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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

MSC 03 248 63852

Office: LOS ANGELES

Date: **AUG 01 2008**

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 National Benefits Center. 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The director denied the application, finding that the applicant had been convicted of three misdemeanors.

On appeal, counsel for the applicant asserts the applicant's convictions under California Penal Code §§ 23152(A) and 23152(B) arose out of single scheme of criminal misconduct and should only be counted as one conviction.

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).

The record reflects the following criminal history for the applicant:

1. An arrest on November 20, 1989, in Santa Ana, California, for Assault and Battery under California Penal Code (PC) § 240/242;
2. A conviction on September 18, 1998, in Santa Ana, California, for Infliction of Corporal Injury on a Spouse or Cohabitant, under PC § 273.5;
3. A conviction on January 4, 2001, in Westminster, California, for one count of Driving Under the Influence (DUI) under VC § 23152(A); and,
4. A conviction on January 4, 2001, in Westminster, California, for one count of DUI—Blood Alcohol Level over 0.08 percent, under VC § 23152(B).

The applicant was sentenced to 10 days with credit for time served in the Orange County Jail for the PC § 273.5 domestic violence conviction.

He was sentenced to 23 days with credit for time served in the Orange County Jail for the VC § 23152(A) DUI conviction.

As to both the VC § 23152(A) and VC § 23152(B) convictions, the applicant was sentenced separately to completion of 176 hours of a state licensed drunk drivers program, an 18 month suspension of his driver's license, and enrollment in and completion of an 18 month Multiple Offender Program.

The issue in this proceeding is whether the applicant is ineligible for benefits under the LIFE Act because of his criminal convictions.

Under California law, convictions in violation of VC §§ 23152(A) and 23152(B), and under PC § 273(A) are all misdemeanors. Each conviction can result in a term of imprisonment of up to one year.

The regulation at 8 C.F.R. § 245a.1(o) defines “misdemeanor,” in relevant part, as a crime committed in the United States, punishable by imprisonment for a term of one year or less, regardless of the term actually served.

LIFE Act applicants are subject to the particular criminal provisions under the LIFE Act, separate and distinct from other provisions found throughout the Immigration and Nationality Act (INA). In the applicant’s case, he was convicted of three separate crimes, each punishable by up to one year imprisonment. For purposes of LIFE Act eligibility, the applicant has been convicted of three misdemeanors, regardless of the fact that two of them occurred on the same day, as a result of his driving under the influence of alcohol.

Counsel asserts that the applicant’s convictions under California Vehicle Code §§ 23152(A) and 23152(B) arose out of the same incident and so should only be counted as one conviction. In his brief in rebuttal to the director’s Notice of Intent to Deny (NOID) dated September 21, 2006, counsel cites to INA § 212(a)(2)(B) which provides that any alien is inadmissible if he or she is “convicted of 2 or more offenses *regardless* of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct.” Emphasis added. Counsel’s reference to this section of the INA does not support his assertion and fails to overcome the director’s basis for denial. INA § 212(a)(2)(B) states, in relevant part, that an alien is inadmissible *regardless* of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct. So, an individual convicted of two crimes that were part of a single scheme of criminal misconduct would be inadmissible under INA § 212(a)(2)(B).

Counsel erroneously refers to a section of the INA that is not applicable to the applicant in these proceedings. Section 237(a)(2)(A)(ii) states that any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, is deportable. In determining whether the applicant is eligible for LIFE Act, we look to § 1104 (c)(2)(D)(ii) of the LIFE Act, not to § 237(a)(2)(A)(ii) of the INA. These sections are distinguishable in several significant ways.

First, § 237(a)(2)(A)(ii), in determining a class of deportable aliens, only applies to aliens who have been admitted to the United States. The applicant in this case entered the United States without inspection and has not been admitted to the United States. He is therefore subject to the grounds of inadmissibility under § 212(a) of the Act, not the grounds of deportability under § 237(a).

Second, in addition to being subject to the grounds of inadmissibility, LIFE Act applicants are also subject to the criminal provisions in § 1104 (c)(2)(D)(ii) of the LIFE Act. While § 237(a)(2)(A)(ii) refers specifically to two or more convictions of crimes involving moral turpitude, § 1104 (c)(2)(D)(ii) of the LIFE Act, makes no such reference. An alien is ineligible for adjustment of status under the LIFE Act

for conviction of any three misdemeanors, regardless of whether either one or both is a crime involving moral turpitude.

Third, § 237(a)(2)(A)(ii) specifically includes the language “not arising out of a single scheme of criminal misconduct.” Section § 1104 (c)(2)(D)(ii) of the LIFE Act makes no such reference. An alien is ineligible for adjustment under the LIFE Act for conviction of any three misdemeanors, regardless of whether they arise out of a single scheme of criminal misconduct or not. Consequently, the AAO need not address the issues of whether the applicant’s three convictions constitute crimes involving moral turpitude, or whether the two DUI convictions arise out of a single scheme of criminal misconduct.

The fact that the applicant was convicted of two separate crimes that occurred on the same day does not mean that the applicant was only convicted of one crime. The dispositions submitted by the applicant indicate that he stands convicted of three separate crimes: 1) DUI, 2) DUI– Blood Alcohol Level over 0.08 percent, and 3) Infliction of Corporal Injury on a Spouse or Cohabitant, and is ineligible for benefits under the LIFE Act pursuant to the specific criminal provisions for LIFE Act applicants at Section § 1104 (c)(2)(D)(ii) of the LIFE Act. Consequently, the director's decision to deny the LIFE Act application will be affirmed.

The AAO notes that the applicant did not provide the final disposition for the November 20, 1989, assault and battery charge. In addition, the record contains evidence of a 1994 DUI conviction, but does not contain a final court disposition for that conviction. The record contains a Notice of Completion dated January 10, 1996, for a Drinking Driver Program licensed by the state of California. For a three month 1st Offender Program that the applicant completed on January 16, 1995. The record also contains a Notice of Completion Certificate for an 18 month Multiple Offender Program that the applicant completed on August 23, 2002.

Beyond the decision of the director, the application cannot be approved because the applicant has not furnished sufficient credible evidence to establish his entry into the United States before January 1, 1982; his continuous residence from January 1, 1982, through May 4, 1988; and, his continuous physical presence in the United States during the requisite period.

In support of his application, the applicant submitted numerous affidavits including a “Corroborative Affidavit” form signed by [REDACTED], a notarized letter from [REDACTED] and handwritten, unnotarized letter from [REDACTED]. He did not provide any contemporaneous evidence of residence in the United States during the duration of the requisite period. None of the affidavits indicated personal knowledge of the applicant’s entry to the United States prior to January 1, 1982. none of them provided sufficient details about the circumstances of the applicant’s continuous residence and physical presence in the United States. As such, these documents can be given minimal weight as evidence of the applicant’s residence in the United States during the requisite period.

The record contains other documents, including a letter dated March 7, 2001, from [REDACTED] asserting that he has known the applicant for the past 12 years. None of this evidence addresses the

applicant's qualifying residence or physical presence during the eligibility period in question, specifically from before January 1, 1982, through May 4, 1988.

The regulation at 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.” Preponderance of the evidence is 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). See *Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991).

Given the insufficiency in the evidence, the applicant has not met his burden of proof. The applicant has not established, by a preponderance of the evidence, that he entered the United States before January 1, 1982, resided in this country in an unlawful status continuously since that time through May 4, 1988, and maintained continuous physical presence in the United States during the period from November 6, 1986 through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). Thus, he 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.