5 of the California Penal Code was granted on October 13, 2006. Thus, the applicant's 1990 conviction for one count of driving under the influence of alcohol is no longer a valid conviction for immigration purposes. See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006).

Nonetheless, the AAO notes that the court documents in the record reveal that the motion to vacate judgment was granted solely as to Count One of the conviction. The applicant remains convicted for one count of section 14601.2(A) of the California Vehicle Code, *Driving with a Suspended License*. This remaining count of the 1990 conviction remains valid for immigration purposes.

Additionally, the record before the AAO also indicates that the applicant's 1989 conviction for a violation of section 23152(A) of the California Vehicle Code, *Unlawfully Drive a Vehicle while under the Influence of Intoxicating Liquor*, remains in effect and thus valid for immigration purposes.

We turn, next, to the applicant's 1993 conviction for a violation of 14601.2(A) of the California Vehicle Code, *Driving with a Suspended License*. The applicant's motion to vacate judgment pursuant to section 1016.5 of the California Penal Code was granted on October 13, 2006. Counsel for the applicant

asserts that this conviction, now having been vacated under the same statutory provision as the one count of the 1990 conviction, is no longer valid for immigration purposes, and thus, leaves the applicant eligible for adjustment to permanent resident status. Counsel cites *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) as controlling authority for this conclusion. The AAO has reviewed *Matter of Adamiak* and we draw a contrary conclusion. In that case, the BIA held that a conviction vacated pursuant to section 2943.031 of the Ohio Revised Code for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes. Section 1016.5 of the California Penal Code is equivalent to the Ohio Revised Code section noted above, and operates in the same manner. Consequently, if an alien defendant in California state criminal proceedings is not advised of the immigration consequences of a guilty plea, the conviction is vulnerable to a motion to vacate judgment. In the Ohio case, the court ordered that the alien defendant be afforded a new trial on the underlying drug trafficking charge in order to remedy the procedural defect in the original proceedings. In the matter presently before the AAO, there is no evidence in the record indicating that the trial court ordered a new trial on the underlying charge.

The record before the AAO indicates that in the proceedings leading up to the 1993 conviction, the applicant was clearly advised of the immigration consequences of entering a guilty plea to the charge of driving with a suspended license. The court documents submitted by the applicant show that the trial court advised the applicant that a conviction for the charged offense will have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, and that the applicant knowingly, and explicitly waived these rights. Thus, the record establishes that there was no underlying procedural defect in the criminal proceedings, such as to trigger scrutiny pursuant to Section 1016.5 of the California Penal Code, and the vacated judgment remains valid for immigration purposes.

The applicant has three misdemeanor convictions: in 1989 for driving while intoxicated, in 1990 for driving with a suspended license, and again in 1993 for driving with a suspended license. Any three misdemeanor convictions are an automatic disqualification for adjustment to permanent resident status under the provisions of the LIFE Act.

Because of his three misdemeanor convictions, the applicant is ineligible for adjust to permanent resident status under the LIFE Act pursuant to 8 C.F.R. § 245a.18(a)(1). Within the provisions of the LIFE Act, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying for adjustment of status under the provisions of section 1140 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 INA, and is otherwise eligible for adjustment of status. 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.