



U.S. Citizenship
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FILE: [Redacted]
MSC 02 316 60521

Office: Los Angeles

Date: MAR 24 2006

IN RE: Applicant: [Redacted]

PETITION: 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, 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 (AAO) on appeal. The appeal will be dismissed.

The district director determined that the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. In addition, the district director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act) because he had been convicted of, admitted having committed, or had admitted to committing acts that constitute the essential elements of a crime involving a controlled substance and that such ground of inadmissibility could not be waived pursuant to 8 C.F.R. § 245a.18(c)(2)(ii). Therefore, the district director concluded that the applicant was ineligible to adjust to permanent residence under the provisions of the LIFE Act and denied the application.

On appeal, counsel asserts that the Immigration and Naturalization Service, or the Service (now Citizenship and Immigration Services, or CIS) erred in denying the application without considering the applicant's response to the notice of intent to deny. Counsel includes copies of previously submitted documentation in support of the appeal.

The first issue in this proceeding is whether the applicant established 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.

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. *See* 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 only 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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant is a class member in a legalization class-action lawsuit and as such, was permitted to previously file a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A

of the Act on November 30, 1988. At part #33 of the Form I-687 application where applicants were asked to list all residences in the United States since first entry, the applicant listed [REDACTED] in Huntington Park, California from November 1981 to December 1986 and [REDACTED] in Paramount, California from January 1987 to November 18, 1988, the date the Form I-687 application was executed. Further, the applicant failed to list any information at part #34 of the Form I-687 application where applicants were asked to list all affiliations or associations with clubs, organizations, churches, unions, business, etc. The record shows that the applicant subsequently filed his Form I-485 LIFE Act application with the Service on August 12, 2002.

In support of his claim of continuous unlawful residence in this country since before January 1, 1982 to May 4, 1988, the applicant submitted two pieces of evidence that appear to corroborate his claim for that portion of the period in question from February 1988 to May 4, 1988. The applicant submitted a photocopied letter to the applicant dated February 1, 1988 from the State of California Franchise Tax Board and a photocopy of customer receipt from the California Department of Motor Vehicles dated March 4, 1988. Although these documents tend to support the applicant's claim of residence for that portion of the requisite period discussed above, he also submitted supporting documentation that is either insufficient in providing specific detailed information relating to his residence or contains information that does not conform with critical elements of the applicant's own testimony as contained in the Form I-687 application.

The applicant submitted a Spanish language Certificate of Baptism from the First Church of the Fundamental Bible, which reflects that he was baptized at this church on September 20, 1987. However, the certificate does not list the location of this church and provides no information relating to the applicant's residence in this country during the requisite period. In addition, as noted above, the applicant provided no indication that he was a member, parishioner, or associate of any church at part #34 of the Form I-687 application where applicants were asked to list all affiliations or associations with clubs, organizations, churches, unions, business, etc. The applicant failed to advance any explanation as to why he did not list his association with this or any other church when asked to do so at part #34 of the Form I-687 application.

The applicant included an affidavit that is signed by [REDACTED] who indicated that she first met the applicant at a church function in 1981 and subsequently developed a friendship with him. Ms. [REDACTED] stated that she had personal knowledge that the applicant resided in the City of Los Angeles, California from June 30, 1981 to May 16, 2002 the date the affidavit was executed. While Ms. [REDACTED] testified that the applicant resided in Los Angeles, California, she failed to provide any detailed and verifiable information, such as his specific addresses, relating to the applicant's residence in this country during the period from prior to January 1, 1982 to May 4, 1988. Furthermore, the credibility of Ms. [REDACTED] testimony that she met the applicant at a church function in 1981 is diminished by the fact the applicant failed to list any membership or association with a church at part #34 of the Form I-687 application.

The applicant provided two affidavits that are dated November 28, 1988 and May 15, 2002 respectively, and both signed by [REDACTED]. In the affidavit dated November 28, 1988, Mr. [REDACTED] indicated that he had personal knowledge that the applicant resided in the United States since November 1981 as a family member with whom he had resided and visited. In the other affidavit, Mr. [REDACTED] stated that he had personal knowledge that the applicant resided at [REDACTED] in Huntington Park, California from November 1981 to August 1982 and an unspecified address in Los Angeles, California from August 1982 to May 15, 2002, the date the affidavit was executed. Mr. [REDACTED] declared that this knowledge was based on the fact that he was the applicant's brother and resided with his brother at the address mentioned in the affidavit. However, Mr. [REDACTED] testimony relating to the applicant's addresses of residence is directly contradicted by the applicant's own testimony that he lived at the [REDACTED] address in Huntington Park, California from November 1981 to December 1986, and then [REDACTED] in Paramount, California from January 1987 to November 18, 1988, at part #33 of the Form I-687 application. Further, the probative value of the testimony contained in these affidavits is limited in that Mr. [REDACTED] has acknowledged that he is the applicant's brother, an immediate family member who must be viewed as having an interest in the outcome of proceedings, rather than an independent and disinterested third party.

