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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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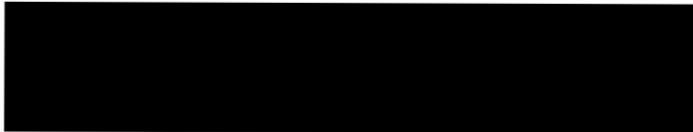
IN RE:

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, Fresno, 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 had been convicted of felony burglary in California, and was statutorily ineligible for adjustment to permanent residence pursuant to the terms of the LIFE Act.

**The applicant is represented by counsel on appeal.** Counsel acknowledges the applicant's felony conviction, but argues that his conviction should be considered a misdemeanor because the statutory maximum period of incarceration for the applicant's felony conviction does not exceed one year. By this reasoning, counsel argues that the applicant should be granted adjustment of status to one of permanent residence in accordance with 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" 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 photocopy of the sentencing order issued by the Superior Court of California, County of Tulare, dated July 21, 1986. The court order indicates that the applicant pleaded guilty to one count of violating section 459 of the California Penal Code – *Burglary*. The applicant was sentenced to 180 days in jail and three years of probation. The order also clearly notes that the applicant was convicted of felony burglary in the second degree.

Counsel now argues that because second degree felony burglary is punishable in the state of California by a term of imprisonment not to exceed one year, the applicant's conviction should be treated as a misdemeanor. Counsel maintains that the applicant remains eligible for adjustment to permanent residence under the terms of the LIFE Act.

The AAO finds this argument to be without merit. The issue in this proceeding is whether the applicant's burglary conviction should be viewed as a misdemeanor because the statutory maximum sentence does not exceed one year. The AAO concludes that the applicant's burglary conviction is listed on the sentencing order as a felony and should be construed as a felony, and not as a misdemeanor. Therefore, the applicant remains ineligible for adjustment of status to one of permanent residence on account of his felony conviction.

In defining the terms "felony" and "misdemeanor" Congress has adopted a uniform and consistent federal definition in order to compensate for the inconsistent definitions that appear between the criminal statutes of the various states. As noted above, for federal immigration purposes a 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* (emphasis added).

In order for the applicant's second degree burglary conviction to qualify as a misdemeanor, the court had to (1) define the conviction as a misdemeanor, and (2) sentence the applicant to a term of imprisonment of one year or less. In this case, the applicant only meets the second prong of this test, as he was sentenced to 180 days in jail. However, the court did not define the offense as a misdemeanor, but specifically defined it as a felony, as evidenced by the sentencing order.

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 Act, 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.