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U.S. Citizenship
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Services

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FILE:



MSC 02 217 60590

Office: LOS ANGELES, CA

Date:

SEP 29 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:

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 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status filed under the late legalization provisions of 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 dismissed.

The director denied the application based on evidence in the record which substantiates that the applicant has committed three or more misdemeanors and is therefore ineligible to adjust to permanent resident status under the LIFE Act. The director also found that the applicant is inadmissible for having admitted, while being questioned by an immigration officer, to committing acts that constitute the elements of a violation of a law of the United States relating to controlled substances, namely having used marijuana repeatedly over the course of several years. Therefore, the director also denied the application based on the finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act, and consequently is ineligible to adjust under the LIFE Act.

On appeal, the applicant indicated through counsel¹ that the burden is on Citizenship and Immigration Services (CIS) to provide official documentation that the 1983 charges of reckless driving brought against the applicant led to convictions.

Counsel also indicated that any admission of marijuana use on the applicant's part, while being questioned by an immigration officer, may not be considered an admission of the elements of a crime relating to a controlled substance and form the basis of a finding of inadmissibility because the applicant was not informed of the essential elements of any violation relating to a controlled substance prior to making this admission. As his authority, counsel cited *Matter of J*, 2 I&N Dec. 285 (BIA 1945) and *Matter of G—M—*, 7 I&N Dec. 40 (A.G. 1956). The AAO concurs. See *Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002)(which held that where an immigration official failed to inform the applicant of the essential elements of the controlled substance offense at issue, the applicant's admission to the official of repeated marijuana use could not be used as the basis for finding the applicant inadmissible under section 212(a)(2)(A)(i)(II) of the Act.) Thus, the applicant has overcome one of the grounds on which the director denied the application.

Finally, on appeal, the applicant indicated that he was eligible to adjust to permanent resident status under the LIFE Act.

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).

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his or her continuous, unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 1104(c)(2)(B) of the LIFE Act states in relevant part:

- (i) In General – The alien must establish that he or she entered the United States before January 1, 1982, and has resided continuously in the United States in an unlawful status since such date and

¹ In his letter dated August 20, 2008, counsel withdrew himself as counsel of record in this matter. Thus, in this decision, the applicant is listed as self-represented.

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.

See also 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 regulation at 8 C.F.R. § 103.2(b)(13) states in relevant part:

Effect of failure to respond to a request for evidence or appearance. If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

The regulation at 8 C.F.R. § 103.2(b)(11) states:

Submission of evidence in response to a Service request. All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

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.* 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.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

At issue in this proceeding is whether the applicant submitted the appropriate court documents to meet his burden of establishing: that he is admissible to the United States, that he has not been convicted of three misdemeanors or a felony and that he is eligible to adjust to lawful permanent resident status. Here, the applicant has failed to meet this burden.

The record indicates that on or near May 30, 1994, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On May 5, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

In the November 29, 2005, Notice of Intent to Deny (NOID), the director stated that the record indicates the following:

On December 27, 1994, the applicant was convicted of inflicting corporal injury to his spouse/co-habitant, under California Penal Code § 273.5(A), a misdemeanor.

On October 25, 1983, the applicant was convicted of two counts of reckless driving/no injury under California Vehicle Code § 23103, a misdemeanor.

On January 9, 2002, the applicant was convicted of possessing under 1 ounce of marijuana under California Health and Safety Code § 11357(B).

The director also stated that subsequent to a May 17, 1986 arrest, the applicant was charged with: driving under the influence of alcohol/drugs, involving bodily injury under California Vehicle Code § 23153(A), a felony; driving under the influence of alcohol/drugs with 0.08% or more blood/alcohol content, involving bodily injury under California Vehicle Code § 23153(B), a felony; hit and run, involving death or injury under California Vehicle Code § 20001, a felony; and hit and run, involving property damage under California Vehicle Code § 20002(A), a misdemeanor. The director stated that the applicant failed to provide any final court disposition related to these charges.

