U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: Los Angeles Date: AUG 30 2005

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, Director
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 dismissed.

The district director concluded the applicant had not established that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. The district director also determined that the applicant had failed to establish that he satisfied the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act. In addition, the district director concluded that the applicant was inadmissible under section 1140(c)(2)(D)(ii) of the LIFE Act, because he had been convicted of three misdemeanors in the United States. Therefore, the district director concluded the applicant was ineligible for permanent resident status under the LIFE Act and denied the application.

On appeal, the applicant asserts that he has submitted sufficient documentation to establish continuous residence in this country for the requisite period. The applicant contends that he did provide a letter from the school where he has attended English as a Second Language (ESL) classes. The applicant declares that the Immigration and Naturalization Service, or the Service (now Citizenship and Immigration Services or CIS) failed to acknowledge receipt of his response to the notice of intent to deny and prematurely issued a notice of denial. The applicant includes copies of previously submitted documents in support of his 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. *See* § 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.11(b).

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if no single absence from the United States has exceeded *forty-five (45) days*, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, and May 4, 1988, unless the alien can establish that due to *emergent reasons*, his or her return to the United States could not be accomplished within the time period allowed.

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).

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E-- M--*, 20 I. & N. Dec. 77 (Comm. 1989).

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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant is a class member in a legalization class-action lawsuit and as such, was permitted to previously file a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the Immigration and Nationality Act (INA) on November 14, 1989. At part [redacted] of the Form I-687 application where applicants were asked to list all absences from the United States beginning from January 1, 1982, the

applicant indicated that he had been absent from this country for twenty-six days from February 25, 1988 to March 22, 1988, when he traveled to Mexico to visit his ill mother. The record shows that the applicant subsequently filed his Form I-485 LIFE Act application on August 27, 2001. In support of his claim of continuous residence in the United States since prior to January 1, 1982, the applicant submitted employment letters, affidavits of residence, postmarked envelopes, correspondence, bills, a marriage certificate, birth certificates, a computer printout, a driver's license, paycheck stubs, rent receipts, a residential lease, and church documents.

The record shows that the applicant appeared for an interview relating to his LIFE Act application at the Los Angeles, California District Office on June 18, 2003. The notes of the interviewing officer reflect that the applicant testified under oath that he had been absent from the United States from July 1984 to January 1985 because his mother was sick. The applicant also provided a signed sworn statement dated June 18, 2003, in which he reiterated that he had departed this country on an unspecified date in 1984 because his mother was ill and he did not return to the United States for six months.

Clearly, the applicant's absence of approximately 180 days from the United States from July 1984 to January 1985, exceeds the forty-five day limit for a single absence from this country in the period from January 1, 1982 to May 4, 1988 set forth in 8 C.F.R. § 245a.15(c)(1). Therefore, the applicant cannot be considered to have continuously resided in the United States for the requisite period pursuant to 8 C.F.R. § 245a.11(b), because his absence of some 180 days exceeded the forty-five day limit for a single absence. Accordingly, the applicant is ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act

Under section 1104(c)(2)(E)(i) of the LIFE Act ("Basic Citizenship Skills"), an applicant for permanent resident status must demonstrate that he or she:

(I) meets the requirements of section 312(a) of the INA (8 U.S.C. 1423(a)) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Attorney General may waive all or part of the above requirements for aliens who are at least 65 years of age or developmentally disabled.

The applicant, who is neither 65 years old nor developmentally disabled, does not qualify for either of the exceptions in section 1104(c)(2)(E)(ii) of the LIFE Act. Nor does he satisfy the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i)(I) of the LIFE Act because he does not meet the requirements of section 312(a) of the INA. An applicant can demonstrate that he meets the requirements of section 312(a) by "[s]peaking and understanding English during the course of the interview for permanent resident status" and answering questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test . . . by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS)." 8 C.F.R. § 245a.3(b)(4)(iii)(A)(1) and (2).

Pursuant to 8 C.F.R. § 245a.17(b), an applicant for permanent residence under the provisions of the LIFE Act who fails to pass the English literacy and/or United States History and government tests at the time of the

interview, shall be afforded a second opportunity after six months to pass the tests or submit evidence to establish compliance with the alternate means to demonstrate minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States. The record shows that the applicant failed to pass a standardized section 312 test at his interview at the Los Angeles, California District Office on June 18, 2003. The record further shows that the applicant was not afforded another opportunity to appear for a second interview and establish a minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States as required by 8 C.F.R. § 245a.17(b). In addition, it is noted that the applicant subsequently provided correspondence from the Garfield Community Adult School of the Los Angeles Unified School District in an attempt to satisfy the "basic citizenship skills" requirement set forth in section 1104(c)(2)(E)(i) of the LIFE Act. The district director has failed to address such correspondence in either the notice of intent to deny or notice of denial. Consequently, the district director's conclusion that the applicant failed to establish compliance with the "basic citizenship skills" requirement cannot be considered as a valid basis to deny the application in light of the fact that evidence submitted by the applicant in an attempt to establish compliance with this requirement has been ignored and he has not been provided with an opportunity to establish compliance the requirement at a second interview as required by 8 C.F.R. § 245a.17(b).

An alien must establish that he is admissible to the United States as an immigrant, except as otherwise provided under section 245A(d)(2) of the Immigration and Nationality Act (INA). Section 1140(c)(2)(D)(i) of the LIFE ACT. An alien who has been convicted of a felony or three or more misdemeanors in the United States is inadmissible and, therefore, ineligible for permanent resident status under section 1140(c)(2)(D)(ii) of the LIFE Act.

"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).

An alien who has been convicted of a felony or of three or misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(1).

Under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the INA, no effect is to be given, in immigration proceedings, to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I. & N. Dec. 512, (BIA 1999).

A review of the record reveals that the applicant was convicted of the following three misdemeanor offenses:

- A violation of § 23152(b) of the California Vehicle Code, driving a vehicle under the influence of an alcoholic beverage with 0.08 percent or more, by weight, of alcohol in his or her blood on January 6, 1992;

- A violation of § 273.5 of the California Penal Code, inflicting a corporal injury on one's spouse on September 4, 1990; and,

- A violation of § 23152(b) of the California Vehicle Code, driving a vehicle under the influence of an alcoholic beverage with 0.08 percent or more, by weight, of alcohol in his or her blood on February 13, 1990.

The applicant is inadmissible because of his three misdemeanor convictions under section 1140(c)(2)(D)(ii) of the LIFE Act. Further, the applicant is ineligible for adjust to permanent resident status under the LIFE Act pursuant to 8 C.F.R. § 245a.18(a)(1). Within the provisions of the LIFE Act, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying for adjustment of status under the provisions of section 1140 of the LIFE Act has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from January 1, 1982 to May 4, 1988, is admissible to the United States under the provisions of section 212(a) of the INA, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.11. The applicant has failed to meet this burden.

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