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Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]

Office: LOS ANGELES

Date: FEB 04 2009

MSC 02 215 60016

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.

A handwritten signature in black ink, appearing to read "John F. 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 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 is currently pursuing post-conviction relief that would allow him 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 conviction has 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 September 11, 2006 from the California state Department of Justice, Bureau of Criminal Identification and Information that outlines the applicant's criminal conviction:

- On October 20, 1983, the applicant was charged with one count of violating section 11359 of the California Health and Safety Code – *Possession of Marijuana for Sale*. This charge was ultimately dismissed for lack of probable cause.

- On May 30, 1984, the applicant was charged with two counts of violating section 11352 of the California Health and Safety Code – *Transport/Sell Narcotic/Contl Sub*, and one count of violating section 11360A of the California Health and Safety Code – *Sell/Furnish/Etc Marijuana/Hash*. 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 180 days in jail and three years of probation. The remaining charges were dismissed. These offenses are considered felonies under California law, and the court documents submitted with the letter referenced above marks the applicant’s conviction as a felony offense.
- On October 25, 1984, the applicant was charged with one count of violating section 11377A of the California Health and Safety Code – *Possession of a Controlled Substance* and two counts of violating section 11550A of the California Health and Safety Code – *Using or Being Under the Influence of a Controlled Substance*. The applicant was convicted of one count of violating section 11550A of the California Health and Safety Code – *Using or Being Under the Influence of a Controlled Substance*. The applicant was sentenced to 150 days in jail and the remaining charges were dismissed. This offense is considered a misdemeanor under California law, and, of itself, is not considered a disqualifying offense for immigration purposes. 8 C.F.R. § 245a.18(a)(1).

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).

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>1</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

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<sup>1</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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2007); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1067 (9<sup>th</sup> Cir. 2003) (expunged conviction for lewdness with a child qualified as an aggravated felony).

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 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.