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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES

Date: FEB 04 2009

MSC 02 239 64624

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:

[Redacted]

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

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. *Section 1104(c)(2)(D)(ii) of the LIFE Act.* The director noted that the applicant failed to demonstrate by a preponderance of credible evidence that he: (1) entered the United States prior to January 1, 1982 and continuously resided here through May 4, 1988, (2) was physically present in the United States from November 6, 1986 through May 4, 1988, and (3) had not been convicted of a felony or three misdemeanors at any time.

The applicant is represented by counsel on appeal. Counsel states that “neither Barragan nor his agents ever received such NOID (Notice of Intent to Deny)...” (parenthesis added).

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 documents in the record include a minute order from the Superior Court of California, County of Los Angeles that reveal the applicant was arrested on July 12, 1996, in Los Angeles County, and charged with one count of violating section 11352 of the California Health and Safety Code – *Transport/Sell Narcotic/Contl Sub.* The applicant was convicted of one count of violating section 11352 of the California Health and Safety Code – *Transport/Sell Narcotic/Contl Sub.* The applicant was sentenced to 24 days in jail and three years of probation. This offense is considered a felony under California law.

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 felony conviction. The applicant's felony conviction for trafficking in a controlled substance makes him ineligible for adjustment of status. Trafficking in controlled substances is considered a serious criminal offense, with substantial and unwaivable immigration consequences for applicants seeking to become a permanent resident of the United States. *See* 8 U.S.C. § 1182 (a)(2)(A)(C); 8 C.F.R. § 245a.18(a)(1) and (2).

In reviewing the documents in the record before the AAO, we note that the applicant claims that he never received the NOID and therefore did not have an opportunity to respond to the allegations contained therein. We find this allegation to be not credible. First and foremost, the address listed on the Form I-485 was corrected in red ink to reflect the applicant's address at: [REDACTED], East Palmdale, CA 93550. The correction appears to have been done at the time of the applicant's interview before a district adjudications officer conducted on April 25, 2007. On that date the applicant was directed to provide original court certified dispositions of his arrest and conviction, and other evidence of eligibility. The applicant responded to this Request for Evidence (Form I-72) by letter dated June 22, 2007 and included the requested documents, among others. The NOID was issued on August 1, 2007, and mailed to the applicant at the address listed on the Form I-485. The decision to deny the application for permanent residence was issued on September 4, 2007 and again, mailed the address listed on the Form I-485. Nothing in the record indicates that the applicant changed his address during the intervening time between the interview, the request for evidence, the issuance of the NOID, and the ultimate decision. Clearly, the applicant was aware of the conviction for drug trafficking and the need to explain it, given the consequences of the conviction on his application for permanent residence. Thus, the AAO concludes that the applicant's claim that he never received the NOID, and would have addressed the deficiencies noted therein had he received it, is neither supported by the record nor remedied by the submission of further evidence.

Furthermore, the record before the AAO contains a minute order issued by the Superior Court of California, Los Angeles County dated March 26, 2003. The minute order indicates that on March 23, 2003 the applicant's felony conviction for trafficking in a controlled substance was dismissed pursuant to section 1203.4 of the California Penal Code. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has ruled on the effect of post-conviction expungements pursuant to a state rehabilitative statute.¹ Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that 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).

applicant's conviction was expunged because of an underlying procedural defect in the trial court proceedings, and the vacated judgment remains valid for immigration purposes.

Because of his felony 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 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.