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

U.S. Citizenship
and Immigration
Services

L2

FILE:

Office: LOS ANGELES

Date: APR 07 2009

MSC 02 030 60011

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 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 later reduced to a misdemeanor offense, and one additional misdemeanor offense for a crime involving moral turpitude (CIMT) that is not relevant for immigration purposes because it falls under the "petty offense" exception. Counsel maintains that the applicant remains eligible for permanent resident status and that his application (Form I-485) 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 court documents, conviction records and other government documents that outline the applicant's criminal history:

On March 16, 1992, the applicant was charged with one count of violating section 207(A) of the California Penal Code – *Kidnapping* and one count of violating section 245(A)(2) of the

California Penal Code – *Assault with a Firearm on Person*. Court documents also indicate that on July 10, 1992, the “assault with a firearm” charge was amended to a charge of violating section 245(A)(1) – *Assault with Deadly Weapon Not Firearm with Great Bodily Injury Likely*. Los Angeles County Superior Court, [REDACTED]

It is important to note that both the “kidnapping” charge and the amended “assault with a deadly weapon great bodily injury likely” charge are felony offenses in California and were designated as such by the trial court. On July 10, 1992, the applicant pleaded guilty to one count of violating section 245(A)(1) of the California Penal Code – *Assault with Deadly Weapon Not Firearm Great Bodily Injury Likely*. He was sentenced to five days in jail, three years of probation, and ordered to pay restitution in the amount of \$250.

Thereafter, on February 21, 1995, the applicant’s conviction was reduced to a misdemeanor and the case was dismissed pursuant to section 1203.4 of the California Penal Code.

- The record also contains two certified statements of conviction/disposition issued by the Clerk of the Circuit Court of Cook County, Illinois [REDACTED] and [REDACTED]. These documents state that in 1986 the applicant was charged with “unlawful use of rec. sound”, a felony offense and that in 1987 the applicant was charged with “violating bail bond”, a misdemeanor offense. The final disposition of these offenses are unclear from the documents in the record, except for the notation that the felony charge was “nolle prosequi” (dismissed) on July 31, 1998, approximately twelve years after the original indictment. The documents in the record suggest that the applicant was charged with the felony offense of violating the Illinois copyright laws in 1986, and that a bond to secure the applicant’s appearance in court was issued. The applicant failed to appear as scheduled, which culminated in a judgment on the bond forfeiture on January 7, 1987. The notation indicates that violating the terms of the bail bond is considered a misdemeanor offense in Illinois.
- On June 21, 2004, the applicant was charged with one count of violating section 653W(A) of the California Penal Code – *Failure to Disclose Origin of Recording*, and one count of violating section 42.00(B) of the California Penal Code – *Street Sales of Goods*. Both offenses are designated as misdemeanors. The applicant pleaded guilty to the misdemeanor offense of violating section 653W(A) of the California Penal Code – *Failure to Disclose Origin of Recording*. The remaining charge was dismissed pursuant to the terms of a plea agreement. The applicant was sentenced to thirty days in jail and three years of probation. Los Angeles County Superior Court, [REDACTED]

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 convictions. The AAO has reviewed all of the criminal records in the file as well as the statutes in question, and we conclude that the applicant’s felony conviction for “assault with a deadly weapon with great bodily injury likely” remains a felony conviction for immigration purposes, despite the court’s subsequent action dismissing the charges. 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 conviction was reduced to a misdemeanor offense and ultimately dismissed. The AAO finds this argument to be without merit. 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 245(A)(1) of the California Penal Code – *Assault with Deadly Weapon Not Firearm Great Bodily Injury Likely* was charged as a felony offense in the court documents in the file. The conviction was reduced to a misdemeanor offense and then dismissed *only after* the applicant successfully completed the conditions of his probation. Thus, the court's action was rehabilitative in nature and 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. Therefore, we need not address whether the applicant's misdemeanor convictions in Illinois and California for violating bail bond and copyright infringement are equally disqualifying crimes involving moral turpitude.

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.

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).