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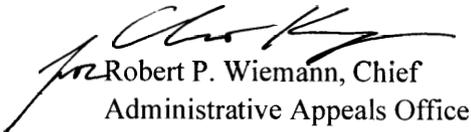
Applicant:

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. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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, 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 failed to submit sufficient evidence to establish residence in the United States in an unlawful status from January 1, 1982 through May 4, 1988. The district director further determined that the applicant had been convicted of a felony. 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 contends that the district director failed to address evidence submitted in response to the notice of intent to deny. Counsel argues that pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the applicant's successful completion of a diversion program renders him not convicted for federal immigration purposes.

An applicant is ineligible to adjust to permanent resident if he or she has been convicted of any felony or of three or more misdemeanors committed in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.11(d)(1).

The term "conviction" means, with respect to an alien, 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. Section 101(a)(48)(A) of the Immigration and Nationality Act (Act).

The first issue to be determined in this proceeding is whether the applicant is ineligible to adjust to permanent residence as a result of his criminal conviction. The record contains a five page certified report dated May 6, 2002 from the Municipal Court of Los Angeles-Van Nuys Judicial District Los Angeles County, California, which reflects the following information relating to the applicant's criminal history:

- An arrest on November 30, 1998 by Los Angeles Police Department and subsequent plea agreement for a deferred entry of judgment under section 1000 of the California Penal Code on January 25, 1999 in the Superior Court for the County of Los Angeles, State of California for a violation of section 11350(a), Possession of a Narcotic Controlled Substance, of the California Health and Safety Code. The applicant successfully completed his diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 of the California Penal Code on July 24, 2000 (Case Number [REDACTED])

In denying the Form I-485 LIFE Act application, the district director determined that the applicant's plea agreement equated to a felony criminal conviction. The district director concluded that the felony conviction rendered the applicant ineligible to adjust to permanent residence. However, the district director failed to determine whether the applicant remained convicted for immigration purposes in light of the subsequent state action purporting to erase the original determination of guilt. As the present case arises in the Ninth Circuit, the decision reached in *Lujan* is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).<sup>1</sup>

The Ninth Circuit Court of Appeals stated in *Lujan* that "if (a) person's crime was a first-time drug offense, involved only simple possession or its equivalent, and the offense has been expunged under a state statute, the expunged offense may not be used as a basis for deportation." *Lujan*, 222 F.3d at 738.

*Lujan* holds that the definition of "conviction" at section 101(a)(48) of the Act does not repeal the Federal First Offender Act (FFOA) or the rule 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. *Lujan*, 222 F.3d at 749.

The Ninth Circuit *Lujan* decision explained that:

The [FFOA] is a limited federal rehabilitation statute that permits first-time drug offenders who commit the least serious type of drug offense to avoid the drastic consequences which typically follow a finding of guilt in drug cases. The [FFOA] allows the court to sentence the defendant in a manner that prevents him from suffering *any* disability imposed by law on account of the finding of guilt. Under the [FFOA], the finding of guilt is expunged and no legal consequences may be imposed as a result of the defendant's having committed the offense. The [FFOA's] ameliorative provisions apply for *all* purposes. *Id.* at 735.

To qualify for first offender treatment under federal laws, an applicant must show that (1) he has been found guilty of simple possession of a controlled substance; (2) he has not, prior to the commission of the offense, been convicted of violating a federal or state law relating to controlled substances; (3) he has not previously been accorded first offender treatment under any law; and (4) the court has entered an order pursuant to a state rehabilitative statute under which the criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation. *Cardenas-Uriate v. INS*, 227 F.3d 1132, 1136 (9<sup>th</sup> Cir. 2000).

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<sup>1</sup> In cases arising outside the Ninth Circuit, a State expungement does not erase the conviction for immigration purposes, even if the alien could have been eligible for Federal First Offender Act (FFOA) treatment. See *Matter of Salazar-Regino*, *supra*; see also *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999) and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)

In *Garberding v. INS*, 30 F.3d 1187 (9<sup>th</sup> Cir. 1994), the Ninth Circuit rejected, on equal protection grounds, the rule that only expungements under exact state counterparts to the FFOA could be given effect in deportation proceedings. “[U]nder *Garberding*, persons who received the benefit of a state expungement law were *not* subject to deportation as long as they *could* have received the benefit of the [FFOA] if they had been prosecuted under federal law.” *Lujan*, 222 F.3d at 738 (citing *Garberding*, 30 F.3d at 1190).

*Lujan* further explained that rehabilitative laws included “vacatur” or “set-aside” laws -- where a formal judgment of conviction is entered after a finding of guilt, but then erased after the defendant has served a period of probation or imprisonment. In addition, rehabilitative laws included “deferred adjudication” laws -- where no formal judgment of conviction or guilt is entered. See *Lujan*, 222 F.3d at 735. The Ninth Circuit then re-emphasized that determining eligibility for FFOA relief was not based on whether the particular state law at issue utilized a *process* identical to that used under the federal government’s scheme, but rather by whether the petitioner would have been *eligible* for relief under the federal law, and in fact received relief under a state law. See *Lujan*, 222 F.3d at 738.