On August 8, 2003, the district director issued a notice of intent to deny informing the applicant that his application would be denied because he had failed to submit sufficient evidence to support his claim of residence in the United States for the period in question. While the district director also cited a separate and distinct basis for denial in the notice, this issue shall be examined after an initial discussion relating to the applicant's claim of residence and the sufficiency of the evidence submitted in support of that claim. The applicant was granted thirty days to respond to the notice and submit additional evidence in support of his claim of residence in this country for the requisite period.

Although counsel submitted a response to the notice of intent to deny prior to the issuing of the notice of denial October 24, 2003, such response was not acknowledged or addressed by the district director in the notice of denial. Therefore, this response shall be incorporated into the appeal.

On appeal, counsel reiterates the applicant's claim of residence in this country by providing copies of previously submitted documentation including those supporting documents discussed above. While the applicant did submit photocopies of two contemporaneous documents that tend to corroborate his claim of residence in the United States after February 1988, the remainder of the supporting evidence tends to detract from rather than support his claim residence in this country in that period from prior to January 1, 1982 to January 1988. The remaining supporting documents, three affidavits, either lack sufficient specific and verifiable information to corroborate the applicant's claim of residence or contain testimony that conflicts with a variety of elements of his claim of residence. Neither counsel nor the applicant has included a statement or any new evidence that would tend to reconcile the discrepancies between the applicant's testimony and the testimony contained in the supporting documentation relating to his claim of residence for the requisite period.

The absence of sufficiently detailed supporting documentation and the existence of conflicting testimony that contradicts critical elements of the applicant's claim of residence seriously undermines the credibility of the supporting documents, as well as the credibility of the applicant's claim of residence in this country for the requisite period. Pursuant to 8 C.F.R. § 245a.12(e), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he or she has resided in the United States since prior to January 1, 1982 to May 4, 1988 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.12(e) and *Matter of E-- M--*, 20 I&N Dec. 77 (Comm. 1989).

Given the fact that the majority of supporting documentation provided by the applicant is of minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 as required under section 1104(c)(2)(B) of the LIFE Act. The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act.

The other issue in this proceeding is whether the applicant is inadmissible because he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance.

An applicant for permanent resident status under the provisions of LIFE Act 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 who has been convicted of a felony or three or more misdemeanors in the United States is ineligible to adjust to permanent resident status under the provisions of the LIFE Act. *See* 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).

An alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802). Section 212(a)(2)(A)(i)(II) of the Act.

No waiver is available to an alien found to be inadmissible under section 212(a)(2)(A)(i)(II) of the Act for a crime involving a controlled substance (except for so much of such paragraph as relates to a single offense of simple possession of 30 grams or less of marijuana). *See* 8 C.F.R. § 245a.18(c)(2)(ii).

The record contains a report from Federal Bureau of Investigation (F.B.I.) that is dated November 27, 2002, which based upon fingerprint comparison reflects that the applicant was arrested by the El Paso, Texas Police Department on August 7, 1997, and charged with possession of a controlled substance, cocaine in an amount over one gram but under four grams. The F.B.I. report does not reflect a final disposition. The record shows that the Service issued an I-72, Request for Additional Evidence, on December 12, 2002 in which the applicant was asked to provide court documents to establish the disposition of the criminal charge brought against him on August 7, 1997.

In response, counsel submitted a complaint report from the El Paso, Texas Police Department reflecting that the applicant was arrested and charged with possession of cocaine, a felony violation of section 481.115 of the Texas Health and Safety Code, on August 7, 1997. Counsel also submitted a letter from the United States District Court for the Western District of Texas that reflected that the applicant had no record of either civil or criminal actions at or pending before this court in the period from January 1, 1959 to January 15, 2003. However, the criminal charge brought against the applicant would not be adjudicated in a Federal court, as the applicant was not charged with a violation of Federal law. Rather the applicant was arrested by a municipal police force, the El Paso, Texas Police Department, and charged with a violation of the laws of the State of Texas, specifically a felony violation of section 481.115 of the Texas Health and Safety Code, and would fall under the original jurisdiction of a Texas district court or criminal district court pursuant to Article 4.05 of the Texas Code of Criminal Procedure. Consequently, the letter from the United States District Court for the Western District of Texas is not a relevant court document that establishes the disposition of the criminal charge brought against the applicant on August 7, 1997.

The record shows that the applicant subsequently appeared for the interview relating to his LIFE Act application at the Houston, Texas District Office on May 5, 2003. The notes of the interviewing officer read as follows, in pertinent part:

He stated he was arrested 8/97 for possession of cocaine-was convicted for 2 yrs. and probation does not remember. Brought in court records showing no record found but record were searched under name [REDACTED] only. I-72 given to bring in new

court disposition under name [REDACTED] When asked how much cocaine he had he stated 2 little packets that a girl at a bar asked him to buy for her.

