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

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: MAY 23 2008

MSC 02 081 60551

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:

SELF-REPRESENTED

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, Los Angeles, California, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not demonstrated that he entered the United States prior to January 1, 1982, or that he was continuously physically present in the United States from November 6, 1986, to May 4, 1988. The director also determined that the applicant had been convicted of a felony and therefore, pursuant to 8 C.F.R. § 245a.18(a), was inadmissible to the United States.

On appeal, the applicant asserts that, because of his illegal status, he is unable to provide evidence other than affidavits to establish his entry and presence in the United States during the requisite period. The applicant further states that his felony charge was reduced to a misdemeanor. The applicant provides additional documentation in support of the appeal.

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. Section 1104(c)(2)(B) of the LIFE Act; 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 applicant 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 Citizenship and Immigration Services (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).

On an affidavit to determine class membership, which he signed under penalty of perjury on September 12, 1990, the applicant stated that he first arrived in the United States in September 1981, when he crossed the border without inspection. On his Form I-687, Application for Status as a Temporary

Resident, which he also signed under penalty of perjury on September 2, 1990, the applicant stated that he worked for [redacted] at [redacted] Rosamond, California, from September 1981 to October 1988, and was provided with room, board and a salary of $80 per month. The applicant denied affiliation with any church, club or other organization in block 34 of the Form I-687 application.

In an attempt to establish continuous unlawful residence since before January 1, 1982, through May 4, 1988, the applicant submitted the following evidence:

1. A September 1, 1990, sworn statement from [redacted], in which she certified that the applicant worked in her orchards from September 1981 through October 1988, taking care of apple trees. Ms. [redacted] stated that the orchards were located in Tehachapi, California, and that she lived at [redacted] in Rosamond. Ms. [redacted] stated that she provided the applicant with room and board and cash of $80 per month. Ms. [redacted] did not indicate whether the information regarding the applicant's employment was taken from official company records as required by 8 C.F.R. § 245a.2(d)(3)(i), or how she dated the applicant's employment with her. The applicant provided no documentation such as pay stubs, pay vouchers or similar documentation to corroborate his employment with Ms. Salas.

2. A September 12, 1990, affidavit from [redacted], in which he certified that the applicant had been living in the United States since September 1981. The affiant stated that they "have been friends since and at present we live and work in the same place." The affiant did not state the circumstances surrounding his initial acquaintance with the applicant or how he dated their relationship.

3. A copy of an April 27, 2000, affidavit from [redacted], who stated that he worked in cement finishing, and that he had been a friend and co-worker of the applicant since 1986. The affiant did not state the name of his employer; however, we note that the applicant stated that he worked for [redacted] tending orchards from 1981 through 1988. Further, [redacted] stated that, to his knowledge, the applicant had lived in Lancaster, California from 1986 to April 2000. However, the applicant claimed to have resided in Rosamond, California from September 1981 to October 1988. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

4. A September 2, 1990, affidavit from [redacted], in which he certified that he was a friend of the applicant, and that the applicant left the United States on November 11, 1987, and returned on December 18, 1987. The affiant listed his address as [redacted] in Rosamond, California, an address also claimed by the applicant and [redacted]

5. An August 31, 1990, letter from [redacted], in which he stated that he has known the applicant since October 1988 and has personal knowledge of his presence in the United States since April 1988. Mr. [redacted] stated that the applicant has worked at Rainbow Ridge Ranch since October 1988, but did not indicate the basis of his "personal knowledge" of the applicant's residence in the United States in April 1988, prior to their meeting in October 1988.

In response to the director's Notice of Intent to Deny (NOID) issued on December 22, 2005, the applicant submitted a copy of the 1990 statement from [redacted]s, certifying his employment from September 1981 to October 1988, and a copy of the 1990 letter from [redacted]

On appeal, the applicant submits the following additional documentation:

6. A copy of a January 19, 2006, affidavit from [redacted], in which he states that he has known the applicant since September 1981 through fellowship at their church.

7. A copy of a January 19, 2006, affidavit from [redacted], in which he states that he has known the applicant since April 1985 through fellowship at their church. The affiant did not identify the church of which he was a member.

8. A copy of a January 19, 2006, affidavit from [redacted], in which she states that she has known the applicant since June 1986 through fellowship at church. However, the affiant did not state the name of the church in which she and the applicant were members.

9. A copy of an October 12, 1986, service receipt from Hi-Desert Auto Parts & Service in Rosamond, California, showing the applicant as the customer.

10. A copy of a January 19, 2006, affidavit from [redacted], in which he states that he has known the applicant since May 1987 through fellowship at their church. The affiant did not identify the church of which he was a member.

11. A copy of a February 20, 1988, service receipt from Hi-Desert Auto & Truck Salvage, showing the applicant as the customer.

Although each of the affiants indicated they knew the applicant through fellowship at their church, none identified the church that they attended. Further, on his Form I-687 application, the applicant denied any affiliation with a church or other organization during the qualifying period. The applicant submitted no competent objective evidence to resolve this inconsistency. *Id.*

Citing *Matter of E-M-*, the director concluded that the applicant had failed to establish by competent evidence that he had entered the United States prior to January 1, 1982. However, the director misread the court's finding in *Matter of E-M-* and incorrectly applied the provisions of 8 C.F.R. § 245a.16. Neither requires the applicant to submit governmental or non-governmental issued documentation to establish initial entry into the United States. Pursuant to 8 C.F.R. § 245a.16, such documentation constitutes only one type of acceptable documentation to aid the applicant in establishing continuous residence and presence in the United States.

However, given the unresolved inconsistencies in the record and the minimum contemporaneous documentation, it is concluded that the applicant has failed to establish by a preponderance of the evidence that he entered the United States prior to January 1, 1982, and maintained continuous residence in the United States for the required period.

The second issue on appeal is whether the applicant is inadmissible into the United States because he has been convicted of a felony.

The applicant's criminal record history reveals that on November 8, 1993, the applicant was convicted in the Superior Court of California, County of Los Angeles, of the felony offense of possession of marijuana for sale, in violation of California Health and Safety Code section 11359. Case no. [redacted]. The applicant was sentenced to 90 days in the county jail and placed on five years probation.

On June 28, 2005, the court entered an order setting aside the conviction pursuant to California Penal Code section 1203.4. State rehabilitative actions, however, that do not vacate a conviction on the merits are of no effect in determining whether an alien is considered convicted for immigration purposes. Congress has not provided any exception for aliens who have been accorded rehabilitative treatment under state law *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

The regulation at 8 C.F.R. § 245a.18 provides:

> (a) *Ineligible aliens*. (1) An alien who has been convicted of a felony or of three or [more] misdemeanors committed in the United States is ineligible for adjustment to LPR status under this Subpart B.

On appeal, the applicant states that his offense was reduced to a misdemeanor. However, we note that the order does not include the order reducing the offense to a misdemeanor. Accordingly, the record reflects that the applicant has been convicted of a felony and is therefore ineligible for adjustment of status under the LIFE Act.

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 applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

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