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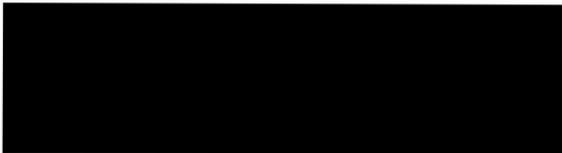
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U.S. Department of Homeland Security
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Washington, DC 20529-2090
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U.S. Citizenship
and Immigration
Services

L2



FILE: [Redacted]
MSC 02 252 63343

Office: LOS ANGELES

Date: NOV 14 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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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 three misdemeanors in the United States. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel states that the applicant is currently pursuing post-conviction relief that will remedy the applicant's criminal ineligibility. Counsel avers that the applicant is otherwise eligible for 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 Los Angeles County Municipal Court, California:

- A January 25, 1988 conviction for a violation of section 487.3 of the California Penal Code, *Attempted Grand Theft Auto*, as well as a conviction for a violation of section 853.7 of the California Penal Code, *Failure to Appear*. Both of these convictions are considered misdemeanors under California law. The applicant was sentenced to 180 days in jail and 36 months probation.
- A May 17, 2001 conviction for a violation of section 12500(A) of the California Vehicle Code, *Unlicensed Driver*, a misdemeanor. The applicant was placed on 12 months probation. Docket No. [REDACTED]

An October 1, 1993 conviction for a violation of section 242 of the California Penal Code, *Battery*, a misdemeanor. The applicant was placed on 24 months probation. Docket No. [REDACTED]

The record before the AAO also contains conviction documents that reveal the applicant was arrested and removed from the United States to Mexico on August 23, 1998, and that he unlawfully re-entered the United States on or about November 14, 1999. For these offenses the applicant was convicted on May 12, 2000, for a violation of 8 U.S.C. §1325 – *illegal entry*, in the United States District Court for the Southern District of California (Docket No. [REDACTED]). The applicant was sentenced to 90 days in jail.¹

Counsel's assertion that the applicant is pursuing post-conviction relief is without merit. Even if the applicant were to obtain orders vacating any of the misdemeanor convictions, Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law. State rehabilitative actions that do not vacate a conviction on the merits because of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.* Therefore, the applicant remains "convicted" of the three misdemeanor offenses cited above for immigration purposes

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.

¹ The AAO notes that the record also contains FBI fingerprint documents that indicate the applicant was arrested on March 21, 1996 for a first degree felony offense of assault with a deadly weapon on a person with a firearm, and an arrest on July 25, 2000, for illegal re-entry in violation of 8 U.S.C. §1325. The documents indicate that the applicant was sentenced to 90 days in the custody of the Bureau of Prisons for the charge of illegal re-entry. The record does not indicate the ultimate disposition of the first degree felony charge.

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.