



U.S. Citizenship  
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FILE:

MSC 02 249 64257

Office: LOS ANGELES

Date:

JUL 27 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 a misdemeanor conviction for possession of a controlled substance, and a felony conviction for possession of a controlled substance for sale.<sup>1</sup> *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel states that the felony conviction was vacated by court order dated January 16, 2007. Counsel avers that the applicant is otherwise eligible for adjustment to permanent resident status under the provisions of the LIFE Act.

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she 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.

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).

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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<sup>1</sup> The director erroneously identifies both drug convictions as “crimes involving mortal turpitude” (CIMT). Drug offenses do not fall under the CIMT grounds for exclusion in the Immigration and Nationality Act. *See* Section 212(a)(2)(A)(i)(II) of the Act.

Even if the director has some doubt as to the truth, if the applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or applicant has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. See 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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).

The AAO has reviewed all of the evidence and documents in the file. We note that the applicant has submitted a photocopy of a motion to vacate judgment filed before the Superior Court of California, County of Los Angeles, dated November 29, 2006. The motion identifies [REDACTED] and the

supporting documents indicate that the applicant pleaded guilty to one count of trafficking in a controlled substance, in violation of section 11360(a) of the California Health and Safety Code. The applicant was sentenced to 120 days in jail and 36 months probation on February 16, 1989. This offense is considered a felony as the range of punishment under the statute is two to four years in the state penitentiary. The applicant's motion is based, in part, on his contention that he was not informed of the immigration consequences of his guilty plea, as required under section 1016.5 of the California Penal Code.

The record before the AAO also contains a photocopy of a minute order issued by the same court noted above and dated January 29, 2007. This record indicates that the motion to vacate was granted as compelled under section 1016.5 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.<sup>2</sup> Generally, expungements or vacatures of a criminal conviction pursuant to the successful completion of some form of rehabilitation or probation are considered valid convictions for immigration purposes unless the conviction was dismissed because of a fundamental procedural or constitutional error in the trial court proceedings. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, *supra*. However, because this dismissal of the judgment is based on due process and constitutional grounds, the dismissal is entitled to full faith and credit in immigration proceedings. Therefore, the applicant's felony drug trafficking conviction is no longer valid for immigration purposes.

The record before the AAO also contains a letter dated July 12, 2006, from the California State Department of Justice, Criminal Records Division. This letter indicates that the applicant has a series of arrests under six different alias:

- An arrest by the Los Angeles Police Department on or about November 9, 1985 for burglary, in violation of section 459 of the California Penal Code. [REDACTED] Burglary is a felony offense. This record does not identify an ultimate disposition.
- An arrest by the Los Angeles Police Department on or about March 31, 1986 for possession of a controlled substance for sale, in violation of section 11351 of the California Health and Safety Code. [REDACTED]. This offense is considered a felony.
- An arrest by the Los Angeles Police Department on or about February 19, 1987 for possession with intent to sell/furnish/import a controlled substance for sale, in violation of section 11360 of

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<sup>2</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 (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).

the California Health and Safety Code. [REDACTED]. This charge is marked “dismissed for lack of probable cause/evidence”.

- An arrest by the Los Angeles Police Department on or about January 15, 1988 for possession of marihuana for sale, in violation of section 11359 of the California Health and Safety Code. [REDACTED] The disposition is marked, “accusation set aside.”
- An arrest by the Los Angeles Police Department on or about on February 2, 1989 for possession of a controlled substance for sale, in violation of section 11351 of the California Health and Safety Code. An additional charge of one count of violating section 11360(a) of the California Health and Safety Code was added on March 14, 1989. [REDACTED] The applicant was convicted of the latter charge and sentenced to 120 days in jail and 36 months probation. This is the conviction that was later vacated by the trial court on January 29, 2007, and is no longer valid for immigration purposes.
- An arrest by the Los Angeles Police Department on or about November 2, 1989, for sale of over one ounce of marihuana, in violation of section 11360(a) of the California Health and Safety Code. The record identifies this incident as [REDACTED] and no. [REDACTED]
- An arrest on January 1, 1990 by the Los Angeles Police Department for one count of violating section 211 of the California Penal Code – robbery. [REDACTED]. This charge is marked has having been dismissed for “lack of corpus.”
- An arrest on January 3, 1991, by the Los Angeles Police Department for one count of violating section 11352 of the California Health and Safety Code – Transport, Sell Narcotics/Controlled Substance.
- An arrest by the Los Angeles Police Department on or about September 3, 1998 for one count of violating section 2800.3 of the California Vehicle Code – Evading a Peace Officer with Causing Serious Bodily Injury or Death. [REDACTED]
- An arrest by the San Fernando Police Department on or about December 6, 1999, for four separate counts of DUI, and evading the police. [REDACTED] This record indicates that the applicant pleaded guilty to two of the four misdemeanor charges. The applicant was convicted on one count of violating section 23152(b) of the California Vehicle Code – Driving with Blood Alcohol Level of More Than .08%, a misdemeanor, and on one count of violating section 2800.3 of the California Vehicle Code, also a misdemeanor. The applicant was sentenced to 13 and 30 days in jail and 36 months probation.
- A notice from the Selective Service System dated March 11, 1987, which requests the applicant to comply with the federal requirements for draft registration. The letter informs the applicant that “a willful failure to register is a felony offense punishable by imprisonment and fine.” The applicant provides no explanation regarding the outcome of the notice to comply.

Having reviewed all of this evidence, the AAO concludes that the applicant has at least two misdemeanor convictions, and a significant number of additional arrests for various other misdemeanor and felony charges which remain unexplained by the applicant and for which the record contains no final disposition. We note that the applicant was requested to supply documents to explain the final disposition for all criminal charges, but that he failed to do so.

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.