The rule set forth in *Lujan*, regarding first-time simple possession of a controlled substance offense, 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” under the Act. The Ninth Circuit continues to hold that “persons found guilty of a drug offense who could *not* have received the benefit of the [FFOA] [are] not entitled to receive favorable immigration treatment, even if they qualified for such treatment under state law.” *Lujan*, 222 F.3d at 738 (citing *Paredes-Urrestarazu v. INS*, 36 F.3d 801, 812 (9<sup>th</sup> Cir. 1994)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9<sup>th</sup> Cir. 2002), the Ninth Circuit further clarified that California Penal Code section 1203.4 provides a limited expungement even under state law, and that it is reasonable to conclude that, in general, a conviction expunged under that provision remains a conviction for purposes of federal law. *Ramirez-Castro*, 287 F.3d at 1175. Furthermore, the holding set forth in the Ninth Circuit case, *Garcia-Gonzales v. INS*, 344 F.2d 804 (9<sup>th</sup> Cir. 1965) remains applicable to expungement cases that do not fit the limited circumstances set forth in *Lujan*.

In deciding whether a criminal conviction expunged pursuant to section 1203.4 of the California Penal Code remained a “conviction” for immigration purposes, the Ninth Circuit in *Garcia-Gonzales* analyzed Congress’ intent in enacting section 241(a)(11) of the Act as in effect in 1965, 8 U.S.C. § 1251(a)(11). See *Garcia-Gonzales*, 344 F.2d at 806-7. Under former section 241(a)(11) of the Act, an alien in the United States was deportable if the alien:

at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of . . . any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange,

dispensing, giving away, importation or exportation of . . . heroin. 8 U.S.C. § 1251(a)(11)(1965).

The Ninth Circuit in *Garcia* stated that in enacting section 241 of the Act as in effect in 1965, “Congress intended to do its own defining of ‘conviction’ rather than leave the matter to variable state statutes.” *Id.* at 807 (citing *Arrellano-Flores v. Hoy*, 262 F.2d 667 (9<sup>th</sup> Cir. 1958)). The Ninth Circuit agreed that:

Congress did not intend that aliens convicted of narcotic violations should escape deportation because, as in California, the State affords a procedure authorizing a technical erasure of the conviction. Traffic in narcotics has been a continuing and serious Federal concern. Congress has progressively strengthened the deportation laws dealing with aliens involved in such traffic. . . . In the face of this clear national policy, I do not believe that the term “convicted” may be regarded as flexible enough to permit an alien to take advantage of a technical “expunge[ment]” which is the product of a state procedure wherein the merits of the conviction and its validity have no place . . . . I, therefore, regard it as immaterial for the purposes of § 241(a)(11) [of the Act] that the record of conviction has been cancelled by a state process such as is provided by § 1203.4 of the California Penal Code . . . . *Garcia-Gonzales*, 344 F.2d at 809 (quoting *Matter of A-F-*, 8 I&N Dec. 429, 445-46 (AG 1959)).

*Lujan* discussed *Matter of A -F-*, stating that the case “remained the rule for all drug offenses until 1970, when Congress adopted the Federal First Offender Act . . . a rehabilitation statute that applies exclusively to first-time drug offenders who are guilty only of simple possession.” *Lujan*, 222 F.3d at 735. Thus, while *Lujan* supercedes *Garcia* in limited circumstances, the general holding that expungements do not erase “convictions” for federal immigration purposes remains valid, even in the Ninth Circuit.

In the present case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant entered a plea agreement for a deferred entry of judgment under section 1000 of the California Penal Code on January 25, 1999 in the Superior Court for the County of Los Angeles, State of California for a violation of section 11350(a), Possession of a Narcotic Controlled Substance, of the California Health and Safety Code. The applicant successfully completed his diversion program and the court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 of the California Penal Code on July 24, 2000. The evidence in the record shows that he was not, prior to the commission of the offense, convicted of violating a federal or state law relating to controlled substances and that he was not previously accorded first offender treatment under any law.

The applicant has established that he is not “convicted” for immigration purposes. Consequently, the applicant is not ineligible to adjust to permanent residence pursuant to section

1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.11(d)(1). Therefore, the applicant must be considered to have overcome this particular basis of denial put forth by the district director.

