



U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE:

[REDACTED]

Office: Los Angeles, California

Date:

SEP 30 2004

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. The file has been returned to the Los Angeles District Office. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained.

The district director concluded that the applicant was ineligible for adjustment to legal permanent resident status under 8 C.F.R. § 245a.11(d)(1) because he had been convicted of a felony – possession of narcotics, a controlled substance – in the United States.

On appeal counsel asserts that the applicant's controlled substance conviction has been expunged pursuant to a rehabilitative statute in the State of California which, in accordance with the Federal First Offender Act ("FFOA"), makes him no longer "convicted" for immigration purposes.

Under section 1104 of the LIFE Act, an applicant for permanent resident status must establish that he or she has not been convicted of a felony or of three or more misdemeanors committed in the United States. See section 1104(c)(2)(D)(ii) of the LIFE Act, 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(1). There is no waiver provision under the LIFE Act for this ground of inadmissibility to the United States. The applicant was arrested on June 27, 1997 in Los Angeles County, California, and charged with possession of a controlled substance, a felony count under section 11350(A) of the California Health and Safety Code. The applicant pleaded guilty on July 1, 1997, which the court recorded as a conviction. The court deferred entry of judgment, however, and on August 12, 1997 ordered the charge diverted for a period of 24 months while the applicant fulfilled specific terms and conditions. On August 11, 1999, at the completion of that 24-month probationary period, the court set aside the applicant's guilty plea and dismissed the charge pursuant to section 1000.3 of the California Penal Code.

In his appeal brief counsel argues that pursuant to the precedent decision issued by the U.S. Court of Appeals for the Ninth Circuit on August 1, 2000, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) ("*Lujan*"), the applicant is eligible for treatment under the FFOA and the expungement of his state felony conviction removes the bar to his adjustment of status under the LIFE Act. Since this case arises in the Ninth Circuit, *Lujan* is controlling.

The FFOA, 18 U.S.C. § 3607, provides, in relevant part, as follows:

- (a) . . . If a person found guilty of [simple possession of a controlled substance] (1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and (2) has not previously been the subject of a disposition under this subsection; the court may . . . place him on probation for a term of not more than one year without entering a judgment of conviction. [During or a]t the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation . . .
- (b) . . . A disposition under subsection (a) . . . shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose.

Section 101(a)(48)(A) of the Immigration and Nationality Act (INA) defines the term "conviction" as "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." (Emphases added.) The applicant's felony conviction in July 1997 satisfied all of the statutory criteria, as highlighted.

Lujan, however, holds that the “definition of ‘conviction’ for immigration purposes does not repeal either the [FFOA] or the rule [set forth in *Matter of Manrique*, 21 I & N Dec. 3250 (BIA, 1995)] that no alien may be deported based on an offense that could have been tried under the [FFOA], but is instead prosecuted under state law, when the findings are expunged pursuant to a state rehabilitative statute.” See *Lujan* at 749. The rule set forth in *Lujan* for a first-time conviction of simple possession of a controlled substance is applicable only in the Ninth Circuit and is a limited exception to the generally recognized rule that an expunged conviction qualifies as a “conviction” for immigration purposes.

The record indicates that the applicant would have qualified for treatment under the FFOA. The applicant pleaded guilty to simple possession of a controlled substance. There is no evidence that the applicant had ever been convicted of a federal or state controlled substances law prior thereto, or that he had previously been accorded first offender treatment under the FFOA or a state law. Finally, the applicant’s felony conviction for possession of narcotics was expunged pursuant to a rehabilitative statute – section 1000.3 of the California Penal Code.

Thus, the applicant has not been “convicted” of a felony for immigration purposes. Accordingly, the applicant is not statutorily barred by section 1104(c)(2)(D)(ii) of the LIFE Act from adjusting to permanent resident status.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in one of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“CSS”), *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“LULAC”), or *Zambrano v. INS*, vacated sub nom. *Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993) (“Zambrano”). See section 1104(b) of the LIFE Act and 8 C.F.R. § 245a.10.

The record establishes that the applicant filed a timely claim in 1990 for class membership in CSS.

An applicant for permanent resident status under section 1104 of the LIFE Act must also establish that he or she entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. See 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.11(b).

8 C.F.R. § 245a.12(e) provides that “[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods. . . . The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification.” As explained in *Matter of E-M-*, 20 I & N Dec. 77, 80 (Comm. 1989), “when something is to be established by a preponderance of the evidence it is sufficient that the proof only establish that it is probably true.” The decision went on to declare that, in the absence of contemporaneous documentation, affidavits are “relevant documents” which warrant consideration in legalization proceedings. *Id.* at 82-83. Preponderance of the evidence has also been defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black’s Law Dictionary 1064 (5th ed. 1979).

The applicant asserts that he entered the United States unlawfully from Mexico in September 1981, and resided in Long Beach, California for the rest of the 1980s. The record includes numerous pay statements, tax records, and company letters related to the applicant’s employment during the 1980s which show that the applicant has been employed in the United States since at least March 13, 1984. A pay statement from Integrated Aerospace in January 2002 identifies the applicant’s “hire date” as March

13, 1984 and a letter dated April 7, 2003 from [REDACTED] Human Resources Manager of Integrated Aerospace, confirms that [the applicant] is "an NC Machinist" who began working for the company on March 13, 1984. Prior to then, according to the applicant, he worked at various odd jobs and was paid in cash for his labor. As evidence of his U.S. residence before March 1984, the record includes a total of eight sworn affidavits from friends, neighbors, and co-tenants of the applicant's during the 1980s – three of which were dated December 28, 1990, three of which date from June 12-July 1, 1992, and two of which were dated October 3, 1994 – declaring that the applicant lived in Long Beach and Paramount, California throughout the decade. Though the affidavits vary to some extent with one another, and with the applicant's own Form I-687 in 1990, as to the exact addresses and time frames of the applicant's places of residence, none of the affidavits conflict with the applicant's fundamental assertion that he resided in the Long Beach Area continuously from 1981 onward.

Viewing the evidence in its entirety, the AAO is persuaded that the applicant has met his burden of proof. He has established, by a preponderance of the evidence, that he entered the United States before January 1, 1982 and resided in the United States continuously and unlawfully from before January 1, 1982 through May 4, 1982, as required under section 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.12(e).

Accordingly, the applicant's appeal will be sustained. The district director shall continue the adjudication of the application for permanent resident status.

ORDER: The appeal is sustained.