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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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OCT 23 2009

FILE: [redacted] Office: LOS ANGELES Date:
MSC 02 001 63292

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).

IN 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Director, Los Angeles, California, 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 he had continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988. The director also denied the application because the applicant failed to submit the requested court documentation.

On appeal, the applicant asserts that the denial failed to apply the correct preponderance of the evidence standard. The applicant asserts that the denial is contrary to the terms of the law and is an abuse of discretion. The applicant put forth a request for a copy of the record of proceedings (ROP) and indicated that a brief and/or evidence would be submitted to the AAO within 30 days after the receipt of his ROP request.

A copy of the material contained in his record was released to the applicant on May 18, 2009. However, to date, no additional evidence has been presented by the applicant.

An applicant for permanent resident status under section 1104 of the LIFE Act 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 and 8 C.F.R. § 245a.11(b).

The applicant 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 under the provisions of section 212(a) of the Immigration and Nationality Act (Act), 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.

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).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The first issue to be addressed is the applicant's criminal history.

The record contains court documentation from the Orange County Municipal Court in California, which reflects that on June 12, 1997, the applicant was arrested for driving under the influence, a violation of section 23152(a) VC, and driving with .08 percent or more alcohol in the blood, a violation of section 23152(b) VC. On July 3, 1997, the applicant was convicted of violating section 23152(a) VC, a misdemeanor. The applicant was ordered to pay a fine and placed on probation for three years. The remaining charge was stayed pursuant to section 654 PC. [redacted]

The FBI report dated September 1, 2005, reflects that on October 10, 1991, the applicant was arrested under a bench warrant by the Santa Ana Police Department in California for receiving known stolen property, a violation of section 496 PC.

On September 4, 2006, a Form I-72 was issued requesting the applicant to submit the police reports and certified court dispositions for all arrests. In response, the applicant submitted:

- Court documentation from Orange County Superior Court, indicating that the applicant had violated Municipal Code 9.37.030, on December 7, 1990 in [redacted] The documentation also indicated that the records had been destroyed in accordance with Government Code section 68152.
- A booking report from the Orange County Jail indicating that on October 9, 1991, the applicant was arrested under bench warrant by the Garden Grove Police Department for willful violation of written promise to appear, a violation of section 853.7 PC, and for violating Municipal Code OR9.37.030, both misdemeanors.
- A letter dated November 4, 2006, from the City of Garden Grove Police Department indicating that all records prior to 1997 had been purged pursuant to City Resolution 5853-79.
- An Orange County Sheriff Booking printout dated December 4, 2006, indicating that on October 9, 1991, the applicant was booked for violating: 1) Penal Code 853.7 PC, and Municipal Code OR9.37.030 in [redacted] and 2) Penal Codes 496 and 853.7, both misdemeanors in [redacted] The printout indicated that on October 18, 1991, the applicant was sentenced to serve 3 days in jail in [redacted] and 15 days in jail in [redacted].

The director, in issuing his Notice of Intent to Deny on February 13, 1997, advised the applicant that if court records have been destroyed, the applicant must contact the California Department of Justice in order to obtain the records. Counsel, in response, asserted, in pertinent part:

> On February 23, 2007, the California Department of Justice issued a letter and a copy of their records on Applicant. The record shows that the Applicant was arrested on October 9, 1991 under PC 496, but there is no record of the disposition. Thus, the Applicant has exhausted all sources for any and all record of alleged criminal activity, and he should not be denied on that basis.

Counsel, however, did not provide the letter from the California Department of Justice. The assertion of counsel does not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's failure to present the requested documentation greatly reduces the violability of his contention that no final disposition was rendered in these offenses.

The applicant has failed to establish he is admissible due to his failure to provide the requested documentation for the arrest on October 10, 1991, necessary for the adjudication of the application. Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

The second issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he 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:

- An earnings statement from S.P. West Construction, Inc. dated December 24, 1987.
- A letter dated May 1987, from [redacted] Up in Oranges, California, who indicated that the applicant was in his employ from November 1981 to December 1987. The affiant indicated that the applicant received his wages in cash as he did not have a social security number and, therefore, there is no record of payment.
- Envelopes postmarked October 21, 1986, March 2, 1987 and August 3, 1987.
- An affidavit from [redacted] who indicated that the applicant resided in his home at [redacted] from June 1981 to May 1986.
- Affidavits from [redacted] and [redacted] who indicated that they met the applicant at a family party and attested to the applicant's residence in Riverside, California since September 1981.
- An affidavit from [redacted] who indicated that he met the applicant at a park and attested to the applicant's residence in Orange County, California since September 1981.
- An affidavit from [redacted] who indicated that he met the applicant at a Christmas party and attested to the applicant's residence in Orange County, California since December 1981.
- A photocopied letter dated August 1, 1995, from Father [redacted], associate pastor of La Purisima Catholic Church in Orange, California, who indicated church records reflect that the applicant has been attending on a regular basis since 1981.

On February 13, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted did not contain sufficient information and corroborative documents and, therefore, lacked probative value. Counsel, in response, submitted an additional affidavit from [redacted] who reaffirmed the applicant's employment from 1981 to 1987. Counsel also submitted an unsigned affidavit from [redacted]

The U.S. Citizenship and Immigration Services (USCIS) has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E--M--*, *supra*. In ascertaining the evidentiary weight of such affidavits, USCIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--*, *supra*, the affidavits should be analyzed to determine if the affidavits upon which the claim relies are consistent both internally and with the other evidence of record, plausible, credible, and if the affiant sets forth the basis of his knowledge for the testimony provided. The statements issued by the applicant have been considered. However, the documents discussed above do not support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988.

The employment letters from [redacted] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulation, the affiant also 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.

The affidavit from [redacted] has no probative value as it was not signed by the affiant. The letter from [redacted] has little evidentiary weight or probative value as it does not conform to the basic requirements specified in 8 C.F.R. § 245a.2(d)(3)(v).

While the application should not be denied solely because the applicant has only submitted affidavits to establish continuous residence in the United States for the duration of the requisite period, the submission of affidavits alone will not always be sufficient to support the applicant's claim. The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Casting doubt to the applicant's claim that he resided in the United States continuously during the entire requisite period is the fact that all of the affiants fail to indicate that they have direct personal knowledge of the applicant's continuous residence in the United States. Upon review, considered individually and within the totality of the evidence, the AAO determines that the affidavits and letters mentioned above do not establish by a preponderance of the evidence that the applicant resided continuously and was physically present in the United States during the requisite period.

The applicant has not established, by a preponderance of the evidence, that he 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 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