Although the interview notes and the record reflect that the applicant was issued another Form I-72, Request for Additional Evidence, at his interview on May 5, 2003, and was asked again to provide court documents to establish the disposition of the criminal charge brought against him on August 7, 1997, neither counsel nor the applicant has provided any evidence to show the disposition of this criminal charge involving a controlled substance in these proceedings.

In the notice of intent to deny issued on August 8, 2003, the district director stated that the applicant admitted under oath that he was arrested on August 1997 for possession of cocaine, that he possessed the cocaine because he had been asked to buy it by another person, and that he had been convicted of this criminal charge. The district director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(II) of the Act because he had been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance and that such ground of inadmissibility could not be waived pursuant to 8 C.F.R. § 245a.18(c)(2)(ii). However, this issue must be examined in greater depth as the district director failed to differentiate whether the applicant had been convicted, admitted to committing, or admitted committing acts that constitute the essential elements of a crime involving a controlled substance.

The record contains no evidence demonstrating the disposition of the criminal charge brought against the applicant when he was arrested by the El Paso, Texas Police Department on August 7, 1997, and charged with possession of a controlled substance, cocaine, in an amount over one gram but under four grams. Without evidence to show the disposition of this charge, it cannot be concluded that the applicant had in fact been convicted of a crime involving a controlled substance.

The precedent decisions, *Matter of J--*, 2 I&N Dec. 285 (BIA 1945), *Matter of L--*, 2 I&N Dec. 486 (BIA 1946), and *Matter of K--*, 7 I&N Dec. 594 (BIA 1957), set forth strict standards to determine whether an alien has either admitted to committing or admitted to committing acts which constitute the essential elements of a crime involving moral turpitude. These standards are best enunciated in *Matter of J--*, 2 I&N Dec. 285, at 288-289 (BIA 1945), as follows:

1. It must be clear that the conduct in question constitutes a crime or misdemeanor under the law where it is alleged to have occurred.
2. The alien must be advised in a clear manner of the essential elements of the alleged crime or misdemeanor.

3. The alien must clearly admit conduct constituting the essential elements of the crime or misdemeanor and that he committed such offense. By the latter it is meant that he is guilty of the crime or misdemeanor.
4. It must appear that the crime or misdemeanor admitted actually involves moral turpitude, although it is not required that the alien himself concede the element of moral turpitude.
5. The admissions must be free and voluntary

The holding reached in *Matter of K--*, 7 I&N Dec. 594 (BIA 1957), also requires that an alien be furnished with a definition of the specific crime in question in reasonable terms in addition to those standards cited above in order to reach the conclusion that an alien has either admitted to committing or admitted to committing acts which constitute the essential elements of a crime involving moral turpitude.

These same standards were subsequently utilized by the court in *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) to determine whether an alien either admitted to committing, or admitted to committing acts that constitute the essential elements of, a crime involving a controlled substance. The present case originated in the Los Angeles, California District Office, which is in the Ninth Circuit. Consequently, the same standards shall be utilized to determine whether the applicant in the current proceedings either admitted to committing, or admitted to committing acts that constitute the essential elements of, a crime involving a controlled substance.

The interview notes discussed above consist of a single page of handwritten notes that are undated and do not contain the name of the interviewing officer. The notes contain no indication that all of the standards cited above were strictly followed and imposed in order to reach the conclusion that the applicant has admitted to committing a crime involving a controlled substance or admitted to committing acts that constitute the essential elements of a crime involving a controlled substance. Moreover, the notes do not demonstrate that the applicant was provided with a definition of the crime of cocaine possession or advised in a clear manner of the essential elements of the alleged crime by the interviewing officer.

In light of the deficiencies of the interviewing officer's notes and the lack of conviction documents, it is not possible to determine whether or not the applicant is inadmissible under Section 212(a)(2)(A)(i)(II) of the Act as a result of either having admitted to committing a crime involving a controlled substance or having admitted to committing acts that constitute the essential elements of a crime involving a controlled substance. Therefore, the district director's finding is withdrawn.

Beyond the district director's decision, the applicant is ineligible because he has failed to provide requested court documents necessary for the adjudication of the application and to demonstrate that he is admissible.

Declarations by an applicant that he has not had a criminal record are subject to a verification of facts by the Service or its successor CIS. The applicant must agree to fully cooperate in the verification process. Failure to assist the Service or its successor CIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.18(e).

The evidence in the record clearly demonstrates that the applicant was arrested by the El Paso, Texas Police Department on August 7, 1997, and charged with possession of a controlled substance, cocaine, in an amount over one gram but under four grams. The record further shows that neither counsel nor the applicant has provided any relevant evidence to show the disposition of this criminal charge involving a controlled substance in these proceedings. It is concluded the applicant has failed to provide documents necessary for the adjudication of the application and to demonstrate that he is admissible to the United States as required pursuant to 8 C.F.R. § 245a.12(e). For this additional reason, application may not be approved.

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 [or other office] 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).

An alien applying 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.12(e). The applicant has failed to meet this burden. The applicant is, therefore, 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.