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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

L2



FILE: MSC 02 253 63640

Office: NEW YORK, NEW YORK

Date: **APR 15 2009**

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. If your appeal was dismissed or rejected, all documents have been forwarded to the U.S. 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.

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, New York, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to submit sufficient credible evidence to establish that he had resided continuously in the United States throughout the statutory period as required under section 1104(c)(2)(B) of the LIFE Act. The director indicated, for example, that the statements and affidavits in the record lacked credibility because the statements provide contradictory information regarding the applicant's claimed residences in the United States during the statutory period. The director specified that the applicant submitted: a statement which claimed that he resided at [REDACTED], New York City from January 10, 1981 through November 26, 1989; a lease agreement that stated that he resided at [REDACTED] Brooklyn from June 1, 1981 through May 31, 1983; a statement which claimed that he resided at [REDACTED], New York City from April 3, 1981 through May 31, 1983; and a statement that claimed that he resided at [REDACTED], Brooklyn from June 1983 through August 1987. Because of the contradictory information in the statements, the director determined that all the statements and affidavits in the record lack probative value. The director stated that only independent, objective evidence of the applicant's continuous residence in the United States throughout the statutory period could overcome the discrepancies in the record. The director indicated that the contemporaneous evidence from the latter portion of the statutory period in the record, such as evidence that the applicant's daughter was born in the United States during March 1988, as well as the handwritten receipts in the record were not sufficient to demonstrate that the applicant resided in the United States throughout the statutory period.

On appeal, the applicant did not address the issue of contradictory evidence raised by the director in the Notice of Intent to Deny and Notice of Decision, nor did he provide independent, objective evidence of having resided in the United States throughout the statutory period. Instead, the applicant asserted through counsel that the evidence of record establishes that he is eligible for the benefit sought in this matter. The applicant did not allege any specific legal or factual error in the director's decision.¹ On appeal, the applicant resubmitted copies of evidence already in the record and submitted a statement from [REDACTED] dated August 4, 2007 which repeats her statement submitted earlier in this proceeding. As of the date of this decision, no additional evidence has been submitted. The AAO will consider the record complete.

¹ Any claim that United States Citizenship and Immigration Services (USCIS) officials have an obligation to contact the individuals who signed the statements and affidavits in the record is not correct. Any suggestion that USCIS should expect major inconsistencies in addresses, dates at which the applicant resided at various addresses, etc. as in the present record because of the length of time that has passed since the statutory period is also not correct. As indicated by the director in the Notice of Intent to Deny and in the Notice of Decision, the burden is on the applicant to provide affidavits that are sufficiently detailed, consistent and credible.

Any appeal that fails to state the reason for appeal, or is patently frivolous, will be summarily dismissed. 8 C.F.R. § 103.3(a)(3)(iv). A review of the decision reveals that the director accurately set forth a legitimate basis for denial of the application. On appeal, the applicant has not presented any new, additional evidence and he has not addressed the basis for denial. The appeal must therefore be summarily dismissed.

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).

Beyond the decision of the director, the AAO finds that the applicant is not eligible for permanent resident status under the late legalization provisions of the LIFE Act because he has been convicted of two felonies and because he is inadmissible. The appeal must be dismissed for these reasons as well.

According to the record, the Jersey City Police Department arrested the applicant on August 23, 1993 and charged him with violating the New Jersey Anti-Piracy Act as codified at New Jersey Statutes (N.J.S.) § 2C: 21-21(4)², a crime of the third degree, by: selling counterfeit video tapes (VHS Format), by knowingly advertising, and offering for sale, **16** pirated video tapes, which did not clearly and conspicuously disclose the true name and address of the manufacturer; and by selling counterfeit cassette tapes, by knowingly advertising, and offering for sale, **127** pirated cassette tapes of miscellaneous recording artists, which did not clearly and conspicuously disclose the true name and address of the manufacturer.³ In addition to these two charges, the Jersey City Police Department charged the applicant with theft of services under N.J.S. § 2C: 20-8 and with deceptive business practices under N.J.S. § 2C: 21-7. At the Jersey City Municipal Court, County of Hudson, State of New Jersey on September 29, 1993, in the case having [REDACTED] and [REDACTED], the applicant was convicted of two counts under N.J.S. § 2C: 21-21(4), a crime of the third degree. The record indicates that the other two charges brought against the applicant were dismissed.