On rebuttal, the applicant provided evidence that the January 2002 charge of possession of less than one ounce of marijuana was dismissed pursuant to California Penal Code § 1385. He also submitted documentary evidence to support the finding that the various May 17, 1986 felony and misdemeanor charges of driving under the influence of alcohol/drugs, hit and run, involving death or injury, etc. were settled by stipulation to restitution pursuant to a civil judgment.

The applicant also acknowledged that on December 27, 1994 he was convicted of inflicting corporal injury to his spouse/co-habitant as evidenced by the final court disposition in the record.

On rebuttal, he also suggested through counsel that because the relevant court has no documentary evidence that the two reckless driving, no injury charges from 1983 led to convictions that CIS may not view these charges as having led to two misdemeanor convictions.

On December 27, 2005, the director denied the application based on the reasons set forth in the NOID.

On August 4, 2008, the AAO presented the following list of charges which had been brought against the applicant for which the final disposition had still not been submitted into the record:

- 1) Arrested or received by the Los Angeles, California Police Department on March 1, 1999 with agency case number: [REDACTED]. The charge brought against the applicant is listed as follows: [REDACTED] Spouse Beating.
- 2) Two counts of Reckless Driving/No Injury, California Vehicle Code (CA VC) Section 23103, Los Angeles Municipal Court West, Los Angeles Judicial District, Case [REDACTED]. The apparent conviction date for these two misdemeanor charges is October 25, 1983.
- 3) Failure to appear at the Municipal Court, Metro Branch, 1945 Hill Street, Los Angeles, California on February 22, 1982 for a hearing relating to traffic violations, Docket Number [REDACTED]. The record indicates that the applicant was found guilty under CA VC sections [REDACTED]. A violation of CA VC section [REDACTED] (failure to appear) is a misdemeanor. The record indicates that an Arrest Warrant was issued in relation to these violations on April 17, 1982.
- 4) Failure to appear at the Municipal Court, 6548 Miles Avenue, Huntington Park, California on July 20, 1979 for a hearing relating to traffic violations, Docket Number [REDACTED]. The record indicates that the applicant was found guilty under California Vehicle Code sections [REDACTED]. A violation of CA VC section [REDACTED] is a misdemeanor. The applicant also failed to appear at the Municipal Court, Metro Branch, 1945 Hill Street, Los Angeles, California on February 25, 1980 for a hearing relating to traffic violations, Docket Number [REDACTED]. The record indicates that the applicant was found guilty under California Vehicle Code section [REDACTED]. An arrest warrant was issued on April 21, 1980, apparently, in relation to this hearing and the July 20, 1979 hearing.

This office requested a certified copy of the court disposition relating to each of the charges brought against the applicant and relating to any other criminal charges that may have been filed against him, in or outside the United States, for which he had not yet submitted the final court disposition.

The AAO also stated that if the appropriate court no longer has records of the final dispositions of the court hearings or if the charges against the applicant were dropped prior to trial, the applicant must provide a certified copy of the court's finding that no court records exist for the applicant.³ The search for court records

³ The AAO pointed out to the applicant that he had provided a court certified letter which indicates that the Los Angeles Superior Court, West District, has destroyed court records for case number [REDACTED] from 1983. Thus, the applicant had completed one step toward locating official records of the final disposition of the two counts of reckless driving brought against him in the early 1980s. He had not completed the necessary ensuing steps, as outlined here, for locating the final disposition of these charges. This office also explained that counsel has submitted statements that suggest that the burden is on CIS to provide official documentation that these two charges led to convictions. The AAO stated that counsel is mistaken. The applicant must establish for the record the final disposition of these two misdemeanor charges brought against him. The AAO emphasized that the court record that the applicant submitted for the May 17, 1986 felony charges of DUI Alcohol/Drugs with Bodily Injury, etc. brought against him makes reference to Case No. [REDACTED] and suggests that in that case he was convicted of two misdemeanor charges of reckless driving/no injury. Thus, as the record currently stands, the preponderance of the evidence indicates that on October 25, 1983, the Los Angeles Municipal Court West, Los Angeles Judicial District convicted the applicant of two reckless driving/no injury misdemeanor charges under case number [REDACTED].

must be conducted using the applicant's full name and any aliases that he may have used, as well as his date of birth.

