

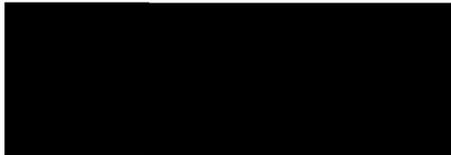
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

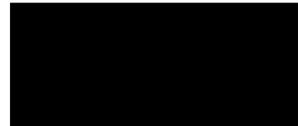
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L1

DATE: JAN 09 2012 Office: LOS ANGELES

FILE:



IN RE: Applicant:



APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) January 23, 2004, and *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) February 17, 2004 (CSS/Newman Settlement Agreements), was denied by the Director, Los Angeles. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant filed a Form I-687 Application for Temporary Resident Status on January 3, 2006. On August 21, 2006, the director denied the application noting that the applicant failed to appear for a scheduled interview. Thus, the director indicated that the application was abandoned.

On September 29, 2010, U.S. Citizenship and Immigration Services (USCIS) informed the applicant that, pursuant to a recent court order, applications for temporary resident status may not be denied based on abandonment.¹ The applicant was informed that he was entitled to file an appeal with the AAO which must be adjudicated on the merits.

On appeal, the applicant states that he did not receive an interview notice.

On September 6, 2011, the AAO issued a notice of intent to deny (NOID) informing the applicant of the deficiencies in the record and providing him with an opportunity to respond. On September 26, 2011, the AAO received the applicant's response to the AAO's NOID. In response to the AAO's NOID, the applicant submits two court dispositions and copies of documents previously submitted into the record.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO found that that the director's basis for denial of the Form I-687 was in error. However, the AAO identified alternative grounds for denial of the application. Specifically, the AAO noted that the applicant failed to submit sufficient evidence in support of his application. Further, the applicant was requested to provide full criminal dispositions for arrests in 1986 and 1999, respectively. The AAO has reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance, and probative value of the evidence.

An applicant for temporary 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 the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since

¹ On December 14, 2009, the United States District Court for the Eastern District of California ruled that United States Citizenship and Immigration Services (USCIS) may not apply its abandonment regulation, 8 C.F.R. § 103.2(b)(13), in adjudicating legalization applications filed by CSS class members. *See, CSS v. Michael Chertoff*, Case 2:86-cv-01343-LKK-JFM.

November 6, 1986. Section 245(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the [REDACTED] Agreements, the term “until the date of filing” in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10. The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 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.2(d)(5). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and 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).

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, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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 issue in this proceeding is whether the applicant has established that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time.

In an attempt to establish continuous unlawful residence since before January 1, 1982 through the end of the relevant period, the applicant provided witness statements from [REDACTED] [REDACTED]

The applicant also provided an employment verification letter signed by [REDACTED] dated March 15, 1990 and notarized on April 26, 1990. [REDACTED] states that the applicant is also known as [REDACTED]. The letter states that the applicant worked for [REDACTED] as a painter "on a self-employed basis" from "November 1984 until the present time." The letter states that the applicant worked at least once every month during this period of time. The record contains a second employment verification letter on [REDACTED] letterhead signed by [REDACTED] on December 21, 1989. The letter states that Pedro Manzo worked as a painter's helper from September 30, 1981 to October 27, 1984.

First, the AAO finds that the applicant has not established that he used the assumed name or alias of Pedro Manzo. The regulation at 8 C.F.R. § 245a.2(d) states in pertinent part that:

(2) *Assumed names* – (i) *General*. In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that the applicant was in fact the person who used that name.... The assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirements of this paragraph documentation must be submitted to prove the common identity, i.e., that the assumed name was in fact used by the applicant.

(ii) *Proof of common identity*. The most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint or detailed physical description. Other evidence which will be considered are affidavits(s) by a person or persons other than the applicant, made under oath, which identify the affiant by name and address, state the affiant's relationship to the applicant and the basis of the affiant's knowledge of the applicant's use of the assumed name. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to affiant under the assumed name in question will carry greater weight.

The documents which the applicant submits in the name of [REDACTED] fail to establish this name as an alias or an assumed name because they do not comply with the above cited regulation. For instance, the applicant has not submitted any documents issued in the assumed name which identify the applicant by photograph, fingerprint or detailed physical description. Further, although [REDACTED] asserts that he has knowledge of the applicant's use of the assumed name, the witness has not stated the basis of his knowledge of the applicant's use of the assumed name. For these reasons, the applicant has failed to establish that he used the name [REDACTED] as an assumed name or alias, and any documents in the name will be given no weight.

² At the time of his interview on December 12, 2003, the applicant stated that he had worked under the name of [REDACTED] which is his cousin's name.

Second, the letters fail to meet certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether USCIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The letters submitted do not include much of the required information and can only be accorded minimal weight as evidence of the applicant's residence in the United States for the duration of the requisite period.

The witness statements of [REDACTED] and [REDACTED] all contain statements that the affiants have known the applicant for years and that attest to the applicant being physically present in the United States during the required period. These statements fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with the applicant, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged.

The record also contains receipts dated 1980 and 1986, paystubs for pay periods ending July 26, 1986; November 8, 1986; August 2, 1986; September 5, 1986; and September 20, 1986. The record also contains tax returns for 1986 and Internal Revenue Service (IRS) letters dated May 25, 1987, September 1, 1987, September 3, 1987, December 28, 1987, and February 1, 1988. This is some evidence that the applicant was present in the United States during those dates. However, the 1980 receipt is inconsistent with the applicant's statement in a CSS class member worksheet signed by him on May 4, 1990 stating that he first entered the United States on September 12, 1981. In addition, in the IRS letters dated May 25, 1987 and September 1, 1987, the applicant lists addresses in [REDACTED]. The applicant failed to list these residence addresses in the instant Form I-687 application and in the initial Form I-687 application filed in 1990 to establish his CSS class membership.

