

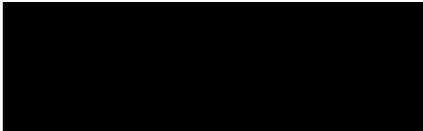
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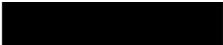
U.S. Citizenship
and Immigration
Services

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FILE:



Office: LOS ANGELES, CALIFORNIA

Date: **AUG 05 2009**

MSC-03-251-62962

IN RE:

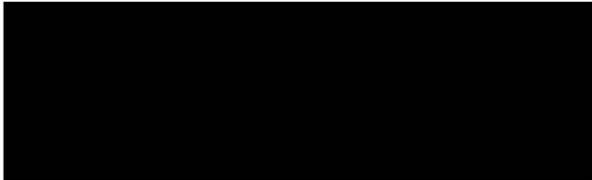
Applicant:



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 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 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 because she determined that when the applicant was convicted of *Grand Theft-Property* under California Penal Code (CA PC) § 487.1, he was convicted of a felony. The director also noted that the applicant failed to establish that he resided continuously in the United States for the duration of the relevant period.

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 *Garcia Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. 2003)(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 *Grand Theft- Property* 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 indicates that the court documents relating to this arrest have been destroyed. Counsel noted that California Government Code §68152(e)(2) requires the trial court clerk to maintain felony conviction records for 75 years. Pursuant to §68152(e) misdemeanor case records may be destroyed after 5 years. Counsel asserts that since the applicant's records have been destroyed, he was convicted of a misdemeanor, not a felony. Finally, Counsel notes that on the applicant's August 8, 1980 sentencing report from the United States Department of Justice, a notation is made to Penal Code §17, reducing the charge from a felony to a 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 § 489 states:

Grand theft is punishable as follows:

- (a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, 2, or 3 years.
- (b) In all other cases, by imprisonment in a 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.* In this case, the applicant plead *nolo contendere* and was sentenced to 24 months probation and a \$505 fine.

The record contains the applicant's criminal history transcript and a letter from the Superior Court of California, County of Los Angeles, indicating that the applicant's case records were destroyed pursuant to Government Code §71008. The applicant's Department of Justice sentencing report references CA PC § 17. Thus, while the final court dispositions of this arrest and conviction are not part of the record, the following summarizes the Federal Bureau of Investigation record, and the Department of Justice Bureau of Criminal Identification Records. On June 16, 1980, the applicant was arrested for violation of CA PC §487.1 *Grand Theft: Property*. On July 11, 1980 he plead *nolo contendere* to the charge in the Superior Court of California, County of Los Angeles. The court imposed a suspended sentence and placed the applicant on 2 years of probation and charged the applicant with a fine of \$505.

On February 9, 2007, 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 July 11, 1980.

In response, counsel asserted that under CA PC §17(b) the applicant's July 11, 1980 conviction is a misdemeanor conviction as it led to a sentence that did not include any term of confinement in the state prison.

On March 23, 2007 the director denied the application for the reasons set forth in the NOID.

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.

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 Federal Bureau of Investigation record, and the Department of Justice Bureau of Criminal Identification Records, that the record establishes that the applicant has a misdemeanor theft conviction, rather than a felony conviction. 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. It is noted that the applicant did not submit the final court disposition for this case, however, he did submit a certified letter from the Superior Court of California, County of Los Angeles, that the applicant's case records were destroyed pursuant to Government Code §71008.

However, the applicant is not eligible to adjust to permanent resident status, because he has failed to establish his continuous unlawful presence for the duration of the relevant period. An applicant for permanent resident status under section 1104 of the LIFE Act must also 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.*

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of several affidavits and letters. The AAO has reviewed each document to determine the applicant’s eligibility; however, the AAO will not quote each witness statement in this decision.

The record contains affidavits from the following individuals:

1. [REDACTED] who indicates that he has known the applicant since 1981 and that the applicant has serviced his truck for many years.
2. [REDACTED] who indicates that he met the applicant in 1981 when he first arrived in the United States. He indicates that the applicant has serviced his family’s vehicles since 1978 and that he visited him periodically at his Pico Rivera address on [REDACTED]. The applicant, on his Form I-485, indicates that he lived on [REDACTED] in Pico Rivera from 1981 until 1995. He lists no address on [REDACTED]. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice.

unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. This inconsistency has not been addressed by the applicant.

3. [REDACTED] and [REDACTED] who indicate that they met the applicant in 1981 while he was working as a mechanic. They list his address during the relevant period as [REDACTED] in Pico River.

Additionally, the record of proceedings contains affidavits from [REDACTED]

[REDACTED] and [REDACTED]. All of the above affiants state that they have known the applicant since before January 1, 1982, however, their statements do not supply enough details to lend credibility to an at least 24-year relationship with the applicant. For instance, the affiants do not indicate how they date their initial meeting with the applicant, how frequently they had contact with the applicant, or how they had personal knowledge of the applicant's presence in the United States. Further, the affiants do not provide information regarding where the applicant lived during the requisite period. Given these deficiencies, these affidavits have minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

While an applicant's failure to provide evidence other than affidavits shall not be the sole basis for finding that he or she failed to meet the continuous residency requirements, an application which is lacking in contemporaneous documentation cannot be deemed approvable if considerable periods of claimed continuous residence rely entirely on affidavits which are considerably lacking in certain basic and necessary information. As discussed above, the affiants' statements are significantly lacking in detail and do not establish that the affiants actually had personal knowledge of the events and circumstances of the applicant's residence in the United States. Few of the affiants provided much relevant information beyond acknowledging that they met the applicant in 1981. Overall, the affidavits provided are so deficient in detail that they can be given no significant probative value.

The record of proceedings also contains a copy of the applicant's Social Security Earnings Report which indicates that the applicant earned taxable wages in the United States in 1978, 1979, and 1980 and then not again until 1993. Additionally, the applicant's marriage certificate, indicating that he was married in Jalisco, Mexico on May 22, 1985.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought.

Given the applicant's reliance upon documents with minimal probative value and the contradictory nature of the evidence provided, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 as required under section 1104(c)(2)(B) of the LIFE Act. The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act on this basis.

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