This office also explained that if the relevant court does conduct a search using the applicant's full name, various aliases and date of birth, and that search leads to a finding that there are no records of charges or convictions against him, he must then request a record of his arrests and convictions from the California Department of Justice, Sacramento, California. The AAO provided instructions regarding how to obtain arrest and conviction records from the California Department of Justice by telephoning [REDACTED] or [REDACTED]

The applicant was told that if the California Department of Justice provided him with official notice that it has no record of his arrests and/or convictions, he must provide this office with that notice. Next, he must request a record of his arrests and the disposition of those arrests from the police department or other agency which arrested him and filed charges against him. The relevant agency must conduct a search using either the applicant's fingerprints or his full name and any aliases that he has used in the past as well as his date of birth. If such records are also unavailable, he must provide an official letter of that from the arresting agency.

Finally, if arrest records are not available, the AAO stated that the applicant should make every effort to provide affidavits from two individuals who have direct knowledge of his arrests and the disposition of those arrests. These individuals should not be his family members. Also, the applicant was told to provide for this office his own statement of what led to his arrests and any other arrests that he may have had, in or outside the United States, and the dispositions of those arrests whether they led to convictions, to acquittals or to a dismissal of charges prior to trial.

On appeal and in response to the AAO's August 4, 2008 letter, the applicant provided a court-certified letter from The Superior Court of California, County of Los Angeles, the Metropolitan Branch dated August 29, 2008. This letter indicates that this court destroys all records which are more than ten years old. The court destroys misdemeanor records after five years and records of infractions after four years. The court searched for the applicant's name as [REDACTED], date of birth June 21, 1957, and case/citation number [REDACTED] and [REDACTED] and determined that the case/citations had been cleared from the court and that the court has no pending or outstanding matters on the named individual.

The applicant also provided a certification of record destruction from the Superior Court of California, County of Los Angeles, Huntington Park which states that case number [REDACTED] had been destroyed. The letter states that for further information on criminal convictions, one may telephone the California Department of Justice, Sacramento, California at [REDACTED]

The applicant failed to provide further documentation relating to his various arrests and offenses as requested by the AAO.

Thus, the evidence indicates that the applicant has been convicted of at least the following misdemeanors. Namely, the final court disposition in the record states that on December 27, 1994 the applicant was convicted of corporal injury to his spouse/co-habitant, a misdemeanor, under California Penal Code § 273.5(A), Case No. [REDACTED], Municipal Court of Van Nuys, County of Los Angeles, State of California. While final court dispositions were never submitted into the record for the following, the preponderance of the evidence indicates that: on October 25, 1983, the applicant was convicted of two counts of Reckless Driving/No Injury under California Vehicle Code Section 23103, Case No. [REDACTED] Los Angeles Superior Court, West District; on February 22, 1982, the applicant was convicted of failure to appear, a misdemeanor, under California

Vehicle Code [REDACTED] Municipal Court, Metro Branch, 1945 Hill Street, Los Angeles, California; and on July 20, 1979, the applicant was convicted of failure to appear, a misdemeanor, under California Vehicle Code [REDACTED] Municipal Court, 6548 Miles Avenue, Huntington Park, California.

Therefore, a preponderance of the evidence indicates that the applicant has been convicted of three or more misdemeanors. Thus, the applicant is not eligible to adjust to lawful permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.18(a)(1). The appeal is dismissed on this basis.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The applicant failed to provide final court dispositions and failed to provide the various required records and forms of documentation required when final court dispositions are not available for several of his various arrests listed above. Yet, the AAO had specifically requested that the applicant provide such documentation. The appeal is dismissed for the applicant's failure to submit requested evidence, as well. *See* 8 C.F.R. §§ 103.2(b)(13) and 103.2(b)(11).

The applicant is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act for the reasons stated above, with each considered as an independent and alternative basis for denial.

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