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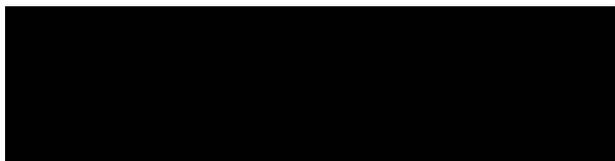
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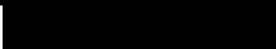
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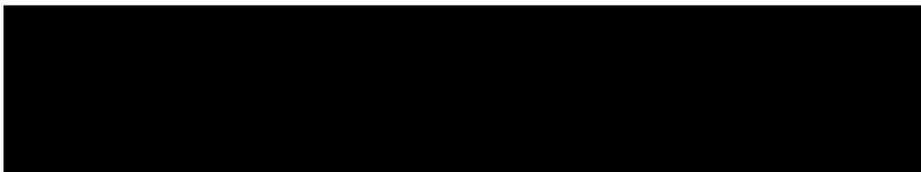
IN RE:

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits [or Records] Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.

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 sustained.

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 contended that the applicant's successful completion of a diversion program renders her not convicted for federal immigration purposes pursuant to the August 1, 2000, Ninth Circuit Court of Appeals decision, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Counsel asserted that the applicant did not possess any contemporaneous evidence to support her claim of residence in this country during the requisite period because she had been born in 1981 did not generate any documentation of her own due to her age. Counsel declared that the Citizenship and Immigration Services or CIS (formerly the Immigration and Naturalization Service or the Service) officer who conducted the interview of the applicant's mother assured her that the Social Security Earnings Records of the applicant's father and witness declarations would be sufficient to prove that the applicant herself resided in the United States since prior to January 1, 1982.

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 her criminal conviction. The record contains a three page docket report dated October 13, 2003 from the Superior Court of California, County of Orange and related documents that reflect the following information relating to the applicant's criminal history:

- A criminal complaint was filed against the applicant by the Orange County District Attorney on June 13, 2001 and subsequent plea agreement for a deferred entry of judgment under section 1000 of the California Penal Code on July 18, 2001 in the Superior Court of California, County of Orange, for a felony violation of section

11350(a), Possession of a Narcotic Controlled Substance, of the California Health and Safety Code. The applicant successfully completed her 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 February 13, 2003 (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).¹

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 or she has been found guilty of simple possession of a controlled substance; (2) he or she has not, prior to the commission of the offense, been convicted of violating a federal or state law relating

¹ 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)

to controlled substances; (3) he or she 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 (9th Cir. 2000).

In *Garberding v. INS*, 30 F.3d 1187 (9th 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 (9th Cir. 1994)). Moreover, in *Ramirez-Castro v. INS*, 287 F.3d 1172 (9th 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 (9th 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 (9th 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 she 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 July 18, 2001 in the Superior Court of California, County of Orange, for a violation of section 11350(a), Possession of a Narcotic Controlled Substance, of the California Health and Safety Code. The applicant successfully completed her 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 February 13, 2003. The evidence in the record shows that she was not, prior to the commission of the offense, convicted of

violating a federal or state law relating to controlled substances and that she was not previously accorded first offender treatment under any law.

The applicant has established that she 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)(v) states that attestations by churches, unions, or other organizations to the applicant's residence by letter must: identify applicant by name; be signed by an official (whose title is shown); show inclusive dates of membership; state the address where applicant resided during 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 information contained in the attestation.

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 examined in this proceeding is whether the applicant has submitted sufficient credible evidence to meet his or her burden of establishing continuous unlawful residence in the United States during the entire requisite period. Here, the applicant has met this burden.

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 Immigration and Nationality Act (Act), on April 3, 1990. Subsequently, on May 12, 2002, the applicant filed her Form I-485 LIFE Act application.

In support of her claim of continuous residence in the United States from prior to January 1, 1982, the applicant submitted affidavits, a letter of membership, and school transcripts.

