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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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FILE: [Redacted]

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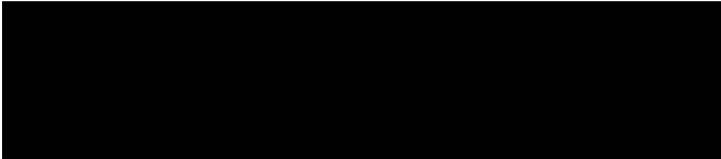
Date: JUN 24 2008

IN RE: Applicant:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the National Benefits Center. 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, Chief
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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director denied the application because the applicant failed to demonstrate that he entered the United States before January 1, 1982, and resided in a continuous unlawful status through May 4, 1988. Specifically, the director concluded that the evidence submitted by the applicant was insufficient to support a finding of eligibility, and noted that although afforded an opportunity to supplement the record, the applicant failed to do so.

On appeal, counsel for the applicant claims that a timely response to the director's request for additional evidence was in fact submitted. Counsel therefore requests reconsideration based on the applicant's compliance with the director's request, and resubmits the response originally submitted by the applicant prior to adjudication.

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – 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. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

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 or 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).

In the affidavit for class membership, which he signed under penalty of perjury on April 16, 1990, the applicant stated that he first arrived in the United States in December 1981 when he crossed the border without inspection. On his Form I-687, Application for Status as a Temporary Resident, which he also signed under penalty of perjury on May 7, 1990, the applicant confirmed that his last entry into the United States was on September 30, 1987. The applicant further claimed to live at the following addresses during the requisite period:

December 1981 to September 1987:
October 1987 to March 1988:
March 1988 to February 1989:



Regarding his employment history, the applicant claimed to work for the following companies:

January 1982 to September 1987: Martha's Restaurant, Dishwasher
October 1987 to January 1989: Chevy's Restaurant, Busboy

On both forms, the applicant claimed that he departed the United States once during the requisite period for a trip to Mexico in September 1987.

The AAO concurs with the director's finding that the applicant submitted insufficient evidence to establish continuous residence and physical presence in the United States during the requisite period. In an attempt to establish continuous unlawful residence since before January 1, 1982 through May 4, 1988, the applicant furnished the following evidence:

- (1) Affidavit dated May 12, 1990 by [REDACTED], claiming that the applicant resided with him from December 1981 to September 1987. Mr. [REDACTED] claims that he first met the applicant in 1981 when the applicant was looking for employment at his restaurant, [REDACTED]. He claims that he hired the applicant and also provided a residence for him at a monthly rent of \$100.00.
- (2) Undated declaration by [REDACTED] claiming that he has knowledge that the applicant resided at [REDACTED] Windsor, CA 95492 from December 1981 to September 1987.
- (3) Undated declaration by [REDACTED], claiming that he has knowledge that the applicant resided at [REDACTED] Windsor, CA 95492 from December 1981 to September 1987.
- (4) Undated declaration by [REDACTED] claiming that he has knowledge that the applicant resided at [REDACTED] Windsor, CA 95492 from December 1981 to September 1987.

- (5) Notarized letter dated April 10, 1990 by [REDACTED], claiming that the applicant worked for him in his restaurant, [REDACTED]'s, as a dishwasher, from January 1982 to September 1987.
- (6) Pay stubs evidencing wages paid to the applicant by Chevy's restaurant for the pay periods ending 10/22/87, 11/06/87, 11/20/87, 12/22/87, 01/07/88, 02/05/88, 02/22/88, 03/07/88, 04/07/88, 11/07/88.
- (7) Letter dated April 9, 1990 from [REDACTED], Office Manager for Chevy's Mexican Restaurant. Ms. [REDACTED] stated that according to company records, the applicant began working for the company on October 6, 1987 as a part-time busser, and that his last day with the company was January 21, 1989.
- (8) Statement by [REDACTED], dated May 2, 1990, claiming that the applicant departed the United States on September 5, 1987 to visit his family in Mexico, and that he returned on September 30, 1987. He claims that he drove the applicant to the border.
- (9) Statement dated May 5, 1990 by the applicant, claiming that he first came to the United States in 1981 when he was fifteen years old. He claims that he did not attend school, and began working in Martha's restaurant. He claims that he resided with his uncle.

In the Notice of Intent to Deny (NOID) dated October 2, 2003, the director noted that the evidence submitted was insufficient. The applicant was afforded thirty days to supplement the record with additional evidence of his eligibility. No response was received, and subsequently the application was denied on June 24, 2004. On appeal, counsel for the applicant contends that the denial was erroneous in that the director never considered the applicant's timely response to the NOID. Counsel resubmits said response and requests reconsideration in light of the new evidence submitted.

