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U.S. Citizenship  
and Immigration  
Services

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FILE:

MSC 03 028 61355

Office: SPOKANE

Date:

JUL 27 2006

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. 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, Chief  
Administrative Appeals Office

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

The director denied the application because the applicant had failed to establish that she satisfied the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act. The district director further determined that the applicant was inadmissible in to the United States because she had been convicted of a crime involving moral turpitude in the United States. Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II). The director, therefore, concluded that the applicant was ineligible for permanent resident status under the LIFE Act and denied the application.

On appeal, counsel states that the director failed to recognize that course work satisfies the requirements for basic citizenship skills, and that the applicant's reduced and suspended sentence falls under the petty offense exception to the LIFE Act. Counsel submits additional documentation on appeal.

Under section 1104(c)(2)(E)(i) of the LIFE Act ("Basic Citizenship Skills"), an applicant for permanent resident status must demonstrate that he or she:

- (I) meets the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. § 1423(a)) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or
- (II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Attorney General may waive all or part of the above requirements for aliens who are at least 65 years of age or developmentally disabled.

The applicant, who was 48 years old at the time she took the basic citizenship skills test and provided no evidence to establish that she was developmentally disabled, does not qualify for either of the exceptions in section 1104(c)(2)(E)(i) of the LIFE Act. Further the applicant does not satisfy the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i)(I) of the LIFE Act because she does not meet the requirements of section 312(a) of the INA. An applicant can demonstrate that he or she meets the requirements of section 312(a) of the Act by "[s]peaking and understanding English during the course of the interview for permanent resident status" and answering questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test . . . by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS)." 8 C.F.R. § 245a.3(b)(4)(ii)(A)(1) and (2).

The regulation at 8 C.F.R. § 245a.17(b) provides that an applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the interview, shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the tests or submit evidence as described in paragraphs (a)(2) or (a)(3) of this section.

The record reflects that the applicant was interviewed twice in connection with her LIFE application, first on June 27, 2003 and again on January 5, 2004. On the first occasion, the applicant, who appeared with an

interpreter, declined to take the basic citizenship skills test. On the second occasion, the applicant failed to demonstrate a minimal understanding of English and minimal knowledge of United States history and government. Furthermore, the applicant has not provided evidence of having passed a standardized citizenship test, as permitted by 8 C.F.R. § 312.3(a)(1).

The applicant, however, could still meet the basic citizenship skills requirement under section 1104(c)(2)(E)(i)(II) of the LIFE Act, if she met one of the criteria defined in 8 C.F.R. §§ 245a.17(a)(2) and (3). In part, an applicant must establish that she meets the following under 8 C.F.R. § 245a.17:

- (2) has a high school diploma or general educational development diploma (GED) from a school in the United States; or
- (3) has attended, or is attending, a state recognized, accredited learning institution in the United States, and that institution certifies such attendance. The course of study at such learning institution must be for a period of one academic year (or the equivalent thereof according to the standards of the learning institution) and the curriculum must include at least 40 hours of instruction in English and United States history and government. The applicant may submit certification on letterhead stationery from a state recognized, accredited learning institution either at the time of filing Form I-485, subsequent to filing the application but prior to the interview, or at the time of the interview.

The record does not reflect that the applicant has a high school diploma or a GED from a United States school, and therefore does not satisfy the regulatory requirement of 8 C.F.R. § 245a.17(2). At her second interview, the applicant submitted a copy of a December 29, 2003, letter from [REDACTED] certifying that the applicant had attended 51 hours of citizenship classes at the college. The letter did not indicate that the applicant was attending or had attended a course of instruction that was one year in duration and of which at least 40 hours were of instruction in English and United States history and government. Therefore, the documentation did not meet the requirements of the regulation and failed to establish that the applicant qualified in the basic citizenship skills pursuant to 8 C.F.R. § 245a.17.

In response to the director's Notice of Intent to Deny (NOID), the applicant submitted a February 25, 2004 letter from Walla Walla Community College, indicating that the applicant was an "ESL/Citizenship" student at the college during the fall quarter of 2003-2004, and was enrolled in the winter 2003/2004 class. A copy of the applicant's transcript was also submitted, and reflected that the applicant completed a course in English as second language during that period. The director determined that the documentation submitted was insufficient to determine if it met the requirements of the regulation or that the applicant was in regular attendance.

On appeal, the applicant submitted an unofficial copy of her transcript from Walla Walla Community College dated August 4, 2004. The transcript reflects that the applicant satisfactorily completed nine hours of instruction in English as a second language, 14 hours of "ABE," and one hour of instruction towards a GED during the period that she had attended Walla Walla Community College. We concur with the director that the information submitted by the applicant is insufficient to determine whether the program meets the requirements of the regulation, in that the evidence does not establish the length of the course, or whether or not the curriculum includes at least 40 hours of instruction in English and American history and government.

Additionally, the record is unclear regarding the initial letter from [REDACTED] dated December 29, 2003, which indicated that the applicant had attended 51 hours of instruction in citizenship, and an undated letter from "E. Zavala," indicating that the applicant "has been taking E.S.L. classes for the past year at [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As previously discussed, the applicant failed to meet the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i)(I) of the LIFE Act because at neither of her two interviews did she demonstrate a minimal understanding of the English language.

