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U.S. Citizenship
and Immigration
Services

L2

FILE:

MSC-02-236-62587

Office: National Benefits Center

Date: FEB 04 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 if your case was 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, 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 had not met his burden of proof to establish eligibility to adjust to permanent resident status under the provisions of the LIFE Act. Specifically, the director noted that the applicant had been convicted of a felony violation of section 11350(a) of the California Health and Safety Code - *possession of a controlled substance*, and was thus ineligible for permanent resident status. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel argues that the applicant's conviction was subsequently expunged pursuant to California's drug diversion program and is no longer a valid conviction for immigration purposes. Counsel cites *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) in support.

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his or her continuous, unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988.¹ Section 1104(c)(2)(B) of the LIFE Act states in relevant part:

(i) In General – The alien must establish that he or she entered the United States before January 1, 1982, and has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

See also 8 C.F.R. § 245a.11(b).

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

¹ The record before the AAO contains documents that indicate the applicant was ordered deported from the United States by an immigration judge on June 1, 1988. As the order of deportation is outside the statutory period of January 1, 1982 to May 4, 1988, the order of deportation does not interrupt the applicant's continuous residence. However, an order of deportation could render him inadmissible.

Additionally, 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). State rehabilitative actions that do not vacate a conviction on the merits as a result 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.*

The record contains certified court documents that reflect the following series of events in the Superior Court of California, County of Los Angeles: on February 25, 2000, the applicant was arrested and charged with a felony violation of section 11350(A) of the California Health and Safety Code – *Possession of Narcotic Controlled Substance*. The applicant entered a plea of *not guilty* on March 21, 2000. Thereafter, subsequent to a series of continued preliminary hearings due to the applicant's failure to appear in court despite the issuance of a bench warrant, the applicant's motion to set aside the *not guilty* plea and enter a plea of *guilty* to violating section 11350(a) of the

California Health and Safety Code – *Possession of Narcotic Controlled Substance*, was granted on March 21, 2006. The entry of judgment was deferred, and the applicant was placed on probation for a period of 18 months. Ultimately, the court granted the applicant’s motion to set aside the guilty plea, pursuant to section 1000.3 of the California Penal Code, on September 21, 2007.

At issue in this proceeding is whether the applicant has established that he resided in the United States throughout the statutory period and whether he met his burden of establishing that he is otherwise admissible to the United States, that he does not have a disqualifying criminal conviction, and that he is eligible to adjust to lawful permanent resident status. Here, the applicant has failed to demonstrate admissibility on account of his inability to establish continuous unlawful residence for the requisite period of time.

The applicant argues that his felony conviction has been expunged and is no longer a valid conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). The AAO has reviewed the cited authority and concludes that the expungement of the applicant’s conviction in this case fits within the parameters outlined in *Lujan-Armendariz*. In that case, the Court held that an alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand “convicted” for immigration purposes, because the alien defendant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a “conviction” for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, and have not previously been the subject of a disposition under FFOA, and were placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique, id.*

Like the alien defendant in *Lujan-Armendariz*, the applicant in the matter presently before the AAO would have qualified for disposition under the provisions of the FFOA. First, the AAO observes that the crime for which the applicant stands convicted is a first time offense for “simple possession of a

controlled substance.” He has not previously been the subject of a disposition under the FFOA, and he was sentenced to a term of probation. The entry of judgment was deferred, and the applicant was placed on probation for a period of 18 months. Ultimately, the court granted the applicant’s motion to set aside the guilty plea, pursuant to section 1000.3 of the California Penal Code. Thus, had the applicant been prosecuted under federal law, 21 U.S.C. section 844, the applicant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. Therefore, the applicant’s expungement under California state law is the equivalent of treatment under the FFOA, and is not a valid felony conviction for immigration purposes.

However, the AAO has reviewed the documents of record in the application presently before us. We note that there are conflicts in the evidence regarding the applicant’s entry into the United States, and that these conflicts remain unresolved. For example, a series of investigative reports indicate that the alien admitted to immigration officers that he was smuggled across the United States border at Nogales, Arizona on March 14, 1982. The applicant also stated on a Request for Asylum in the United States (Form I-589) that he entered the United States without inspection on March 14, 1982. However, on the Biographic Information (Form G-325) dated August 16, 1982 the applicant indicated that he lived in El Salvador from November, 1981 to April, 1982. The applicant’s request for asylum was denied and on June 1, 1988, he was ordered deported from the United States. The Warrant of Deportation (Form I-205) states that the applicant entered the United States on March 14, 1982.

Clearly, the applicant cannot establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and the record suggests that his first entry occurred in March, 1982. Thus, the applicant is not eligible to adjust to lawful permanent resident status under the LIFE Act for the reasons stated above. *See* 8 C.F.R. § 245a.18(a)(1).

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.