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FILE:

Office: SAN DIEGO

Date: FEB 26 2009

[redacted]
[redacted]
[redacted] consolidated herein]

MSC-03-249-64400

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.

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 District Director, San Diego, California, and is now before the Administrative Appeals Office (AAO) on appeal. The Administrative Appeals Office (AAO) originally dismissed the appeal on April 8, 2008 based upon the applicant's ineligibility due to prior criminal convictions. The AAO withdraws its decision dated April 8, 2008, and will remand the file for further consideration.

Counsel for the applicant submitted evidence showing that one of the applicant's misdemeanor criminal convictions was vacated. The applicant also asserts that a second misdemeanor conviction was reduced to an infraction, thereby making the applicant eligible for the benefit sought. On September 26, 2008, the AAO issued a Request for Evidence requesting all motion papers relating to the San Diego County Superior Court Judge's Order to Reduce Misdemeanor to an Infraction dated February 14, 2006 (Docket No. [REDACTED]) filed in connection with the applicant's arrest on November 8, 1994 in which he was convicted of driving with a suspended license, a misdemeanor, in violation of VC section 14601.2A, and sentenced to three years probation as well as a fine and a special program. [Case. No. [REDACTED]]

On October 14, 2008, the AAO received the applicant's response to the Request for Evidence. The moving papers reveal that the applicant's misdemeanor conviction was reduced to an infraction because the applicant was not informed of the immigration consequences of his conviction prior to accepting a guilty plea pursuant to California Penal Code section 1016.5. As such, the AAO accepts the applicant's assertion that his misdemeanor conviction has been reduced to an infraction and therefore, is not relevant to this application.

Accordingly, the AAO will withdraw its decision dated April 8, 2008; and reopen the appeal, *sua sponte*.

The AAO has conducted a *de novo* review of the application, examining all submitted evidence according to the standards set forth herein. The record reveals that the applicant was ordered removed and deported from the United States under Section 241(a) on September 10, 1990. The record reveals that the applicant subsequently reentered the United States without inspection three days later. Under section 212(a) of the Act (1990), aliens who have been excluded and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation . . . the [Secretary of Homeland Security] has consented to their reapplying for admission, shall be excluded from admission to the United States. Since the applicant did not remain outside the United States for at least one year after his September 10, 1990 deportation, and in fact, he filed his Form I-687 application on November 5, 1990 indicating his current address to be in San Diego, California, the applicant is inadmissible.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

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. *See* section 1104(C)(2)(d)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a)(1).

As defined in 8 C.F.R. § 245a.1(o):

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).¹ 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.

A review of the record reveals that the applicant submitted five certified final court dispositions from the Superior Court of California, County of San Diego, confirming that the applicant was convicted of four misdemeanors under the California Vehicle Code (VC) and one infraction under the San Diego Municipal Code during a 22 year period from 1981 until 2003. They include the following:

- On July 22, 1981, the applicant was convicted of *driving under the influence of alcohol or drugs*, a misdemeanor, in violation of VC section 23152(b), and sentenced to two years probation. [Case no. ██████████]

On May 21, 1991, the applicant was again convicted of *driving under the influence of alcohol or drugs*, a misdemeanor, in violation of VC section 23152(a), and sentenced to five years summary probation, 365 days confinement, 363 days suspended, as well as a fine and an alcohol-related special program. On April 5, 2000, the applicant's motion to vacate judgment was denied and he was sentenced to serve 364 days in custody of the sheriff, suspended for five years while the applicant was placed on summary probation. [Case no. ██████████]

On November 8, 1994, the applicant was convicted of *driving with a suspended license*, a misdemeanor, in violation of VC section 14601.1A, and sentenced to three years probation as well as a fine and a special program. [Case no. ██████████]

On December 8, 1997, the applicant was convicted of an infraction under section SCC62.620A of the San Diego Municipal Code, and sentenced to one year probation and a fine. [Case no. ██████████]

¹ The regulation at 8 C.F.R. § 245a.1(p) defines "felony" generally as a crime punishable by imprisonment for more than one year, but makes an exception if such an offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less.

