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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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U.S. Citizenship
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FILE:



Office: LOS ANGELES

Date: **MAY 05 2009**

MSC 03 225 60129

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:

SELF-REPRESENTED

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 of disqualifying criminal convictions for which no waiver exists. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant represents herself on appeal. She states that her convictions were "dismissed" and that she remains eligible for adjustment to permanent resident status. In support, the applicant submitted a certified statement from the Superior Court of California, Orange County, Clerk's office dated November 8, 2007. The letter states that a search of the criminal records from 1998 through the present reveals no records in the name of 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 all of the evidence and documents in the file. The record contains documents that indicate a series of arrests and convictions, including:

- (1) A September 11, 1994 arrest for violating section 460(B) of the California Penal Code – *burglary*. The applicant was ultimately convicted on October 18, 1994 for violating sections 488 and 490.5 of the California Penal Code – *petty theft of retail merchandise* ([REDACTED]). The applicant was sentenced to 3 years probation and one day in jail.

- (2) An arrest on December 3, 1994 for petty theft. The record contains no final disposition for this charge.
- (3) An arrest on February 18, 1998 for petty theft. The record contains no final disposition for this charge. The applicant used the name [REDACTED]

On appeal, the applicant states that the February 18, 1998 arrest is “[connected] to [REDACTED] for not paying the total amount due on time.” The applicant explains that the case was “dismissed” after she paid the total amount due.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 her criminal convictions. The AAO has reviewed all of the documents in the file in their entirety. We conclude that the applicant has not met her burden of proof to establish her eligibility for adjustment to permanent resident status pursuant to the terms of the LIFE Act. The record contains evidence of a minimum of three separate court cases: [REDACTED] and [REDACTED]. The applicant has provided a final disposition for [REDACTED], involving the conviction for theft of retail merchandise for which the applicant served one day in jail and three years of probation. The record contains letters from the Superior Court of California, San Bernardino Clerk’s office dated June 12, 2007 and September 23, 2003 that explain no records are available for the other two arrests.

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).

Additionally, an alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is not eligible to adjust to lawful permanent resident status under the LIFE Act. See 8 C.F.R. § 245a.18(a)(1).

The applicant has not submitted the appropriate court documents to meet her burden of establishing that she is admissible to the United States, *i.e.*, that she has not been convicted of three misdemeanors or a felony and that she is otherwise eligible to adjust to lawful permanent resident status. In this case, the

¹ The AAO notes that [REDACTED] was dismissed pursuant to California’s rehabilitative statute found at section 1203.4 of the California Penal Code. 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 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. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

applicant has failed to meet this burden because she has provided no final dispositions regarding at least two criminal charges filed against her in California.

On appeal, the applicant submits the letters from the Superior Court of California explaining that a search of the criminal records under the applicant's name and date of birth yield no results. A statement of "no criminal records found" issued by a state Clerk's office is not sufficient to establish eligibility for permanent residence if other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications or petitions for immigration benefits (permanent resident status in this case) the applicant must show that the requested evidence is unavailable. Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. The letters from the Superior Court of California dated June 12, 2007 and September 23, 2003 generally meet these requirements.

However, in the absence of primary evidence, the applicant must then submit relevant "secondary evidence." If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest.

The AAO notes that, despite the request for evidence (Form I-72), the applicant failed to provide final dispositions for the arrests listed in December, 1994 and February, 1998 and this deficiency has not been overcome on appeal. Thus, the applicant has not met her burden of proof and her application must be denied on that ground. *See* section 245A(b)(1)(C) of the Act; 8 C.F.R. § 103.2(b)(2)(i) and (ii); 8 C.F.R. 245a.3(g)(5).

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. Thus, the applicant is not eligible to adjust to lawful permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.18(a)(1). The appeal is dismissed.

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