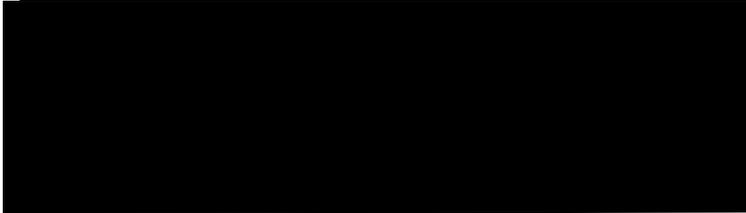




U.S. Citizenship
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invasion of personal privacy*



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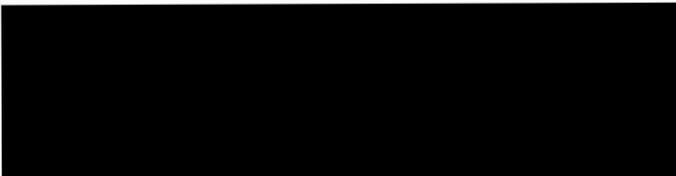
Office: LOS ANGELES

Date: APR 07 2009

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The 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 a felony 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 has one felony conviction that was subsequently reduced to a misdemeanor offense and ultimately dismissed. Counsel maintains that the applicant remains eligible for permanent resident status and that his application for permanent residence should be granted.

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).

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. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The AAO has reviewed the evidence and documents in the file. The record contains *inter alia*, the first page of a minute order issued by the Municipal Court of the Pasadena Judicial District, County of Los Angeles, a Motion for Expungement of Felony Conviction and supporting memorandum of law, the applicant's sworn affidavit, and a probation report. Having examined all of these documents, the AAO has determined the following series of events explaining the applicant's criminal conviction.

The applicant was arrested by the Pasadena Police Department on December 23, 1988, and was charged with one count of violating section 20001 of the California Vehicle Code – *Hit and Run/Death or Injury*, and one count of violating section 12500(A) of the California Vehicle Code – *Unlicensed Driver*. **Both offenses are charged as felony violations.** The probation report indicates that the applicant struck a pedestrian while operating a motor vehicle and then left the scene of the accident without offering aid or assistance. The report also reveals that the applicant was not in possession of a valid driver's license and had never applied for a driver's license in California. It appears that the applicant pleaded guilty to the hit and run charge and was sentenced to a term of probation for three years.

Thereafter, the applicant submitted a series of motions to reduce the felony conviction to a misdemeanor offense and ultimately to expunge the conviction pursuant to section 1203.4 of the California Penal Code. In his declaration filed in support of the motions, the applicant states, "I am currently applying for immigration benefits which could be jeopardized by this conviction." The applicant's motions were granted by the trial court on September 9, 1996.

The issue in this proceeding is whether the applicant presently remains ineligible for adjustment of status to one of permanent residence on account of his criminal conviction. The AAO has reviewed all of the evidence in the file as well as the statutes in question, and we conclude that the applicant's felony conviction remains a felony conviction for immigration purposes, despite the court's subsequent action reducing the charge to a misdemeanor offense and ultimately dismissing the conviction. Therefore, the applicant does not qualify for adjustment to permanent resident status pursuant to the terms of the LIFE Act. *Pickering v. Gonzales*, 465 F.3d at 266; 8 C.F.R. § 245a.18(a)(1).

On appeal, counsel argues that the felony charge "should have been a misdemeanor in the first instance." Counsel's assertion is irrelevant in that the applicant was charged with a felony offense and our determination on eligibility for adjustment of status turns on the effect of the trial court's reduction and expungement of the conviction. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.¹ In general, a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type rehabilitative statute unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings.

In this case, the applicant's conviction for violating section 20001 of the California Vehicle Code – *Hit and Run/Death or Injury*, was charged as a felony offense in the court documents in the file. The

¹ See *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001) (expunged theft conviction still qualified as an aggravated felony); *Ramirez-Castro v. INS*, 287 F.3d 1172, 1174 (9th Cir. 2002) (expunged misdemeanor California conviction for carrying a concealed weapon did not eliminate the immigration consequences of the conviction); see also *de Jesus Melendez v. Gonzales*, 503 F.3d 1019, 1024 (9th Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9th Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

conviction was reduced to a misdemeanor offense and then dismissed *only after* the applicant successfully completed the conditions of his probation. The applicant admits that his reason for seeking the expungement was to avoid the immigration consequences of his felony conviction. Thus, the court's action was rehabilitative in nature and was not generated by a procedural defect in the underlying trial court proceedings.

Because of his felony conviction, the applicant is ineligible for adjustment 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.