Therefore, the applicant does not satisfy either alternative of the "basic citizenship skills" requirement set forth in section 1104(c)(2)(E)(i) of the LIFE Act. Accordingly, the applicant's failure to demonstrate the basic citizenship skills requirement of the statute makes her ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act.

The second issue on appeal is whether the applicant is admissible to the United States. An alien must establish that he or she is admissible to the United States as an immigrant, except as otherwise provided under section 245A(d)(2) of the Act. Section 1140(c)(2)(D)(i) of the LIFE Act.

An alien is inadmissible if he or she has been convicted of a crime involving moral turpitude (other than a purely political offense), or an attempt or a conspiracy to commit such crime. Section 212(a)(2)(A)(i)(I) of the Act. Pursuant to 8 C.F.R. § 245a.18(c)(2), grounds of inadmissibility under this section of the Act (crimes involving moral turpitude) may *not* be waived.

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).

The record reveals that the applicant was convicted in October 2001 of shoplifting of less than \$250, which, according to the Revised Code of Washington at 9A.056.050, is theft in the third degree and a "gross" misdemeanor. The applicant was sentenced to 365 days in jail, all of which was suspended, to pay restitution of \$75.76 and to pay a fine of \$500. Theft in the third degree is a crime of moral turpitude. *See, e.g., Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979).

Section 212(a)(2)(A)(ii) of the Act provides:

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one crime if-

(1) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

In this case, the applicant was born on February 2, 1965 and convicted of a crime involving moral turpitude at the age of 36 on October 2, 2001. Therefore, the exception contained at section 212(a)(2)(A)(ii)(I) of the Act does not apply to the applicant as she was over 18 years of age at the time of her conviction. However, a review of the Revised Code of Washington at section 9A.20.021 reveals that the applicant's conviction for a gross misdemeanor is punishable by a fine not exceeding five thousand dollars (\$5,000.00), or by imprisonment in the county jail for not more than one year, or both. Clearly, if the applicant did not receive a sentence of imprisonment of more than six months, the exception contained at section 212(a)(2)(A)(ii)(II) of the Act would apply as the crime for which she was convicted, shoplifting, has a maximum sentence of no more than one year of confinement.

Subsequent to the issuance of the NOID on February 2, 2004, the applicant, through counsel, requested the court to amend her jail sentence from 365 to 90 days "for INS purposes." The court agreed and amended the applicant's sentence on the shoplifting charge from 365 days suspended to 90 days suspended. Counsel asserts that the amended sentence qualifies the applicant for the exception to section 212(a)(2)(A)(ii)(II) of the Act.

The director rejected this argument, citing *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), which held that "convictions vacated for the sole purpose of avoiding immigration hardships are still considered convictions for immigration purposes." The director stated that, although the court did not vacate her conviction, the applicant's request for a reduced sentence for the sole purpose of meeting immigration requirements is "congruent with the *Pickering* decision."

Counsel asserts on appeal that the reliance on the *Pickering* decision is clear error, and that case law requires Citizenship and Immigration Services (CIS) to consider the modified sentence. Citing *Matter of Song*, 23 I&N Dec. 173 (BIA 2001) and *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9<sup>th</sup> Cir. 2003), counsel states that "while a vacated conviction may not have a legal effect for immigration purposes if it is the result of only equitable reasons . . . the basis for an amended sentence is irrelevant."

The ninth circuit's decision in [REDACTED] was based on the state court's determination that the applicant's conviction under one of California's "wobbler" statutes was a misdemeanor. The court held that the court's determination that the offense was a misdemeanor was binding for immigration purposes. The court's rationale is therefore inapplicable in the present case.

However, the Board of Immigration Appeals' decision in *Matter of Song* is persuasive and controlling. Song was convicted in state court of an "aggravated felony" in 1992 and sentenced to one year in prison. In 1999, pursuant to section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G), CIS initiated removal proceedings. On appeal, the alien presented a court order dated April 4, 1999, "which vacated nunc pro tunc the district court's February 2, 1992, sentence in the criminal case an[d] ordered the sentence revised nunc pro tunc to 360 days, which was suspended." The BIA determined that the modification to the alien's sentence demonstrated that he was sentenced to a term of imprisonment of less than one year and

therefore was not removable pursuant to 101(a)(43)(G) of the Act. The record did not indicate the reasons for the state court's vacation of the original sentence and substitution for a lesser one. However, the reason did not appear to be relevant to the court's decision.

Accordingly, we find that the applicant has established that she meets the exception of section 212(a)(2)(A)(i)(II) of the Act, and is therefore not inadmissible for her conviction of a crime involving moral turpitude.

Beyond the decision of the director, the applicant has not established that she resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act, and was continuously physically present in the United States from November 6, 1986 through May 4, 1988, as required by section 1104(c)(2)(C) of the LIFE Act.

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).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Although CIS 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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The record contains an October 1, 2002 notarized statement from [REDACTED] who stated that the applicant "cut asparagus from April thru June 1985 for [REDACTED] and again "during the year of 1986." [REDACTED] did not indicate the basis of his knowledge of the applicant's work experience during the stated time frames. The record contains no other evidence of the applicant's residency and

presence in the United States during the required time period. This deficiency constitutes an additional ground for denial of the application.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa application proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The record does not establish that the applicant satisfies the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i) of the LIFE Act. Further, the record reflects that the applicant has not established that she continuously resided in the U.S. for the required period. Accordingly, the applicant is ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act.

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