



U.S. Citizenship
and Immigration
Services

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FILE: 

Office: LOS ANGELES

Date:

AUG 24 2005

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. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The district director denied the application because the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The district director also denied the application because the applicant had been convicted of at least three misdemeanors in the United States.

On appeal, counsel puts forth a brief disputing the director's decision and submits additional documentation in an attempt to establish the applicant's residence in the United States.

An applicant for permanent resident status must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date and through May 4, 1988. 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).

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E--M--*, 20 I. & N. Dec. 77 (Comm. 1989).

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

In this instance, the applicant submitted evidence, including contemporaneous documents, which tends to corroborate his claim of residence in the United States during the requisite period. The district director has not established that the information in this evidence was inconsistent with the claims made on the application, or that it was false information. As stated on *Matter of E--M--*, *supra*, when something is to be established by a preponderance of evidence, the applicant only has to establish that the proof is probably true. That decision also points out that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. The documents that have been furnished may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

The documentation provided by the applicant supports by a preponderance of the evidence that the applicant satisfies the statutory and regulatory criteria of entry into the United States before January 1, 1982, as well as continuous unlawful residence in the country during the ensuing time frame of January 1, 1982 through May 4, 1988, as required for eligibility for legalization under section 1104(c)(2)(B)(i) of the LIFE Act.

The regulation at 8 C.F.R. § 245a.18(a) states in part that an alien who has been convicted of a felony or three or more misdemeanors committed in the United States is ineligible for adjustment to LPR status.

"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 the term "felony," pursuant to 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 record reflects the applicant's criminal history in the State of California:

1. On May 31, 1981, the applicant was arrested by the Santa Ana Police Department for violating section 23102 VC, drunk driving on the highway, a misdemeanor. The final outcome is unknown as the requested court disposition was not made available to the Citizenship and Immigration Services.
2. On August 15, 1999, the applicant was arrested and subsequently charged with violating section 23152(a) VC, driving under the influence, section 23152(b) VC, driving with .08 percent or more alcohol in the blood, and section 12500(a), driving without a license, all misdemeanors. On September 29, 1999, the applicant was convicted of all offenses. Case no. [REDACTED]
3. On September 22, 2000, the applicant was arrested and subsequently charged with violating section 14601.2(a) VC, driving while license is suspended for driving under the influence, a misdemeanor. On November 29, 2000, the applicant was convicted of this offense. Case no. [REDACTED]
4. On April 24, 2003, the applicant was arrested and subsequently charged with violating section 14601.2(a) VC, driving while license is suspended for driving under the influence, a misdemeanor. On August 8, 2003, the applicant was convicted of this offense. Case no. [REDACTED]

On December 10, 2003, the applicant was requested to submit the final court dispositions for all arrests. The applicant, in response, submitted the court dispositions for two and three above. In response to the Notice of Intent to Deny dated June 16, 2004, counsel submitted the court disposition for number four along with additional copies for numbers two and three.

Counsel argues that driving without a license is an infraction not a misdemeanor. According to section 40000.11 of the California Vehicle Code, a violation of section 12500(a) VC is a misdemeanor and not an infraction. Section 17(d) of the California Penal Code renders this offense an infraction **only** if the District Attorney considers it to be an infraction and/or the court specifically stated it was an infraction. The court disposition submitted clearly indicates that the applicant was charged with and subsequently convicted of a misdemeanor offense.

Counsel asserts that the "DUI has a Count B that merges with the count A thus constitutes only one Count for one misdemeanor for the DUI." Counsel's assertion, however, is unfounded. The Supreme Court of California found that the 1981 legislative action creating section 23152 VC retained the "driving under the influence" statute as subdivision (a), and established as "a new and separate offense" subdivision (b) relating to blood alcohol content. *Burg v. Municipal Court*, 198 Cal. Rptr. 145 (1983). Moreover, "[b]ecause neither subdivision describes a lesser included crime of the other, dual convictions are both possible and proper." *People v. Duarte*, 207 Cal. Rptr. 615, 621 (5th Dist. 1984).

The applicant is ineligible for the benefit being sought due to his five misdemeanor convictions. 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a). Within the LIFE program, there is no waiver available to an alien convicted of a felony or three misdemeanors committed in the United States. Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

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