On December 18, 2003, the applicant was convicted of *driving under the influence of alcohol or drugs*, a misdemeanor, in violation of VC section 23152(b), and sentenced to 180 days incarceration, suspended for five years, with special classes and a fine. [Case no. ██████████]

On appeal, the applicant stated that the court reduced his first misdemeanor conviction to an infraction and vacated his third misdemeanor conviction which means that he no longer stands convicted of three misdemeanors. In support of his assertions, the applicant submitted two orders by the San Diego County Superior Court Judge. The first order, dated November 1, 2005, vacated the applicant's 1981 misdemeanor conviction (Case No. ██████████) pursuant to California Penal Code section 1016.5. That code section authorizes California courts to vacate judgments against non-citizens if they were not advised of the negative consequences that a plea of guilty or *nolo contendere* could have on their admissibility to the United States under U.S. immigration laws.

The second court order, dated February 14, 2006, reduced the applicant's 1994 misdemeanor conviction (Case No. ██████████) to an infraction. As provided in Penal Code section 19.6, an infraction is not punishable by any jail time. According to the applicant, therefore, he only has two misdemeanor convictions.

On April 8, 2008, the AAO dismissed the applicant's appeal indicating that 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. Citing *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the AAO determined that unless the conviction is vacated on the merits, a state rehabilitative action is of no effect in determining whether an alien is considered convicted for immigration purposes. The AAO found that the record did not indicate that either of the court orders in 2005 and 2006 vacating and reducing two of the applicant's earlier misdemeanor convictions was based upon the merits of the case. Concluding that the applicant remained convicted of four misdemeanor convictions, the appeal was dismissed.

In a complaint filed on May 27, 2008, in United States District Court for the Southern District of California, the applicant, citing *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), argued that if a criminal court fails to advise the defendant of the criminal consequences of his guilty plea, the subsequent *vacatur* is not a conviction for immigration purposes. Because his July 22, 1981 conviction for *driving under the influence of alcohol or drugs*, a misdemeanor, in violation of VC section 23102(A), was subsequently vacated pursuant to California Penal Code 1016.5², the applicant asserted that he does not stand convicted in this case.

² California Penal Code 1016.5 requires defendants to be advised of the immigration consequences of a plea of guilty or *nolo contendere* to any offense punishable as a crime under state law, except offenses designated as infractions under state law.

Since failure to apprise a defendant of the immigration consequences of his criminal conviction and/or plea is not a state rehabilitative action, the applicant properly concludes that the *vacatur* of his misdemeanor should be recognized in subsequent immigration proceedings. Accordingly, the applicant's "conviction" of July 22, 1981 will not be recognized in evaluating his eligibility under the LIFE Act.

The applicant also contended, in the same complaint, that his November 8, 1994 conviction was subsequently designated as an infraction on February 14, 2006 by order of the Superior Court of California, County of San Diego in case number [REDACTED] Citing *Garcia-Lopez v. Ashcroft*, 334 F.3rd 840 (9th Cir. 2003), the applicant contended that the state court's designation of an offense is binding in immigration proceedings. The applicant was convicted under Vehicular Code (VC) Section 14601.2 which states:

(a) No person shall drive a motor vehicle when his or her driving privilege is suspended or revoked for any reason other than those listed in Section 14601.2 or 14601.5, if the person so driving has knowledge of the suspension or revocation. Knowledge shall be conclusively presumed if mailed notice has been given by the department to the person pursuant to Section 13106. The presumption established by this subdivision is a presumption affecting the burden of proof.

(b) Any person convicted under this section shall be punished as follows:

(1) Upon a first conviction, by imprisonment in the county jail for not more than six months or by a fine of not less than three hundred dollars (\$300) or more than one thousand dollars (\$1,000), or by both that fine and imprisonment.

