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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEW YORK Date: OCT 30 2008

MSC 02 036 65836

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits 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.

for 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 Director, New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988.

On appeal, counsel asserts that the applicant did submit a response to the Notice of Intent to Deny, and therefore, the application should not have been denied. Counsel asserts that the applicant explained at the time of her interview that household bills were not in her name as she resided with a relative during her first few years in the United States.

The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. Section 1104(c)(2)(B)(i) 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 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.

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. *See* 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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

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

- Two envelopes postmarked in 1981 and 1986 addressed to the applicant at [redacted] Brooklyn, New York.
- An envelope postmarked in 1987 and addressed to the applicant at [redacted] Ridgewood, New York.
- A letter dated December 7, 1990, from [redacted] of New York University Bellevue Medical Center, who indicated that the applicant was treated on November 10, 1981 and June 12, 1982.
- A receipt dated October 6, 1981 from Trim Corporation of American in New York City.
- A notarized affidavit from [redacted] of Ridgewood, New Jersey, who attested to the applicant's absence from the United States from December 15, 1987 to January 25, 1988. The affiant asserted that he took the applicant to the airport.
  A letter dated March 21, 1991, from [redacted] of Basilica of Our Lady of Perpetual Help in Brooklyn, New York, who indicated that the applicant was a member of the church from December 1981 to May 1990.
- A letter dated January 16, 2004, from [redacted] of St. Peter & Paul's Church in Brooklyn, New York, who indicated that the applicant was a registered member of the church from 1982 to 1986.
- Notarized affidavits from a brother, [redacted], owner of L&M Grocery Store in Brooklyn, New York, who indicated that the applicant resided with him at [redacted] Brooklyn, New York from May 1981 to June 1987 and was in his employ from July 1981 to May 1987 as a cashier.
- A notarized affidavit from [redacted], who indicated that the applicant resided with her at [redacted], Ridgewood, New Jersey from June 1987 to June 1990.
- Notarized affidavits from [redacted] of Goyo Grocery in Brooklyn, New York, who indicated that the applicant had been employed as a cashier since May 1987 to May 1992.
- Notarized affidavits from [redacted] of Brooklyn, New York, and [redacted] of Ridgewood, New York, who attested to the applicant's residences from May 1981 to June 1987 in Brooklyn, New York and from June 1987 to July 1990 in Ridgewood, New York. [redacted] asserted that he met the applicant while visiting a friend and has remained good friends with the applicant since that time. Ms. [redacted] indicated that she met the applicant "at the neighborhood were [sic] we used to live long ago."
- A letter dated November 16, 1990, from a representative of Dominicana Airlines, who asserted that the applicant departed from John F. Kennedy (JFK) International Airport on December 15, 1987 via Dominicana Airlines on flight [redacted]
- Notarized affidavits from [redacted] of New Brunswick, New Jersey, and Luz [redacted] of Princeton, New Jersey who attested to the applicant's residences from May 1981 to June 1987 in Brooklyn, New York and from June 1987 to July 1990 in Ridgewood, New York. Mr. [redacted] asserted that he met the applicant at the grocery store where she worked in 1981. Ms. [redacted] asserted, "since I met [the applicant] in 1982 we have shared a good relationship."

- A notarized affidavit from [redacted], of Jersey City, New Jersey, who attested to the applicant's residences from May 1981 to June 1987 in Brooklyn, New York and from June 1987 to July 1990 in Ridgewood, New York. The affiant asserted that he met the applicant in 1981 at a friend's home.
- A letter from [redacted], administrator of Clinica Central in Jackson Heights, New York, who certified that the applicant had attended the clinic on July 17, 1984, June 29, 1985 and November 18, 1986.
- A letter from the president of Aeremundo Travel in Ridgewood, New York, who indicated that its agency sold a pre-paid ticket to the applicant to travel from San Juan, Puerto Rico to JFK airport on January 25, 1988 via Eastern Airlines.
- A letter dated September 21, 1992, from the manager of Franklin Travel Agency, who indicated that the applicant had purchased an airline ticket to travel from JFK airport to Dominican Republic on December 15, 1987.

On April 14, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted appeared to be neither credible nor amenable to verification and that no evidence was submitted demonstrating that the affiants had direct personal knowledge of the events attested to in their respective affidavits. The applicant was also advised that she failed to submit evidence of her entry into Puerto Rico on May 12, 1981. The applicant was granted 30 days in which to submit a response.

In denying the application, the director noted that the applicant had not submitted any additional evidence for consideration. The director concluded that the applicant had failed to meet her burden of proof needed to qualify for adjustment of status under the LIFE Act.

On appeal, counsel asserts that additional evidence was submitted within the 30-day period of the Notice of Intent to Deny. The record, however, reflects that counsel's response to the Notice of Intent to Deny was received at the New York Office on June 28, 2007; five days after the director had issued the denial notice. Nevertheless, counsel's response with be considered on appeal.