On June 17, 2004, the district director issued a notice of intent to deny to the applicant informing her of CIS’s intent to deny her application because she failed to submit sufficient evidence of continuous unlawful residence in the United States from January 1, 1982 through May 4, 1988. The applicant was granted thirty days to respond to the notice.

In response, counsel argued that the CIS officer who conducted the applicant’s interview on July 21, 2003 refused to allow the applicant’s witnesses to testify. Counsel contended that the CIS officer’s actions violated the applicant’s due process rights to a meaningful opportunity to be heard. However, counsel failed to cite any relevant statute, regulation, or precedent decision that would support his position that an applicant has a right to have witnesses provide oral testimony at the time of their interview. Rather, the regulations at 8 C.F.R. § 245a.15 mandate the submission of documentary evidence including that containing the testimony of witnesses to establish an applicant’s eligibility with no provision allowing the oral testimony of a witness to be entered into the record. The record contains documentary evidence in support of the applicant’s claim of residence that has been submitted and incorporated into the record throughout the course of these proceedings including documents provided at the time of the applicant’s interview on July 21, 2003. Therefore, counsel’s contention that the applicant’s due process rights have been violated is without merit.

The district director determined that the applicant failed to submit sufficient credible evidence demonstrating her 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 August 5, 2004.

Counsel asserted that the applicant did possess little contemporaneous evidence to support her claim of residence in this country during the requisite period because she had been born in 1981 and did not generate any documentation of her own due to her age. Counsel declared that the CIS officer who conducted the interview of the applicant's mother assured her that the Social Security Earnings Records of the applicant's father and witness declarations would be sufficient to prove that the applicant herself resided in the United States since prior to January 1, 1982. Counsel provided three new affidavits in support of the applicant's claim of residence in the United States since prior to January 1, 1982.

A review of the record revealed that the applicant had previously submitted a separate Application for Suspension of Deportation or Special Rule Cancellation of Removal (Pursuant to section 203 of Public Law 105-100 (NACARA)) or NACARA application on September 1, 1999. At part #2 of the NACARA application where applicants were asked to provide information relating to their first entry into the United States, the applicant testified that she first entered this country on July 10, 1987. The record shows that the applicant signed the NACARA application thereby certifying under the penalty of perjury that the information contained in such application and evidence submitted with it was true and correct. The applicant's testimony on her NACARA application directly contradicted her claim that she continuously resided in the United States since prior to January 1, 1982 as put forth in her Form I-687 application, class-membership determination form, Form I-485 LIFE Act application, and supporting documents. This contradictory testimony seriously undermined the applicant's credibility as well as the credibility of her claim of continuous residence in the United States from prior to January 1, 1982 to May 4, 1988. By providing the contradictory testimony described above in filing the NACARA application, Form I-687 application, and Form I-485 LIFE Act application, the applicant appears to have sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact.

The AAO issued a notice to both the applicant and counsel on March 18, 2008 informing the parties that it was the AAO's intent to dismiss the applicant's appeal based upon the derogatory information cited above. Counsel and the applicant were granted fifteen days to provide substantial evidence to overcome, fully and persuasively, these findings.

In response, counsel submitted school transcripts that clearly demonstrate that the applicant attended school in this country well before the date that was listed as her date of entry into the United States on the NACARA application. Clearly, the finding that the applicant first entered this country on July 10, 1987 was in error. The statements of counsel regarding the difficulties that the applicant encountered in obtaining contemporaneous evidence to support her claim of residence in this country for the requisite period because of her young age have been considered. In this instance, the applicant submitted evidence, including affidavits, a letter, and contemporaneous documents, which tends to corroborate her claim of residence in the United States during the

requisite period. As stated in *Matter of E-M-*, when something is to be established by a *preponderance of evidence*, the proof submitted by the applicant has to establish only that the assertion or asserted claim is probably true. *Id.* 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 establishes by a preponderance of the evidence that she 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. Consequently, the applicant has overcome the basis of denial cited by the district director as well.

Accordingly, the applicant's appeal will be sustained. The district director shall continue the adjudication of the application for permanent resident status.

ORDER: The appeal is sustained.