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U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

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[Redacted]

FILE:

[Redacted]

Office: LOS ANGELES

Date: DEC 16 2008

MSC 03 227 61068

[Redacted]

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting 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.

On appeal, counsel asserted the applicant has submitted sufficient documentation establishing continuous residence in the United States from prior to January 1, 1982 through May 4, 1988. Counsel provided an affidavit in support of the appeal, and indicated that a brief and/or additional evidence would be submitted within 30 days. However, more than a year later, no further correspondence has been presented by counsel.

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 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:

- Affidavits from acquaintances, [REDACTED] and [REDACTED] of Los Angeles, California, who indicated that they have been acquainted with the applicant since 1981.
- A letter from [REDACTED], president of WCH Metal Polishing, Inc., who attested to the applicant's employment as a polisher from September 1984 to March 1985 and since May 1988.
- An affidavit from [REDACTED] of Los Angeles, California, who attested to the applicant's absence from the United States July 24, 1987 to August 10, 1987.
- Affidavits from [REDACTED] of Chicago, Illinois, who indicated that he has known the applicant since June 1981 and that the applicant resided with him and was in his employ in maintenance from 1981 to December 1983 and from April 1985 to April 1988.
- An affidavit notarized December 27, 1997, from [REDACTED] of South Gate, California, who attested to the applicant's South Gate residence at [REDACTED] since 1985. The affiant indicated that she has been a neighbor and friend of the applicant for a long time.
- An affidavit notarized July 15, 2005, from [REDACTED], who indicated that he has known the applicant since June 1981 and attested to the applicant's moral character.
- A Social Security Statement dated November 17, 2004, reflecting the applicant's wages since 1988.

On June 6, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted were vague and lack corroborating evidence to substantiate his claim of continuous residence during the requisite period.

Counsel, in response, asserted that the applicant submitted several affidavits attesting to his presence in the United States during the requisite period, and that one of the affiants provided a detailed affidavit describing when and where he met the applicant. Counsel submitted copies of previously submitted affidavits along with:

- An additional statement from [REDACTED] of Los Angeles, California, who indicated that he has personally known the applicant since September 1981. The affiant asserted that the applicant resided across the street from his brother's house on North and Spalding in Chicago, Illinois. The affiant indicated he would visit his brother in Chicago several times a year due to his seasonal employment. The affiant asserted that his association with the applicant continued for several years while he was in Chicago.
- A statement written in the Spanish language from [REDACTED]. This document, however, has no probative value as it was not accompanied by the required English translation. 8 C.F.R. 103.2(b)(3).

The director, in denying the application, concluded that the information submitted failed to overcome the grounds for denial.

On appeal, counsel submits an affidavit from [REDACTED] who attested to the applicant's residence in Chicago, Illinois from June 1981 to February 1989. The affiant attested to the applicant's moral character.

Citizenship and Immigration Services (CIS) 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, CIS 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 would not necessarily be fatal to the applicant's claim, 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 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 resided since that date through May 4, 1988. Specifically:

1. **The employment documents from [REDACTED] and [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 regulations, the affiants 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.
2. [REDACTED] in his affidavit, indicated that the applicant resided with him from 1981 to December 1983 and from April 1985 to April 1988; however, he failed to provide the address of residence during these periods. Furthermore, [REDACTED] affidavit contradicts the affidavit from [REDACTED] who indicated that the applicant has been residing in Los Angeles, California since 1985.
3. [REDACTED] and [REDACTED] indicated that they have been acquainted with the applicant since 1981. The affiants, however, failed to state the applicant's address of residence during the requisite period. Neither [REDACTED] nor [REDACTED] provides any details regarding the nature of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence.

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 (5<sup>th</sup> 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 his burden of proof. 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 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).

The record reflects that the applicant filed a Form I-589, Application for Asylum and Withholding of Removal, signed December 24, 1992.<sup>1</sup> The applicant was issued alien registration number [REDACTED]. On this application the applicant indicated that he entered the United States in August 1987 and at item 24, the applicant indicated that he had never traveled to the United States before. On his Form G-325A, Biographic Information, signed December 24, 1992, the applicant indicated that he resided in his native country, Mexico, from February 1965 to August 1987. The applicant, in affixing his signature on the Form G-325A, certified that the information he provided was *true* and *correct*.

These factors establish that the applicant utilized documents in a fraudulent manner in an attempt to support his claim of residence in the United States since prior to January 1, 1982 through July 1987. By engaging in such an action, the applicant has irreparably harmed his own credibility as well as the credibility of his claim of continuous residence in the United States for the requisite period.

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).

An alien is inadmissible if he has been convicted of a crime involving moral turpitude (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 Act.

The FBI report reflects that on August 29, 1989, the applicant was arrested by the Los Angeles, Police Department for willful cruelty to a child with possible injury or death.

At the time of his LIFE interview, the applicant was issued a Form I-72, which requested the applicant to submit the final court dispositions for all arrests. Counsel, in response, provided court documentation in Case no. [REDACTED], which revealed that on November 15, 1989, the applicant was convicted in the Los Angeles County Superior Court of violating section 273(a)(1), child abuse, a felony. On December 1, 1989, imposition of sentence was suspended on the conditions the applicant was placed on probation for five years, served 365 days in jail and paid a fine of \$250.00. The probation was ordered terminated and the

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<sup>1</sup> On September 17, 1997, the applicant withdrew the asylum application with prejudice.

conviction was expunged on June 22, 1993 in accordance with sections 1203.3 and 1203.4 PC, respectively. Subsequently a motion was filed to reduce the offense to misdemeanor and a hearing was set on January 18, 2002. On February 25, 2002, the offense was reduced to a misdemeanor pursuant to section 17(b) PC.

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Act, 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).

The Board of Immigration Appeals (BIA) revisited the issue in *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) and concluded that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungement proceedings pursuant to state rehabilitative proceedings.

In addition, in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), a more recent precedent decision, the BIA found that there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceedings and those vacated because of post-conviction events, such as rehabilitation or immigration hardships. The BIA reiterated that if a court vacates a conviction for reasons unrelated to the merits of the underlying criminal proceedings, the alien remains "convicted" for immigration purposes.

The court documentation submitted by counsel does not suggest that the applicant's conviction was reduced or expunged based on the merits of the case. It is noted that in the [REDACTED] file is a letter dated June 28, 1993 from the applicant's probation officer, who indicates that the applicant's probation was terminated early because the applicant had complied with all of the terms and conditions of the probation. In addition, during the applicant's removal proceedings, counsel presented a brief before the Executive Office for Immigration Review indicating that the California Superior Court reduced the offense to a misdemeanor at the request of the applicant's probation officer. Therefore, despite the reduction and expungement of the conviction, the applicant remains convicted, for immigration purposes, of the felony noted above.

The applicant is ineligible for the benefit being sought due to his felony conviction. 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1). The applicant is also inadmissible under section 212(a)(2)9(A)(i)(I) of the Act as child abuse is a crime involving moral turpitude. *See Guerrero de Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969). Accordingly, the applicant is ineligible and inadmissible 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.