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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
and Immigration
Services

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FILE:

MSC-04-260-11151

Office: LOS ANGELES

Date:

MAR 31 2010

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.

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 of the Los Angeles office 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 has been convicted of three or more misdemeanors. *See* Section 1104(c)(2)(D)(ii) of the LIFE Act. The director concluded that the applicant's convictions precluded his adjustment to permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.11(d)(1).

On appeal, counsel concedes that the applicant has three or more misdemeanor convictions. Counsel asserts however, that the convictions should not bar the applicant from adjusting under the LIFE Act because the applicant had no misdemeanor convictions as of the time of the original Legalization application period.

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status under the provisions of the LIFE Act. Section 1104(c)(2)(D)(ii) of the LIFE Act; 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"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 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. § 101(a)(48)(A).

In applying the definition of a conviction under section 101(a)(48)(A) of the Act, the Board of Immigration Appeals (BIA) found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. Thus, if a court vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a "conviction" within the meaning of section 101(a)(48)(A) of the Act; if, however, a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the respondent remains "convicted" for immigration purposes.

Matter of Pickering, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). In this case, the applicant does not claim any defect in the underlying criminal proceedings.

In the Notice of Intent to Deny (NOID), dated August 23, 2009, the director notified the applicant of his intention to deny the application because the applicant was ineligible due to his four convictions. The director granted the applicant thirty (30) days to submit rebuttal evidence. In rebuttal to the NOID the applicant asserted that his convictions should not bar him from adjusting under the LIFE Act because he had no convictions at the time of the original Legalization application period. The director denied the application on May 29, 2009, for the reasons stated in the NOID.

The record contains court documents that reflect the applicant has been convicted of the following offenses:

- On September 1, 1992, the applicant was convicted of a violation of section 23152(B) of the California Vehicle Code (VC), *Driving with Prohibited Blood Alcohol Concentration .08 % or More by Weight*, a misdemeanor. The court sentenced the applicant to five years probation (Superior Court of California, [REDACTED]).
- On October 12, 1995, the applicant was convicted of a violation of section 23152(A) of the California Vehicle Code (VC), *Driving under the Influence*, a misdemeanor. The court sentenced the applicant to five years probation (Superior Court of California, [REDACTED]).
- On September 17, 1996, the applicant was convicted of a violation of section 14601.2 of the California Vehicle Code (VC), *Driving with a Suspended/Revoked License*, a misdemeanor. The court sentenced the applicant to three years probation (Superior Court of California, [REDACTED]).
- On December 9, 1996, the applicant was convicted of a violation of section 23152(A) of the California Vehicle Code (VC), *Driving under the Influence*, a misdemeanor. The court sentenced the applicant to five years probation (Superior Court of California, [REDACTED]).

On appeal, counsel admits that the applicant has had “three or more misdemeanor convictions”, but asserts that the convictions should not bar the applicant from adjusting under the LIFE Act because the convictions occurred outside of the qualifying period, January 1, 1982 to May 4, 1988.

Counsel's assertion is without merit. There is no basis in the Act or in the regulations that would permit the applicant to avoid the requirements for adjustment to permanent resident status under

the provisions of the LIFE Act. It is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all offices of United States Citizenship and Immigration Services (USCIS).

The court record shows that the applicant was convicted of four misdemeanors, described above. Because the applicant has three or more misdemeanor convictions, the applicant is ineligible to 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 applicant convicted of a felony or three or more misdemeanors committed in the United States.

Further, the record reveals that the applicant was deported from the United States at government expense on June 10, 2004, and that he re-entered sometime thereafter.¹ The applicant is therefore inadmissible to the United States based upon section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (INA), as amended. An applicant who is otherwise approvable for adjustment to permanent resident status under the LIFE Act but who was previously deported may be afforded the opportunity to file a waiver if the alien is determined to be inadmissible and the ground of inadmissibility is determined to be one which allows the filing of a waiver. Although the applicant's inadmissibility for having been deported may be waived, even if the applicant were to be granted a waiver he remains ineligible on the basis of his four misdemeanor convictions.

An applicant 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.

¹ The record reveals that the applicant was present in the United States at the time he was interviewed on April 14, 2009.