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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: [REDACTED] Office: LOS ANGELES Date: APR 22 2009
MSC 03 060 60965

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).

IN 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 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.

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, the applicant asserts that he complied with the director's request and provided evidence to establish his continuous residence in the United States during the requisite period. The applicant submits photocopies of the documents submitted in response to the Notice of Intent to Deny.

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 and through May 4, 1988. Section 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.11(b).

The applicant 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 under the provisions of section 212(a) of the Immigration and Nationality Act (Act), 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:

- Several receipts dated during the requisite period.
- An affidavit from an individual with an indecipherable signature attesting to the applicant's employment as a dishwasher from February 1988 to August 1989 at Frank's Pizza in Granada Hills, California.
- An affidavit from [REDACTED], who indicated that the applicant was in his employ from November 1984 to August 1987 in maintenance.
- An affidavit from [REDACTED], who attested to the applicant's residence at [REDACTED], Sepulveda, California from March 1988 to November 1989. The affiant asserted that he was a co-tenant.
- An affidavit from [REDACTED], who attested to the applicant's residence at [REDACTED], Northridge, California from March 1981 to March 1988. The affiant asserted that she was a co-tenant.
- Affidavits from [REDACTED] and [REDACTED], who attested to the applicant's residences in Northridge and Sepulveda during the requisite period. [REDACTED] indicated that he met the applicant through some friends in 1981. [REDACTED] indicated he met the applicant at a social event.
- Several photographs of the applicant during the requisite period.

On November 13, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted did not contain sufficient objective evidence to which they could be compared to determine whether the attestations were credible, plausible, or internally consistent with the record. The applicant was also advised that the employment letter from Frank's Pizza and a receipt from Darling's Tennis Shoppe appeared to have been altered.

The director, in denying the application, noted that the applicant failed to submit a rebuttal to the Notice of Intent to Deny. A review of the record, however, reveals that a response was received prior to the issuance of the director's decision of August 7, 2008. Accordingly, the applicant's response will be considered on appeal. The applicant, in response, submitted:

- An affidavit from [REDACTED] who indicated that the applicant was in her employ as a gardener on July 5, 1981.
- An affidavit from [REDACTED] who indicated that she has known the applicant since 1982 and that the applicant was in her employ as a gardener.
- An affidavit from [REDACTED], who indicated that he has been acquainted with the applicant since 1983. The affiant asserted that he married the applicant's cousin.

The U.S. Citizenship and Immigration Services (USCIS) 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, USCIS 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 should be analyzed to determine 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 the applicant 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, as he has presented inconsistent documents, which undermines his credibility.

The employment affidavits 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 affidavits from Frank's Pizza and [REDACTED] 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. Further, the signature on the affidavit from Frank's Pizza is indecipherable, thereby giving rise to questions whether the signature is that of a person who was authorized and affiliated with the company.

The applicant indicated on his Form G-325A, Biographic Information, dated November 23, 2002, employment at Over Seas Food Dist., since 1987. The applicant did not claim any employment at Frank's Pizza or with [REDACTED] on this form.

None of the affiants provide any details regarding the basis for their continuing awareness of the applicant's residence. 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.

The photographs have no identifying evidence which would serve to either prove or imply that the photographs were taken in the United States and during the requisite period.

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 evaluation of the applicant's claim is a factor on both the quality and quantity of the evidence provided. While affidavits in certain cases can effectively meet the preponderance of evidence standard, the affidavits submitted by the applicant are lacking in probative value and evidentiary weight and, therefore, 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.

Finally, the record reflects that on May 22, 1990, the applicant pled *nolo contendere* to violating section 23152(b), VC, driving with .08 percent or more alcohol in the blood, a misdemeanor in [REDACTED]. On May 4, 2005, this conviction was expunged in accordance with section 1203.4 PC.

The record also reflects that on September 12, 2001, the applicant pled *nolo contendere* to violating section 23152(b), VC, driving with .08 percent or more alcohol in the blood, a misdemeanor in [REDACTED]. On May 17, 2005, this conviction was expunged in accordance with section 1203.4 PC.

Under the statutory definition of "conviction" provided at Section 101(a)(48)(A) of the Immigration and Nationality 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.

It is a long-standing principle that issues of present admissibility are determined under the law that exists on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). Pursuant to 8 C.F.R. § 103.3(c), precedent decisions are binding on all Citizenship and Immigration Services offices. Therefore, pursuant to the above precedent decisions, no effect is to be given to the applicant’s expungements.

While these convictions do not render the applicant ineligible pursuant to 8 C.F.R. §§ 245a.11(d)(1) and 245a.18(a), the AAO notes that the applicant does have two misdemeanor convictions.

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