The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies in the record regarding the date of the applicant's initial entry into the United States, and the dates when the applicant resided at particular locations in the United States are material to the applicant's claim in that they have a direct

bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. 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. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

An additional issue is whether the applicant has met his burden of establishing that he is otherwise admissible to the United States, and that he does not have disqualifying criminal convictions that render him ineligible to adjust to temporary resident status.

An alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for temporary resident status. 8 C.F.R. § 245a.2(c)(1).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except 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 such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

"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 such alien 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 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 Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

In addition, an alien is inadmissible if he has been convicted of a crime involving moral turpitude (CIMT) (other than a purely political offense), or if he admits having committed such crime, or if he admits committing an act which constitutes the essential elements of such crime. Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act).

The most commonly accepted definition of a crime involving moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *Jordan v. De George*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951).

Further, an alien is inadmissible if he has been convicted of, or admits having committed, or admits committing acts which constitute the essential elements of a violation of (or a conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 Title 21). Section 212(a)(2)(A)(i)(II) of the Act.

The record reflects the following criminal history:

- On June 17, 1986 the applicant was arrested by the Norwalk Sheriff's Office and charged with *Inflicting Injury Upon a Child* (██████████)
- On March 8, 1999 the applicant was charged with a violation of Section 11350(a) of the California Health and Safety Codes *Possession Narcotic Controlled Substance* (██████████) ██████████ On May 7, 1999, the applicant pleaded guilty to the charge, a felony. Also on that date the court deferred entry of judgment for 18 months and ordered that the applicant enroll in a narcotic treatment program. The court terminated the deferred entry of judgment and dismissed the case pursuant to section 1000.3 of the California Penal Code on November 7, 2000 (██████████ Municipal Court of Lynwood Courthouse Judicial District, County of Los Angeles).

As the present case arises in the Ninth Circuit, the decision reached in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) is the controlling precedent. *Matter of Salazar-Regino*, 23 I&N Dec. 223, 227 (BIA 2002).³

³ 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). The AAO notes that the Ninth Circuit recently overruled its decision in *Lujan-Armendariz*, in the case of *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011), finding that the constitutional guarantee of equal protection, for immigration purposes, did not require treating an expunged state conviction of a drug crime the same as a federal drug conviction that had been expunged under the Federal First Offender Act (FFOA). However, the Ninth Circuit decided to apply the decision in *Nunez-Reyes* only prospectively: for those aliens convicted before July 14, 2011 (the publication date of the decision), *Lujan-Armendariz* applies; for those aliens convicted after July 14, 2011, *Lujan-Armendariz* is

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 (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

overruled. Because the applicant was convicted before July 14, 2011, the rule announced by the Ninth Circuit in *Lujan-Armendariz* applies in this case.

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.

In the present case, the applicant has established that he would have qualified for treatment under the FFOA. The applicant pleaded guilty to simple possession of a controlled substance and the court deferred entry of judgment. 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 November 7, 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.

Therefore the applicant has established that he has not been convicted of possession of a controlled substance, for immigration purposes.

However, as stated above, there is evidence in the record that the applicant was arrested by the Sheriff’s Office Norwalk, Los Angeles, California on June 17, 1986, and charged with *Inflicting Injury Upon Child* [REDACTED].⁴ The applicant did not submit a disposition for this arrest. In response to the NOID, the applicant submitted a copy of a May 27, 2004 letter from the District Attorney’s office of Los Angeles City stating that no criminal charges were found. However, the applicant has not provided court or police records to show the factual circumstances of his arrest.

California Penal Code § 273d states, in pertinent part, the following:

§ 273d Corporal punishment or injury of child; felony; punishment; enhancement for prior conviction; condition of probation.

(a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony. . . .

California courts have also held that child abuse under section 273d of the California Penal Code categorically involves moral turpitude. *See e.g. People v. Brooks*, 3 Cal. App. 4th 669, 671-72 (Cal. App. 3rd Dist. 1992). The Ninth Circuit Court of Appeals also held in *Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969), that a conviction under California Penal Code Section 5 273d is a crime involving moral turpitude. The court in *Guerrero de Nodahl* stated that "we find that inflicting 'cruel or inhuman corporal punishment or injury' upon a child is so offensive to American ethics that that the fact that it was done purposely or willingly (the California definition of 'willful')

⁴ The applicant’s arrest on June 17, 1986 is some evidence in support of his residence in the United States for some part of 1986.

ends debate on whether moral turpitude was involved." *Id.* at 1406-07. As the applicant has not submitted a disposition for this arrest, the AAO is unable to determine if he has been convicted of a felony under California Penal Code § 273d, or of a CIMT. Declarations by an applicant regarding his criminal record are subject to verification of facts by U.S. Citizenship and Immigration Services (USCIS). The applicant must agree to fully cooperate in the verification process. Failure to assist USCIS in verifying information necessary for the adjudication of the application may result in a denial of the application. 8 C.F.R. § 245a.2(k)(5). The applicant failed to submit evidence to establish the criminal dispositions for this arrest, as requested. This is another basis to deny the application.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. In addition, the applicant has failed to establish by a preponderance of the evidence that he is admissible to the United States under the provisions of Section 245A of the Act, and is otherwise eligible for adjustment of status. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act.

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