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U.S. Citizenship
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[Redacted]

FILE:

[Redacted]

Office: SAN JOSE

Date:

MAY 08 2009

MSC 02 176 64805

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:

[Redacted]

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

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, San Jose, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district 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 three misdemeanors in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act.

The applicant is represented by counsel on appeal. Counsel argues that the three convictions have been "dismissed", and therefore, the applicant remains eligible for adjustment to permanent resident status under the provisions of the LIFE Act.¹

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 record contains court documents that reflect the applicant has been convicted of the following misdemeanor offenses in the Municipal Court of Los Angeles, California:

- A 1990 conviction for one count of violating section 273.6(A) of the California Penal Code, *Violation of Restraining Order to Prevent Domestic Violence*. The applicant was sentenced to 30 days in jail and 2 years supervised probation. [REDACTED]
- A 1991 conviction for a violation of section 23152(B) of the California Vehicle Code, *Drive a Vehicle with .08% or More Blood Alcohol*. [REDACTED] The record contains no evidence of the sentence imposed by the trial court.

¹ The AAO has reviewed the brief submitted by counsel of record in support of the appeal. We note that the brief appears to be formulaic in content in that it cites a variety of potential appellate arguments applicable to a number of different factual scenarios. For example, the brief cites the Federal First Offender Act, 18 U.S.C. § 3607 (FFOA) as an argument in support of reversing the Director's denial. The AAO notes that the FFOA is limited to first time drug possession convictions, a fact not in evidence in the case presently before us and therefore not relevant to the present proceedings. We find counsel's brief to be unpersuasive.

- A 1997 conviction for one count of violating section 23152(B) of the California Vehicle Code. *Drive a Vehicle with .08% or more Blood Alcohol.* [REDACTED] The applicant was sentenced to three years' probation.

The applicant's motion to dismiss all three convictions pursuant to section 1203.4 of the California Penal Code was granted on December 31, 2002 and January 13, 2003. The issue in this proceeding is whether the applicant's misdemeanor convictions remain valid convictions for immigration consequences. The AAO has reviewed the applicant's brief on appeal and the authorities cited therein, and concludes that the convictions continue to effect immigration consequences, and thus render the applicant ineligible for lawful permanent resident status.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute.² Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or nolo contendere and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's convictions were expunged because of an underlying procedural defect in the merits of the case, and the vacated judgments remain valid for immigration purposes.

The applicant has three misdemeanor convictions. Any three misdemeanor convictions are an automatic disqualification for adjustment to permanent resident status under the provisions of the LIFE Act.

Because of his three misdemeanor convictions, 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.

The AAO notes that the applicant's record contains what appears to be a photocopy of a form letter issued by the legacy INS addressed to the applicant and dated September 4, 2002. This letter purports to grant the applicant permanent resident status. The AAO notes that the letter is not signed by an adjudications officer and does not contain an approval date. A search of relevant records does not reveal that the applicant was granted lawful permanent resident status at any time. Therefore, we conclude that this letter is invalid.

² 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).

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.