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Washington, DC 20529-2090



U.S. Citizenship  
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FILE: [REDACTED] Office: LOS ANGELES  
MSC-03-217-62084

Date: JUL 23 2009

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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

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 on April 2, 2007, based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had a felony conviction in the state of California. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.* Specifically, the director noted that the applicant had a felony conviction for possession of a controlled substance in the state of California and was consequently inadmissible under section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, 8 U.S.C. 1182 (a)(2)(A)(i)(II).

The applicant is represented by counsel on appeal. Counsel argues that the applicant is eligible for status as a permanent resident under the LIFE Act because his one time conviction for possession of a controlled substance “was subject to a California Drug Diversion Program.” Counsel asserts that the drug conviction is no longer valid for immigration purposes pursuant to the Ninth Circuit’s reasoning in *Lujan-Armendariz v. INS*, 222 F 3d 728 (9<sup>th</sup> Cir 2000).<sup>1</sup>

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the

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<sup>1</sup> In that case, the Court held that an alien defendant who had been convicted as a first time offender of attempted possession of narcotic drugs under Arizona law, whose sentence was suspended and ultimately expunged, did not stand “convicted” for immigration purposes, because the alien defendant would have qualified for treatment under the Federal First Offender Act (FFOA) had he been charged with federal offenses. 18 U.S.C. § 3607 (2000), *Lujan-Armendariz v. INS*, 222 F.3d 728, 738. Thus, an expunged conviction under a state rehabilitative statute will have no immigration consequences *only if* the alien defendant could have received FFOA treatment had he been charged under federal drug laws. Under the relevant provisions of the FFOA, a criminal defendant will not be considered to have a “conviction” for any purpose if the conviction is a first time offense for simple possession of a controlled substance, if they have no prior drug offense convictions, and have not previously been the subject of a disposition under FFOA, and were placed on a term of probation. If the defendant has not violated the terms or conditions of probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. *De Jesus Melendez v. Gonzales*, 503 F.3d 1019 (9th Cir. 2007). This rule regarding expungements pursuant to the FFOA was formally adopted in immigration proceedings by the Board of Immigration Appeals (BIA) in *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995). The BIA held that any alien who has been accorded rehabilitative treatment under a state statute will not be deported if he establishes that he would have been eligible for federal first offender treatment under the provisions of the FFOA had he been prosecuted under federal law. *Matter of Manrique*, *id.*

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.

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 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 or 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).

Furthermore, an alien who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. 8 C.F.R. § 245a.3(c)(1). “Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except when the offense is defined by the state as a misdemeanor, and the sentence actually imposed is one year or less, regardless of the term such alien actually served. Under this exception, for purposes of 8 C.F.R. Part 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

“Misdemeanor” means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term such alien actually served, if

any, or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The AAO has reviewed all of the evidence in the applicant's file, including the conviction documents, court records, and criminal background investigation reports. The record contains a photocopy of a printout issued on February 23, 2001, by the California Department of Justice, Bureau of Criminal Identification. This record indicates that the applicant pleaded guilty on or about September 12, 1996 to one count of violating section 11350(a) of the California Health and Safety Code – *felony possession of a controlled substance*. A notation on the printout states, "proceedings suspended/diversion." A second count for the same offense was presumably dismissed pursuant to the terms of a plea agreement. The case is identified with [REDACTED]. There is no record of ultimate disposition under the terms of the suspension and diversion of the charges, and the applicant offers no evidence of the ultimate disposition on appeal.

Additionally, the record contains a photocopy of a criminal record generated by the Superior Court of California, Orange County, dated January 7, 2004. This record identifies the applicant by name and also lists an alias: [REDACTED]. The record reveals the conviction noted above, as well as additional charges: 1) [REDACTED] – an arrest on December 15, 1995 on charges of violating section 14601.1(a) (driving with a suspended/revoked license) and section 40508(a) – failure to appear in court, and 2) [REDACTED] – an arrest on February 3, 1996 on the same two charges as well as an additional traffic violation. The record indicates that all three records have been destroyed under the state provisions that require the destruction of all misdemeanor criminal records five years after final disposition.

From this evidence, the AAO concludes that, in addition to the felony drug possession conviction upon which the director denied the Form I-485, the record reveals at least four additional misdemeanor charges (two counts of driving with a suspended license and two counts of failure to appear in court). These charges are misdemeanor offenses and the records were destroyed pursuant to state record keeping requirements. The destruction of the criminal records does not alleviate the applicant's burden to provide an ultimate disposition for these criminal charges. The record contains no evidence of their ultimate disposition.

Furthermore, as regards the felony drug conviction, the AAO cannot discern from the evidence submitted by counsel whether the applicant successfully complied with the court's requirements regarding diversion and ultimate dismissal of the charges. The printout submitted with the brief on appeal only indicates that the charges were directed to be diverted and suspended by the court in 1996. Proof of successful completion of a drug diversion program would include documents such as the petition for dismissal, supporting briefs, evidence of the court's order, and other court documents that clearly demonstrate the applicant successfully complied with the drug diversion requirements. Under those circumstances, an expunged or dismissed drug conviction would meet the parameters outlined by the court in *Lujan-Armendariz v. INS, supra*.

The AAO concludes that the applicant is ineligible for permanent resident status pursuant to the terms of the LIFE Act, as he cannot meet his burden of proof to establish eligibility for permanent resident status.

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