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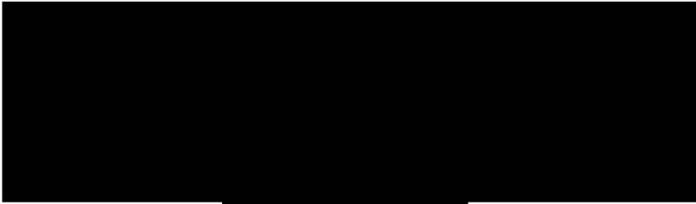
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U.S. Department of Homeland Security  
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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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FILE:

MSC 02 254 64716

Office: LOS ANGELES

Date:

APR 07 2009

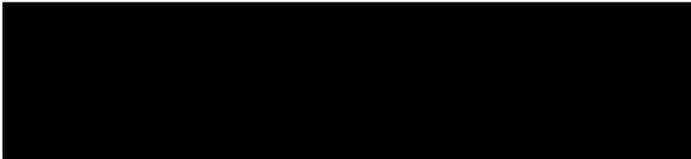
IN RE:

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).*

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 her convictions for “petty theft” and “burglary” are crimes involving moral turpitude (CIMT) for which no waiver exists. *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 would allow her to qualify for adjustment of status pursuant to the terms of the LIFE Act. Counsel also states that a brief in support of the appeal would be forthcoming. To date, no brief has been filed in support of the appeal, and no further evidence regarding the criminal convictions have been submitted by the applicant.

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. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

The AAO has reviewed the evidence and documents in the file. The record contains a letter dated January 3, 2006 from the California state Department of Justice, Bureau of Criminal Identification and Information, FBI reports, a “Disposition of Arrest and Court Action, a letter from the Anaheim City Police Department dated December 29, 2005, an Anaheim Police Department Incident Report (No. [REDACTED] and a letter issued by the Superior Court of California, Orange County, dated December 2, 2005. These documents reveal that the applicant’s vehicle was impounded on November 14, 1990 (No. [REDACTED] for a series of traffic violations and the applicant was charged with driving with a

suspended license. The vehicle was registered under the name of [REDACTED] not contain a final disposition for this incident.

The record does

On May 14, 1988, the applicant was arrested and charged with petty theft in violation of section 488 of the California Penal Code. (No. [REDACTED]). The applicant was found to have shoplifted a number of cosmetic items. The record indicates that the store owner did not pursue the applicant's prosecution in exchange for a return of the items.

On October 7, 1992, the applicant was again arrested and charged with petty theft and burglary (section 459 of California Penal Code) (No. [REDACTED]). The applicant pleaded guilty to both offenses and was sentenced to 36 months of probation. Both offenses are charged as misdemeanor crimes.

On December 24, 1996, the applicant was arrested and charged with assault and battery, in violation of sections 240 and 242 of the California Penal Code. (No. [REDACTED]) The record contains no final disposition for these charges.

The issue in this proceeding is whether the applicant presently remains ineligible for adjustment of status to one of permanent residence on account of her convictions for petty theft and burglary. Upon review of the relevant case law, the AAO concludes that the applicant's conviction for petty theft is a CIMT and thus renders the applicant ineligible for permanent resident status pursuant to the LIFE Act. *See USA v. Esparza-Ponce*, 193 F.3d 1133, 1137-38 (9<sup>th</sup> Cir. 1999) (...theft is a crime of moral turpitude) (citations omitted).

An applicant who has been convicted of a CIMT is inadmissible, and therefore ineligible for permanent resident status. But, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. *See* 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if "the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months." *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9<sup>th</sup> Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9<sup>th</sup> Cir. 2003). For the purpose of the petty offense exception, "the maximum penalty possible" . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed." *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9<sup>th</sup> Cir. 2008) (offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).<sup>1</sup>

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<sup>1</sup> An applicant for admissibility who stands convicted of a CIMT may also be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I).

Counsel for the applicant states on the Notice of Appeal (Form I-290) that the applicant is pursuing post-conviction relief. However, the record contains no evidence that the applicant has been granted any form of post-conviction relief. Furthermore, 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.<sup>2</sup> 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, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural defect in the merits of the case, and the judgment remains valid for immigration purposes.

Because of her theft conviction, 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 CIMT 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.

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<sup>2</sup> 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).