Counsel submitted an **affidavit from a nephew,** [redacted], of Ridgewood, New York, who indicated that when the applicant arrived in the United States in May 1981, she resided at his father's residence at 760 [redacted], Brooklyn, New York. The affiant asserted, "[m]y father moved back to my country and my aunt need a verification of the above fact so I am please to verify and cooperate with a person that is a very hard working and well behave person."

Counsel also submitted an affidavit from [redacted] of Ridgewood, New York, who indicated that she was a neighbor of [redacted] and the applicant, and attested to the applicant's residence at [redacted] apartment from June 1987 to July 1990 at [redacted], Ridgewood, New York.

The statements issued by counsel have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and *continuously* resided since that date through May 4, 1988.

[redacted] and [redacted] all attested to the applicant's residences since 1981, but none of the affiants provide any details regarding the nature of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence. The absence of

sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of her claim.

The employment affidavits from [redacted] and [redacted] failed to 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 as required under 8 C.F.R. § 245a.2(d)(3)(i).

The letter from [redacted] raises questions to its authenticity as the applicant claimed on her Form G-325A, Biographic Information, that she was employed at this entity from 1989.

The letters from [redacted] and [redacted] have little evidentiary weight or probative value as they do not conform to the basic requirements specified in 8 C.F.R. § 245a.2 (d) (3) (v). Most importantly, the affiants do not explain the origin of the information to which they attest. Furthermore, the applicant indicated at item 35 on her Form I-687 application that she was not affiliated with any religious organization during the requisite period.

Doubt cast on any aspect of an applicant's proof 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. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 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 credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met her burden of proof. The applicant has not established, by a preponderance of the evidence, that she entered the United States before January 1, 1982 and resided in this country in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). Given this, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C); 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1).

"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 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).

The record contains an FBI report dated February 18, 2004, which reveals that on November 27, 1995, the applicant was arrested by the New York Police Department for promoting gambling in the 2nd degree and possession of gambling records in the 1st degree. The final outcome, however, is unknown as the court disposition was not made available to Citizenship and Immigration Services.

The applicant did submit Certificates of Disposition from Criminal Court of the City of New York, which revealed the following:

1. On April 17, 1998, the applicant was arrested and charged with promoting gambling and possession of gambling records. On April 27, 1998, the applicant was convicted of disorderly conduct, a violation of PL section 240.20. The applicant was sentenced to serve 15 days in jail and ordered to pay a fine. Case no. [redacted].
2. On January 12, 1999, the applicant was arrested and charged with promoting gambling and possession of gambling records. On February 3, 1999, the applicant was convicted of disorderly conduct, a violation of PL section 240.20. The applicant was sentenced to serve ten days in jail and ordered to pay a fine. Case no. [redacted]
3. On September 7, 1999, the applicant was arrested and charged with promoting gambling and possession of gambling records. On October 6, 1999, the applicant was convicted of disorderly conduct, a violation of PL section 240.20. The applicant was sentenced to serve ten days in jail and ordered to pay a fine. Case no. [redacted]

Federal immigration laws should be applied uniformly, without regard to the nuances of state law. See *Ye v. INS*, 214 F.3d 1128, 1132 (9th Cir. 2000); *Burr v. INS*, 350 F.2d 87, 90 (9th Cir. 1965). Thus, whether a particular offense under state law constitutes a "misdemeanor" for immigration purposes is strictly a matter of federal law. See *Franklin v. INS*, 72 F.3d 571 (8th Cir. 1995); *Cabral v. INS*, 15 F.3d 193, 196 n.5 (1st Cir. 1994). While we must look to relevant state law in order to determine whether the statutory elements of a specific offense satisfy the regulatory definition of "misdemeanor," the legal nomenclature employed by a particular state to classify an offense or the consequences a state chooses to place on an offense in its own courts under its own laws does not control the consequences given to the offense in a federal immigration proceeding. See *Yazdchi v. INS*, 878 F.2d 166, 167 (5th Cir. 1989); *Babouris v. Esperdy*, 269 F.2d 621, 623 (2d Cir. 1959); *United States v. Flores-Rodriguez*, 237 F.2d 405, 409 (2d Cir. 1956).

The fact that New York's legal taxonomy classifies the applicant's offense as a "violation" rather than a "crime," and precludes the offense from giving rise to any criminal disabilities in New York, is simply not relevant to the question of whether the offense qualifies as a "misdemeanor" for immigration purposes. As cited above, for immigration purposes, a misdemeanor is any offense that is punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if any. It is also noted that offenses that are punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. Section 10.003 of New York State Penal Law defines a violation as an offense for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed. In this case, the applicant received a sentence of over five days for each conviction. Therefore, the AAO concludes that the applicant's convictions for disorderly conduct qualifies as a "misdemeanor" as defined for immigration purposes in 8 C.F.R. § 244.1.

The applicant is ineligible for the benefit being sought due to her three misdemeanor convictions. 8 C.F.R. §§ 245a.11(d)(1) and 245a.18(a)(1). Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal.

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