² Throughout the official documentation issued by the Jersey City Municipal Court and the Jersey City Police Department, the relevant section of the N.J.S. for these charges appear as § 2C: 21-21(4). Thus, the AAO has used that designation in this analysis. However, the AAO would also note that within the N.J.S. itself this particular crime appears within the New Jersey Code of Criminal Justice (Title 2C) as § 2C: 21-21(c)(4), and that there is no N.J.S. § 2C: 21-21(4).

³ This language is taken from the copies of the complaints filed against the applicant in the record. The charge which underlies this language is found at N.J.S. § 2C: 21-21(c)(4), but as alluded to in footnote 1, the two complaints cite instead to N.J.S. § 2C: 21-21(4).

The judge issued an aggregate sentence ordering the applicant: to serve 30 days in jail, allowing him credit for two days already served; to pay certain fines and fees; and to remain on probation for one year.

An applicant 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). A misdemeanor includes any offense which is punishable by imprisonment of a term of one year or less, except that it shall not include offenses for which the maximum sentence is five days or less. *See* 8 C.F.R. § 245a.1(o). A felony is a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any, except that when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less. *See* 8 C.F.R. § 245a.1(o).

A conviction under N.J.S. § 2C: 21-21(4) when it involves more than 100 sound recordings (as with the 127 cassettes involved in this matter) or more than 7 unlawful audiovisual works (as with the 16 video tapes involved in this case) shall be punishable as a crime of the third degree and a fine of up to \$150,000 may be imposed. *See* N.J.S. § 2C: 21-21(d)(2). According to New Jersey sentencing guidelines, a person convicted of a crime of the third degree may be imprisoned for three to five years. *See* N.J.S. § 2C: 43-6(a)(3).

Thus, the applicant has been convicted of two felonies as defined under the Act and is not eligible for the benefit sought in this matter. The appeal is dismissed on this basis as well.

Section 212(a)(2)(A) of the Act states in pertinent part:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime. . . is inadmissible.

(ii) Exception.

Clause (i)(I) shall not apply to an alien who committed only one crime if-

....

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to

a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required *mens rea* may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The BIA and U.S. courts have found that it is the “inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction” and not the facts and circumstances of the particular person’s case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Omagah v. Ashcroft*, 288 F.3d 254, 260 (5th Cir. 2002); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Neither the seriousness of the criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the “statutory provision ... encompasses at least some violations that do not involve moral turpitude”).

On August 23, 1993, the Jersey City Police Department arrested the applicant and charged him with two counts of having *knowingly* offered for sale sound recordings or audiovisual works which did not clearly and conspicuously disclose the true name and address of the manufacturer, and in the case of a sound recording, the name of the actual performer of the group, for private financial gain or for commercial advantage, as codified at N.J.S. § 2C: 21-21(4). On September 29, 1993, in the Jersey City Municipal Court, County of Hudson, State of New Jersey, in case having [REDACTED] and [REDACTED] the judge found the applicant guilty on both of these counts.

The AAO finds that a specific intent to defraud or deceive is an element of each of the two counts for which the applicant was convicted on September 29, 1993. Thus, this office finds that the applicant has been convicted of two crimes involving moral turpitude.

The applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act relating to crimes involving moral turpitude based on his two convictions under N.J.S. § 2C: 21-21(4). This ground of inadmissibility may not be waived. *See* 8 C.F.R. § 245a.18(c)(2)(i). 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 is admissible to the United States. *See* 8 C.F.R. § 245a.12(e). The appeal must also be dismissed because the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

The record indicates that the applicant entered as a nonimmigrant B2, visitor for pleasure, at New York City on November 23, 1985. Yet, according to the claims which he made in this proceeding, his intent upon returning in 1985 was to continue residing unlawfully in the United States. Thus, in November 1985, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The applicant did file the Form I-690, Application for Waiver of Grounds of Excludability, which is the form an applicant must file to request a waiver of the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. However, the director has not adjudicated this form. Because the Form I-690 has not been adjudicated, the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act and the appeal must be dismissed on this basis as well.

The appeal is dismissed for the reasons stated above with each considered as an independent and alternative basis for dismissal.

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