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FILE: [Redacted]
MSC 02 064 66682

Office: LOS ANGELES, CALIFORNIA

Date: SEP 02 2008

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

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 (director), Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The matter will be returned to the director to complete the adjudication of the application for permanent residence.

The director denied the application because she determined that when the applicant was convicted of burglary under California Penal Code (CA PC) § 459, he was convicted of a felony.

On appeal, counsel asserted that under CA PC § 17(b) where charges are brought under a section of the CA PC that may lead to a sentence involving confinement in a state prison, or to a confinement in county jail or a fine, if the sentence handed down does not include a term of confinement in a state prison, the resulting conviction is, for all purposes, a misdemeanor conviction. Counsel stated further that, in accordance with *Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004)(where the 9th Circuit found the IJ and the BIA erred in finding a conviction at issue to be a felony conviction), once the court issued a sentence for the applicant that involved probation and a fine, exclusively, and no state prison term, the burglary charge and conviction automatically converted to that of misdemeanor for all purposes. Counsel also provided a Superior Court, Los Angeles County, certified court document which officially reduced the applicant's felony offense to that of misdemeanor.

An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is not eligible to adjust to lawful permanent resident status under the LIFE Act. See 8 C.F.R. § 245a.18(a)(1).

Section 101(a)(48) of the Immigration and Nationality Act (the Act) states:

- (A) 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 be imposed.
- (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

California Penal Code § 459 states:

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house

car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

California Penal Code § 461 states:

Burglary is punishable as follows:

1. Burglary in the first degree: by imprisonment in the state prison for two, four, or six years.
2. Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison.

California Penal Code § 17 states the following in relevant part:

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

- (1) After a judgment imposing a punishment other than imprisonment in the state prison.

In *Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004)(distinguished on other grounds in *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005)), the court held that where the California criminal court decided, under a statute that might lead to either a felony or misdemeanor conviction, that no state prison term would be imposed, the conviction became a misdemeanor for all purposes, including immigration purposes. The *Oliveira Ferreira* court also specified that the fact that the California court judgment document designated Oliveira Ferreira's conviction under a statute designated "F" for felony is not dispositive regarding the issue of whether the resulting conviction is a felony or a misdemeanor. *See Id.* The person who pleads no contest or guilty to a charge which may lead to either a felony or misdemeanor conviction acquires the status of felon until sentenced to something other than confinement in state prison, at which point the offense automatically converts to misdemeanor for all purposes. *See Id.*

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 through May 4, 1988. *See* § 1104(c)(2)(B) of the LIFE Act and 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 states 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 (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.

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 application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant’s statements must not be the applicant’s only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant’s claim of continuous residence in the United States during the statutory period. *See Id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence during the statutory period. *See Id.*

Documentary evidence may be in the format prescribed by Citizenship and Immigration Services (CIS) regulations. *See Matter of E-M-*, 20 I&N Dec. 77 at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and “state the employer's willingness to come forward and give testimony if requested.” *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a “relevant document” under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

At issue in this proceeding is whether the applicant has established that he is eligible to adjust under the LIFE Act in that he has not been convicted of a felony conviction or three misdemeanors. Here, the applicant has met this burden.

On or about November 5, 1991, the applicant applied for class membership in a legalization class-action lawsuit and submitted the Form I-687, Application for Status as a Temporary Resident. On December 3, 2001, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status.

The record contains the final court disposition for the applicant's criminal conviction and the petition filed before the court that the offense be reduced to that of a misdemeanor under CA PC § 17. The following summarizes the court disposition in the record and the petition filed subsequent to the applicant's successful completion of the terms of his probation/sentence:

1. On May 21, 1996, in a case first brought against the applicant on April 23, 1996 in the Superior Court of West District Judicial District, County of Los Angeles, State of California, the applicant pled no contest to the charge of: CA PC § 459 Felony-Burglary. The court imposed a suspended sentence and placed the applicant on 3 years of probation under the following terms: perform 150 hours of community service; pay \$200 to the state restitution fund; obey all laws and orders of the court; and obey all rules and regulations of probation. The court also stated that the matter may be reduced to a misdemeanor upon completion of the restitution and community service.
2. On December 6, 2005, the Superior Court, Los Angeles County, State of California, granted the applicant's request that the felony burglary charge in the above matter be reduced to a misdemeanor charge under CA PC § 17. The court also ordered that the applicant's plea of no contest be set aside and a plea of not guilty be entered; and that the complaint be dismissed under CA PC § 1203.4.

On October 18, 2005, the district director issued a Notice of Intent to Deny (NOID). She stated that she intended to deny the application because the applicant had been convicted of a felony on May 21, 1996.

In response, counsel asserted that under CA PC § 17(b) the applicant's May 21, 1996 conviction is a misdemeanor conviction as it led to a sentence that did not include any term of confinement in the state prison. Counsel also asserted that according to the BIA's decision *In re Min Song*, 20 I&N Dec. 173 (BIA 2001) where a sentence is reduced to less than one year in prison, a theft offense is considered a misdemeanor for immigration purposes.

On November 17, 2005, the director denied the application for the reasons set forth in the NOID.

On appeal, counsel submitted court records that establish that the applicant's conviction was officially reduced to that of misdemeanor on December 6, 2005. Counsel also emphasized that the *Oliveira Ferreira* court stated that whether the term "felony" is used in the charge brought against the alien is not dispositive. Instead, it is the final sentence which reveals whether the conviction is a felony or misdemeanor conviction. *See Oliveira Ferreira* at 1051 and CA PC § 17(b). Finally, counsel asserted that according to the BIA's reasoning in *In re Song*, 20 I&N Dec. 173 (BIA 2001), a misdemeanor sentence makes an offense a misdemeanor offense.

The AAO finds that based on the holding in *Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) as outlined above and under CA PC § 17(b) read in conjunction with the court orders dated May 21, 1996 and December 6, 2005 in this matter, that the record establishes that the applicant has a misdemeanor burglary conviction, rather than a felony conviction. The AAO also notes that any court order that the conviction itself be set aside under CA PC § 1203.4 has no effect under the Act. See Section 101(a)(48)(A) of the Act.

In sum, the AAO finds that the record establishes that the applicant has only one misdemeanor conviction, and as such remains eligible to adjust under the LIFE Act.

Further, CA PC § 459 states that the offense of burglary may involve the intent to commit grand or petit larceny, or *any* felony. Thus, this is a divisible statute. That is, where the record of conviction establishes that the alien had the intent to commit grand or petit larceny or some other felony for which malicious intent, intent to deceive or some other specific intent involving moral depravity is a requisite element, the offense of burglary is a crime involving moral turpitude. Where the record of conviction indicates only that the applicant had the intent to commit an unspecified felony or a felony for which intent involving moral depravity is not a requisite element, the offense of burglary may not be found to be a crime involving moral turpitude. Nothing in the record indicates that the court found that the applicant had the intent to commit any specified felony. Thus, the AAO finds that the applicant's misdemeanor burglary conviction is not a conviction of a crime involving moral turpitude.

ORDER: The appeal is sustained. The director shall continue the adjudication of the application for permanent resident status.