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U.S. Citizenship
and Immigration
Services

L2



FILE: [Redacted]
MSC 02 246 63784

Office: LOS ANGELES

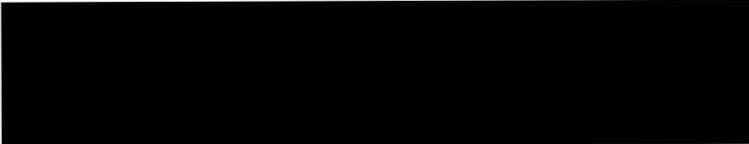
Date: FEB 06 2009

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 he had been convicted of a felony drug offense in California. Section 1104(c)(2)(D)(ii) of the LIFE Act.

The applicant is represented by counsel on appeal. Counsel does not dispute that the applicant has a felony conviction for violating section 11350 of the California Penal Code – *Possession of a Controlled Substance*. Counsel argues that the applicant’s conviction was dismissed pursuant to section 1385 of the California Penal Code, and is no longer a disqualifying felony conviction for purposes of establishing eligibility for permanent residence.

Under the terms of the LIFE Act, 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” is defined as 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).

Under the current statutory definition of “conviction” provided at section 101(a)(48)(A) of the Act, 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 by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains “convicted” for immigration purposes.

The applicant filed his Form I-485, Application to Register Permanent Resident or Adjust Status, under the LIFE Act on June 3, 2002.

In a Notice of Intent to Deny (NOID), dated March 9, 2006, the director advised the applicant that she intended to deny his Form I-485, because the record reflected that he had been convicted on November 12, 1986, in the Superior Court of California, County of Los Angeles, Dept. 112, (Case Number [REDACTED], of the charge of "TRANS SELL NARC CONTRLD SUB," a felony, in violation of the California Health and Safety Code Section 11350. The director afforded the applicant 30 days in which to rebut the adverse information contained in the record.

In response, the applicant submitted a document ("Minute Order") from the court indicating that on April 7, 2006, the court ordered that the applicant's guilty plea be "withdrawn, set aside and vacated" and "dismissed pursuant to [California] Penal Code Section 1385 in the interest of justice."

In a Notice of Decision (NOD), dated June 3, 2006, the director denied the application for the reasons stated in the NOID. The director, citing *Matter of Roldan, supra*, noted that for immigration purposes, no effect is given 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 by operation of a state rehabilitative statute.

On appeal, counsel asserts that *Matter of Roldan, supra*, does not apply in this case because (a) it was reversed by the U.S. Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir 2000), and (b) it only applies to state "rehabilitative statutes." Counsel also asserts that even if the holding in *Matter of Roldan, supra*, applied, it still must be considered in light of the holding of *Matter of Pickering, supra*, which were subsequently "reversed by the Court of Appeals on July 16, 2006." Counsel does not provide a federal citation for the decision to which he refers. However, the AAO concludes that counsel may be referring to *Pickering v. Gonzalez*, 454 F.3d 525 (6th Cir. July 17, 2006), which held that "the BIA correctly interpreted the law by ruling that when a court vacates an alien's conviction solely related to rehabilitation or to avoid adverse immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes." Additionally, the Court held in *Pickering v. Gonzalez, supra* that the government bears the burden of establishing by clear, unequivocal and convincing evidence that the conviction was quashed solely to avoid immigration consequences. *Pickering v. Gonzalez*, 454 F.3d at ?.

The AAO has reviewed all of the documents in the file in their entirety. First and foremost the AAO notes that the director's NOID and subsequent final decision in this case erroneously define a violation of 11350 of the California Health and Safety Code as: *transporting or selling a narcotic controlled substance*. Selling or transporting narcotics is an offense found in section 11352, not section 11350 of the California Health and Safety Code. The criminal record in the file indicates that the applicant was convicted for violating section 11350 of the California Health and Safety Code: *possession of a controlled substance*. The AAO withdraws that part of the Director's decision in this case that incorrectly defines the criminal statute under which the applicant was convicted.

In this case, the court documents reveal that the applicant pleaded guilty to one count of violating section 11350 of the California Penal Code on November 12, 1986. The court records also state that

the “proceedings [are] suspended,” the applicant is sentenced to one year in jail and ordered to serve three years on probation. Thereafter, a minute order from the Superior Court of California, Los Angeles County dated April 7, 2006 states that the applicant’s guilty plea of November 12, 1986 is withdrawn, set aside and vacated, and that the matter is dismissed “pursuant to Penal Code section 1385 in the interest of Justice.” Hence, the AAO concludes that the applicant’s conviction for possession of controlled substances has been set aside and vacated.