An applicant for permanent resident status must also 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. Section 1104(c)(2)(B) of the LIFE Act and 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).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982 to May 4, 1988, the submission of any other relevant document including affidavits is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must: provide the applicant's address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant's duties; declare whether the information was taken from company records; and, identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The regulation at 8 C.F.R. § 245a.2(d)(3)(v) states that attestations by churches, unions, or other organizations to the applicant's residence by letter must: identify the applicant by name; be signed by an official (whose title is shown); show inclusive dates of membership; state the address where applicant resided during the membership period; include the seal of the organization impressed on the letter or the letterhead of the organization, if the organization has letterhead stationery; establish how the author knows the applicant; and, establish the origin of the information being attested to.

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.* at 80. 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, 431 (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.

The next issue to be determined in this proceeding is whether the applicant has submitted sufficient credible evidence to 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. Here, the submitted evidence is not relevant, probative, and credible.

The applicant made a claim to class membership in a legalization class-action lawsuit and as such, was permitted to file a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the Act, on or about July 20, 1990. At part #33 of the Form I-687 application where applicants were asked to list all residences in the United States since the date of their first entry, the applicant indicated that he resided at [REDACTED], in Van Nuys, California from February 1981 to October 1986. [REDACTED] in Van Nuys, California from October 1986 to January 1988 and [REDACTED] in Van Nuys, California from January 1988 to April 1990. At part #36 of the Form I-687 application where applicants were asked to list employment in the United States since first entry, the applicant listed employment as a self-employed laborer from February 1981 to June 1987 and construction for Europalc Inc. from June 1987 through the date the Form I-687 application was submitted.

On May 29, 2002, the applicant filed his Form I-485 LIFE Act application. The record contains documentation establishing that the applicant was detained by the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) for remaining in this country beyond his period of authorized stay on December 21, 1978. The record shows that the applicant was placed into removal proceedings and he was granted voluntary departure up to January 21, 1979. The record does not contain any evidence to demonstrate that the applicant complied with the grant of voluntary departure. Regardless, the applicant failed to submit any independent evidence in support of his claim of continuous residence in the United States since prior to January 1, 1982.

On March 29, 2004, the district director issued a notice of intent to deny to the applicant informing him of CIS’s intent to deny his application in part because he failed to submit any evidence of continuous unlawful residence in the United States from prior to January 1, 1982 through May 4, 1988. The applicant was granted thirty days to respond to the notice.

In response, the applicant submitted an affidavit that is dated May 4, 2004 and signed by [REDACTED]. [REDACTED] stated that he had known the applicant for over twenty years since he was sixteen years old. Nevertheless, [REDACTED] did not provide any specific and verifiable testimony, such as the exact date he first met the applicant, the circumstances under which they met, or the applicant's address of residence, that would tend to corroborate the applicant's claim of residence in this country since prior to January 1, 1982.

The applicant included an affidavit signed by [REDACTED] who indicated that he first met the applicant in 1978 while both were working in [REDACTED] in Arlington, Texas. Mr. Cenicerros noted that the applicant lived in Dallas, Texas from 1978 until he moved to Van Nuys, California in 1990. However, [REDACTED]'s testimony that the applicant and he worked together at [REDACTED] is in conflict with the applicant's testimony relating to his employment history as he failed to list this establishment as one of his employers at part #36 of the Form I-687 application. In addition, [REDACTED] testimony that the applicant lived in Dallas, Texas until 1990 before moving to Van Nuys, California directly contradicted the applicant's testimony that he lived at various addresses in Van Nuys from February 1981 through at least 1990 at part #33 of the Form I-687 application.

The applicant provided an affidavit that is signed by [REDACTED]. [REDACTED] stated that she had known the applicant since he was born. [REDACTED] claimed that the applicant worked for [REDACTED] in Arlington, Texas in 1978 and indicated that she possessed this knowledge because she worked across the street in the Rodeway Inn. However, [REDACTED]'s testimony that the applicant worked at [REDACTED] conflicts with the applicant's testimony at part #36 of the Form I-687 application relating to his employment history as he did not include this establishment in his listing of his employers.

The district director determined that the applicant failed to submit sufficient credible evidence demonstrating his residence in the United States in an unlawful status from January 1, 1982 through May 4, 1988, and, therefore, denied the Form I-485 LIFE Act application on June 7, 2004.

On appeal, counsel objects to the fact that the district director failed to specifically address the documents submitted by the applicant in response to the notice of intent to deny. Although the district director failed to provide an in-depth analysis of such affidavits, it is harmless error because the AAO conducts a de novo review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.12(f). The analysis and evaluation of each of these affidavits has been fully discussed in the preceding paragraphs.

Doubt cast on any aspect of the evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or

reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The absence of sufficiently detailed supporting documentation and the existence of conflicting testimony seriously undermine the credibility of the applicant's claim of residence in this country for the requisite period, as well as the credibility of the documents submitted in support of such claim. 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 has resided in the United States since prior to January 1, 1982 through 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.

Given the applicant's reliance upon documents with minimal or no 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 on this basis.

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