Since the crime is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, it is properly considered a misdemeanor as defined in 8 C.F.R. § 245a.1(o). However, the applicant asserted that the conviction was subsequently designated as an infraction on February 14, 2006 by order of the Superior Court of California, County of San Diego in case number [REDACTED] and that this reduction is binding in subsequent immigration proceedings.

Citing *Garcia-Lopez v. Ashcroft*, 334 F.3rd 840 (9th Cir. 2003), the applicant contends that the state court's *designation* of an offense is binding in immigration proceedings. While the AAO affirms that a state court's designation of an offense is binding according to *Garcia-Lopez*, 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 Roldan*, 22 I&N Dec. 512 (BIA 1999).

In this case, the Order does not state a reason for reducing the misdemeanor conviction to an infraction. The Order simply states, "Defendant [REDACTED]'s conviction in the

above case is reduced to an infraction.” No additional information or documentation, except the cover sheet of the order, was initially contained in the record. Because the AAO was unable to ascertain the reason that the misdemeanor conviction was reduced, on September 26, 2008, the AAO issued a Request for Evidence requesting all motion papers relating to the San Diego County Superior Court Judge’s Order to Reduce Misdemeanor to an Infraction dated February 14, 2006 (Docket No. [REDACTED]) filed in connection with the applicant’s arrest on November 8, 1994 in which he was convicted of *driving with a suspended license*, a misdemeanor, in violation of VC section 14601.2A, and sentenced to three years probation as well as a fine and a special program. [Case. No. [REDACTED]].

On October 14, 2008, the AAO received the applicant’s response to the Request for Evidence. The moving papers reveal that the applicant’s misdemeanor conviction was reduced to an infraction because the applicant was not informed of the immigration consequences of his conviction prior to accepting a guilty plea pursuant to California Penal Code section 1016.5. As such, the AAO accepts the applicant’s assertion that his misdemeanor conviction has been reduced to an infraction and therefore, is not relevant to this application.

For immigration purposes, therefore, the applicant remains convicted of two misdemeanors. His criminal convictions are therefore, not grounds for denial of this application.

However, as stated above, aliens applying for adjustment of status have the burden of proving that they are *admissible* to the United States under the provisions of section 1104(c)(2)(D)(i) of the LIFE Act. 8 C.F.R. § 245a.11(d).

The applicant is not admissible because the applicant was ordered removed and deported from the United States on September 10, 1990. The record reveals that the applicant subsequently reentered the United States without inspection three days later. Under section 212(a) of the Act (1990), aliens who have been excluded and deported and who again seek admission within one year from the date of such deportation, unless prior to their reembarkation . . . the [Secretary of Homeland Security] has consented to their reapplying for admission, shall be excluded from admission to the United States. Since the applicant did not remain outside the United States for at least one year after his September 10, 1990 deportation, and in fact, he filed his Form I-687 application on November 5, 1990 indicating his current address to be in San Diego, California, the applicant is inadmissible. The applicant filed a Form I-212 Application for Permission to Reapply for Admission into the United States after Deportation or Removal, which was denied by the district director, San Diego, on August 30, 2005. However, the applicant may apply for a waiver of inadmissibility by filing a Form I-690, Application for Waiver of Grounds of Excludability, with the district director having jurisdiction over the applicant’s case or with the Director of the Missouri Service Center. 8 C.F.R. § 245a.18(c)(1).

Due to the reasons cited above, the applicant is not presently eligible for adjustment to permanent resident status under the Legal Immigration Family Equity (LIFE) Act. However, if the applicant files a Form I-690 Application, the director shall adjudicate the Form I-690 waiver application. If the waiver application is approved, the director should complete the adjudication

of the application for permanent residence. If the decision on the LIFE Act case is adverse, the director shall certify the decision to the AAO for review.

ORDER: The matter is remanded.