Second, the AAO does not agree with counsel’s assertion that the reasoning in *Pickering* is not applicable in this case because it has been reversed “by the Court of Appeals on July 16, 2006.” We note that the ruling in *Pickering* cited by counsel was issued by the Sixth Circuit Court of Appeals and is limited to cases arising within that jurisdiction. This matter arises in the Ninth Circuit Court of Appeals and thus, the Sixth Circuit’s ruling in *Pickering* is not relevant here. Furthermore, in deciding *Pickering v. Gonzalez*, the Sixth Circuit reaffirmed the threshold principle that convictions vacated, quashed, or otherwise expunged to avoid an immigration hardship remain valid convictions in immigration proceedings. Consequently, the general principle in *Matter of Roldan, supra*, and *Matter of Pickering, supra*, remain valid law in adjudicating an application for permanent residence under the LIFE Act, and will be applied in all matters arising within the jurisdiction of the Ninth Circuit.

Counsel has cited the holding in *Lujan –Armendariz, v. INS*, 222 F.3d 728 (9th Cir. 2000) as controlling authority in this matter, and ultimately, the AAO must determine whether the applicant’s felony conviction for possession of a controlled substance is amenable to disposition under its guidelines. In *Lujan*, the Court ruled that an expunged or vacated drug conviction would be accorded full faith and credit in immigration proceedings only if the conviction would fall within the parameters of the Federal First Offender Act (FFOA), 18 U.S.C. § 3607. The Court noted that the FFOA is a limited rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases, and allows the court to sentence the defendant in a manner that prevents him from suffering any disability imposed by law on account of the finding of guilt. *Lujan –Armendariz, v. INS*, 222 F.3d 728, 735.

In order to qualify for disposition under the FFOA an applicant must (1) have not, prior to the commission of such offense, been convicted of violating a federal or state law relating to controlled substances; and (2) the applicant has not previously been the subject of a disposition under this subsection. The provisions of the FFOA state further that, having met the first two requirements noted above, the court may place the defendant on probation for a term of not more than one year without entering a judgment of conviction. The statute also discusses when and under what conditions probation may be terminated: (1) at any time prior to the expiration of the term of probation, if the defendant has not violated a condition of probation, the court may dismiss the proceedings against him and discharge him from probation; (2) at the expiration of the term of probation, if the person has not violated a condition of probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation, or (3) if the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565. 18 U.S.C. § 3607(a)(2).

Clearly, the FFOA envisions a reprieve from the harsh consequences attendant on a controlled substance violation if it is a first time offense for simple possession, and the defendant complies with all of the conditions of probation and sentencing. In that event, and only under these circumstances, the conviction for a simple drug offense may be expunged and will not be considered a conviction for immigration benefits.

In the present case, the record indicates that the applicant did not comply with the terms of probation imposed by the sentencing court on November 12, 1986. The record before the AAO reveals that on August 25, 1989, three months prior to the official expiration of probation, the applicant was again charged with one count of violating section 11350 of the California Health and Safety Code – *possession of a controlled substance*, and one count of violating section 11352 of the California Health and Safety Code – *transporting and/or selling a controlled substance*. (Case No. A [REDACTED] 1.) Both offenses are labeled as felonies under California law. The court ordered that the earlier three year term of probation be revoked, and that a second term of probation, *on the same terms and conditions* (emphasis added), be imposed.

Thereafter, on December 13, 1990, the applicant was charged with one count of violating section 11357(B) of the California Health and Safety Code – *Possession of less than 1 oz. of Marihuana*. (Case No. [REDACTED]). This offense is marked as a misdemeanor and also occurred while the applicant was serving a term of probation resulting from the prior drug incident in 1989. The applicant was ordered to pay a fine on February 26, 1991. Ultimately the conviction was dismissed on May 10, 2004 pursuant to one of California's post-conviction rehabilitation statutes, section 1203.4 of the California Penal Code.

Additionally, the record reveals that on September 23, 1996, the applicant was charged with one count of violating section 484(A) of the California Penal Code – *Theft of Property*. (Case No. [REDACTED]) This offense is marked as a misdemeanor. **This charge was dismissed on April 30, 1997 in the furtherance of justice under section 1385 of the California Penal Code.**

The AAO concludes that the applicant's felony drug conviction in November of 1986 does not qualify for disposition under the FFOA because he failed to comply with the terms of his probation by committing a second drug offense, including a trafficking offense, before the termination of his probationary period. As noted above, the FFOA is a very limited exception to the generally recognized rule that an expunged conviction qualifies as a conviction under the Immigration and Nationality Act. The Ninth Circuit continues to hold that "persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law." *Lujan*, 222 F.3d at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 810, 812 (9th Cir. 1994)).

Because of his felony conviction, the applicant is ineligible for permanent resident status under the LIFE Act pursuant to Section 1104(c)(2)(D)(ii) of the LIFE Act and 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. Here, the applicant has failed to meet this burden.

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