Upon review of counsel's evidence and the documents contained in the file, it appears counsel correctly contends that a timely response to the director's NOID was received prior to adjudication. The director's error in not reviewing this evidence, however, is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). 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 AAO will evaluate the evidence submitted in response to the NOID when reviewing the application.

In the response to the NOID dated October 30, 2003, counsel contends that the applicant was submitting new third-party declarations. In support of the response, the applicant submitted the following:

- (1) Affidavit dated October 30, 2003 by [REDACTED], uncle of the applicant. He claims he first met the applicant when he traveled to Mexico in 1980. In 1982, he claims that the applicant came to the United States and resided with him in Oakland for approximately three months before moving to Santa Rosa. He further claims that the

applicant came to visit him every two to three weeks thereafter, and that he has seen the applicant regularly since 1982.

- (2) Affidavit dated October 29, 2003 by [REDACTED], who claims that she first met the applicant in 1984. She claims that she met the applicant while she was working in El Faro restaurant, where the applicant was a patron. She claims she saw the applicant every two to three weeks from 1984 to 1988 at El Faro restaurant, and visited him a few times at his house.

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. The applicant submitted two employment letters and several statements and affidavits as evidence to support his Form I-485 application. Here, the applicant has failed to meet this burden.

The AAO will first address the letters of employment. The letter from [REDACTED] of Chevy's restaurant is sufficient to document the applicant's employment with the company from October 1987 to January 1989. The letter complies with the requirements set forth in 8 C.F.R. § 245a.2(d)(3)(i), and is further supported by pay stubs which corroborate her statements.

The second letter, from [REDACTED] of Martha's restaurant, is not as persuasive. The letter is not on employer letterhead stationery, and failed to provide the applicant's address at the time of employment. Under the same regulations cited above, the letter failed to declare whether the information was taken from company records, and failed to identify the location of such company records or state whether such records are accessible or in the alternative state the reason why such records are unavailable. [REDACTED] provides no documentation, such as payroll records, to support this claim.

In addition, the applicant submitted numerous affidavits in support of his application. Each affidavit provided minimal information as well as some conflicting information. First, the AAO will address the applicant's claim of residence. On his Form I-687, he claims that he resided at [REDACTED] in Windsor, CA from December 1981 to September 1987. [REDACTED], in his affidavit dated May 12, 1990, claims the applicant resided with him during this period; however, he does not provide the address. The applicant's uncle, [REDACTED] claims to the contrary that the applicant lived with him for three months after he arrived in the United States in 1982 (not in 1981, as claimed by the applicant). Mr. [REDACTED] also omits the residential address at this time. Finally, the unnotarized statements by [REDACTED], [REDACTED], and [REDACTED] all claim that the applicant resided at [REDACTED] Windsor, CA 95492 from December 1981 to September 1987. None of these persons make reference to the applicant living with his uncle for his first three months in the country. Most importantly, however, is the fact that the claimed address of the applicant, [REDACTED] does not match the applicant's claimed address on his Form I-687 for this period ([REDACTED]). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the applicant has submitted numerous affidavits in support of his application, the applicant has not provided sufficient documentation of residence in the United States during 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. Finally, although the documentation from Chevy's appears to support a finding that the applicant was residing in the United States and steadily employed from October 1987, there is no evidence to support a similar finding for the period from before January 1, 1982 to October 1987. 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 his claim. Pursuant to 8 C.F.R. § 245a.12(e), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon documents with minimal probative value, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States during the requisite period.

Therefore, based on the above, the applicant has failed to establish entry into the United States prior to January 1, 1982, and continuous unlawful residence through May 4, 1988 as required under Section 1104(c)(2)(B) of the LIFE Act. Given this, he is ineligible for permanent resident status under Section 1104 of the LIFE Act.

According to a court disposition in the record, the applicant was arrested on April 22, 1997 in Oakland, California and on August 26, 1997 he was convicted on the felony charge of violating Section 23153(a) of the Vehicle Code, Alcohol or Drugs Causing Injury. On June 5, 2001, the California Superior Court, Alameda County, reduced the felony conviction to a misdemeanor pursuant to section 17 of the Penal Code (PC) and vacated the conviction pursuant to section 1203.4 PC.

Under the current 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 by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. *See also Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (Conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes).

In addition, in *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

This single misdemeanor conviction does not render the applicant inadmissible or ineligible.

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