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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES

Date:

**OCT 13 2009**

MSC-02-246-60637

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 if your case was remanded for further action, you will be contacted.

Perry Rhew  
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, 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 had not met his burden of proof to establish eligibility to adjust to permanent resident status under the provisions of the LIFE Act. Specifically, the director noted that the applicant had been convicted in 1992 of a felony controlled substance offense in the state of California. The director concluded that the applicant's felony conviction rendered him ineligible for permanent resident status. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.*<sup>1</sup>

The applicant is represented by counsel on appeal. Counsel argues that the applicant's conviction was subsequently expunged pursuant to section 1203.4 of the California Penal Code and that the expungement under section 1203.4 is the equivalent of treatment under the Federal First Offender's Act (FFOA). Counsel cites *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) in support. Counsel argues that the drug conviction is no longer a valid conviction for immigration purposes pursuant to the Ninth Circuit's reasoning in *Lujan-Armendariz*. Counsel also argues that the NOID issued to the applicant does not properly identify the statute under which the applicant was convicted.

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his or her continuous, unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 1104(c)(2)(B) of the LIFE Act states in relevant part:

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

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<sup>1</sup> The record before the AAO establishes that the director issued a Notice of Intent to Deny (NOID) on August 19, 2006 subsequent to the applicant's interview conducted on February 2, 2006. The NOID informed the applicant that the Form I-485 would be denied on account of the felony conviction and provided the applicant with thirty days to submit evidence in rebuttal. The applicant did not respond to the NOID and the director issued the Notice of Denial on December 22, 2006.

*See also* 8 C.F.R. § 245a.11(b).

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 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. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6<sup>th</sup> Cir. 2006); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999). State rehabilitative actions that do not vacate a conviction on the merits as a

result of underlying procedural or constitutional defects are of no effect in determining whether an alien is considered convicted for immigration purposes. *Matter of Roldan, id.*

The AAO has reviewed all of the documents in the file in their entirety. The record contains certified court documents issued by the Superior Court of California, Riverside County, Mount San Jacinto Judicial District, [REDACTED]. These documents reveal that on December 27, 1991, the applicant was arrested and charged with one count of violating section 11351 of the California Health and Safety Code – *possession/purchase for sale narcotic controlled substance*. The court proceedings clearly identify this offense as a felony, and that he was specifically charged with possession of cocaine for sale. The applicant pleaded guilty to the charge on January 10, 1992. The applicant's sentence of incarceration was suspended, and he was sentenced to 36 months probation, was ordered to pay a fine and costs, and was given 66 days credit for time served in jail.

Additionally, the documents in the file indicated that the applicant was arrested by the Rancho Cucamonga Police Department on August 29, 2000, and charged with two counts of violating section 20002(a) of the California Vehicle Code – *hit and run involving property damage*; and one count of violating section 16028(a) of the California Vehicle Code- *failure to provide evidence of insurance*. The court documents identify these offenses as a misdemeanor and an infraction, respectively, with [REDACTED]. The applicant pleaded guilty to one count of hit and run and one count of failure to provide evidence of insurance. The applicant was sentenced to 36 months probation and ordered to pay a fine and costs.

At issue in this proceeding is whether the applicant has established that he resided in the United States throughout the statutory period and whether he met his burden of establishing that he is otherwise admissible to the United States, that he does not have a disqualifying criminal conviction, and that he is eligible to adjust to lawful permanent resident status. Here, the applicant has failed to demonstrate admissibility on account of his felony conviction for possession of cocaine for sale.

The applicant argues that his felony conviction has been expunged and is no longer a valid conviction for immigration purposes and cites *See Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) in support. Initially, we note that the record contains no court documents or other evidence to suggest that the applicant's felony drug conviction was dismissed, vacated, expunged, or otherwise discharged under section 1203.4 of the California Penal Code, or under any other section of the California criminal statute. Court documents indicate only that the applicant was ordered to appear on February 7, 1995 for a hearing regarding "probation expiration." Counsel asserts that the conviction has been expunged, but the record does not confirm this statement. Counsel's assertions are not evidence.

Second, the AAO has reviewed the cited authority and the statute under which the applicant was convicted and concludes that an expungement of the applicant's conviction in this case would not fit within the parameters outlined in *Lujan-Armendariz*. In that case, the Ninth Circuit held that an

alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand “convicted” for immigration purposes, because the alien defendant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws.

Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a “conviction” for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, have not previously been the subject of a disposition under FFOA, and were placed on probation for a term of not more than one year without entering a judgment of conviction. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019, (9<sup>th</sup> Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique, id.*

Unlike the alien defendant in *Lujan-Armendariz*, the applicant in the matter presently before the AAO would not have qualified for disposition under the provisions of the FFOA. The AAO observes that the crime for which the applicant stands convicted is not a first time offense for “simple possession of a controlled substance.” The applicant was convicted for a trafficking offense, which is a much more serious felony than a first time simple possession conviction. The section of the California Health and Safety Code described in the statute and under which the applicant was convicted contemplates a term of imprisonment in the state penitentiary for two to four years. *See* section 11351(a) of the California Health and Safety Code. Thus, had the applicant been convicted of violating a different subsection of the California Health and Safety Code instead of subsection 11351(a), and had he been ordered to serve a term of imprisonment or probation for one year or less, the applicant may have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. *See also Fernandez-Bernal v. Attorney General*, 257 F.3d 1304 (11<sup>th</sup> Cir. 2001). However, this is not the case here.

Therefore, the record does not indicate that the applicant’s California state conviction was expunged under any provision of the California Penal Code, and an expungement under section 1203.4 would not be the equivalent of treatment under the FFOA because the statute under which the applicant was convicted is not for simple possession of a controlled substance. The conviction remains a valid felony conviction for immigration purposes. 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).

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

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