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U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship
and Immigration
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FILE: [REDACTED] Office: CHICAGO
MSC 02 241 61566

Date: JUL 28 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:

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.

A handwritten signature in black ink, appearing to read "J. F. Grissom".

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, Chicago, Illinois, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because the evidence of record did not establish that he applied for class membership in any of the legalization class action lawsuits.

The applicant is represented by counsel on appeal. Counsel argues that the applicant's father "possesses evidence of class membership, i.e., an employment authorization card" and that the applicant listed as a minor child on his father's application for permanent residence status. Counsel maintains that had the applicant's father been granted permanent resident status, the applicant would have had derivative status, thus allowing him to self-petition.

The AAO has reviewed all of the evidence in the file and we agree with counsel that the applicant qualifies for derivative class membership through his father. The evidence of record indicates that the applicant's father, [REDACTED], filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on May 29, 2002. [REDACTED] application was denied on October 22, 2004, for failure to demonstrate the required citizenship skills. 8 U.S.C. § 1255a, 8 C.F.R. §245a.17. As his father was unsuccessful in gaining permanent resident status only on account of his failure to demonstrate a working knowledge of English and American history, and not on account of his failure to establish class membership, as his son, the applicant has standing as a derivative. Therefore, is the applicant is eligible to apply for permanent resident status pursuant to the settlement agreements.

In a letter dated June 2, 2009, the AAO notified the applicant of adverse information contained in the file regarding his eligibility for permanent resident status and provided him with an opportunity to address the derogatory information. To date, the applicant has submitted no additional evidence or response to the letter issued on June 2, 2009. The AAO will examine the evidence of record as it currently stands.

Therefore, the issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982, (2) has continuously resided in the United States in an unlawful status for the requisite period of time, and (3) is otherwise admissible, i.e., has no disqualifying criminal convictions. The AAO concludes that, upon review of all of the evidence of residence and admissibility the applicant's claim is *not* more likely true than not. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring).

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 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 applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 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.2(d)(5). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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.* 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. 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.

The AAO has reviewed all of the documents in the file in their entirety regarding the issue of the applicant's entry and residence in the United States for the requisite period. The applicant's proof of entry and residence includes an affidavit dated February 16, 2006 from [REDACTED] Mr. [REDACTED] states therein that he has known the applicant and his father since 1982. However, this affidavit fails to establish

that the applicant entered on or before January 1, 1982 because [REDACTED] stated to the adjudication officer when contacted by phone that the applicant entered the United States sometime in March, 1982. The applicant submitted no documentation to establish entry or residence on or before January 1, 1982, such as rental receipts, utility bills, tax returns, bank statements, lease agreements, or any other document that would support his assertion of eligibility.

As noted above, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). The applicant has failed to meet this burden of proof regarding his entry and residence in the United States for the requisite period, and his application for permanent resident status pursuant to the LIFE Act must be denied on those grounds.

Furthermore, the AAO notes that the applicant is likewise ineligible for permanent resident status on account of his multiple criminal arrests and convictions. An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to Lawful Permanent Resident status. 8 C.F.R. § 245a.18(a)(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 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 to be imposed.

Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

The record contains court documents that reflect the applicant has numerous arrests and convictions for misdemeanor offenses in both Du Page and Cook County, Illinois:

- An April 22, 1991 arrest for violating Chapter 38 25-1(a)(2) of the Illinois Criminal Code, *Mob Action* [REDACTED]. This charge was dismissed (*nolle prosequi*) on June 12, 1991.

- A June 12, 1991 conviction for a violation of 625 Illinois Consolidated Statutes (ILCS) 5/11-402, *Motor Vehicle Accident Involving Damage to Vehicle* (██████████). The applicant paid a fine of \$50, and placed under court supervision for an unspecified period of time. This offense is considered a Class A misdemeanor.
- A June 12, 1991 conviction for a violation of 625 ILCS 5/11-403, *Duty to Give Information and Render Aid* (██████████). The applicant paid a fine of \$50, and was placed under court supervision for an unspecified period of time. This offense is considered a Class A misdemeanor.
- A February 5, 1993 conviction for a violation of 720 ILCS 5/16A-3, *Retail Theft* (██████████). The applicant paid a fine of \$1,000 and was placed on probation for one year. This offense is considered a Class A misdemeanor. However, this conviction will not be considered as a disqualifying conviction because it is amenable to the “petty offense” exception to grounds of inadmissibility.¹
- A September 13, 2004 conviction for a violation of 625 ILCS 5/11-501-A2, *Driving Under the Influence of Alcohol or Drugs*, (██████████). The applicant was placed on probation for one year and fined \$969. This offense is considered a Class A misdemeanor.
- A September 13, 2004 conviction for a violation of 625 ILCS 5/11-709-A, *Improper Lane Usage – Change Lanes Unsafely*, (██████████). The applicant was placed on probation for one year and fined \$190. This offense is considered a Class A misdemeanor.
- The record reveals three additional charges arising from the September 13, 2004 conviction. These charges were dismissed (*nolle prosequi*) on September 13, 2004: a violation of 625 ILCS 5/11-804-B, *Failure to Signal When Turning*, a violation of 625 ILCS 5/6-112,

¹ The Seventh Circuit Court of Appeal, which is the jurisdiction in which this case arises, has ruled that a conviction for *Retail Theft* is a crime involving moral turpitude (CIMT). See *Gutnik v. Gonzales*, 469 F.3d 683, 685 (7th Cir. 2006). An applicant who has been convicted of a CIMT is inadmissible, and therefore ineligible for permanent resident status. But, an alien with one CIMT is not inadmissible if he or she meets the petty offense exception. See 8 U.S.C. § 1182(a)(2)(A)(ii). A CIMT will meet the petty offense exception if “the maximum penalty possible for the crime of which the alien was convicted . . . did not exceed imprisonment for one year and . . . the alien was not sentenced to a term of imprisonment in excess of 6 months” or the crime was committed when the alien was under 18 years of age. The applicant was not under 18 years of age when the crime was committed, but the maximum sentence for a Class A misdemeanor offense is one year incarceration or less. The applicant was not sentenced to a term of imprisonment, but was ordered to serve a term of probation for one year.

*Failure to Carry Driver's License While Driving, and a violation of 625 ILCS 5/11-907-A, Failure to Yield to Emergency Vehicles.*²

The record demonstrates that the applicant has four misdemeanor convictions in the state of Illinois and other criminal arrests which are not addressed by the applicant, despite the June 2, 2009, request to provide additional evidence. Because of his four misdemeanor convictions, the applicant is ineligible for adjust to permanent resident status under the LIFE Act pursuant to 8 C.F.R. § 245a.18(a)(1). Within the provisions of the LIFE Act, there is no waiver available to an alien convicted of a felony or three or more misdemeanors committed in the United States.

An alien applying for adjustment of status under the provisions of section 1140 of the LIFE Act has the burden of proving by a preponderance of evidence that he or she has continuously resided in an unlawful status in the United States from January 1, 1982 to May 4, 1988, is admissible to the United States under the provisions of section 212(a) of the INA, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.11. The applicant has failed to meet this burden of proof and his application must be denied on criminal grounds also.

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

² The AAO notes that the record also contains evidence of two additional arrests in Cook County: *disorderly conduct* in 1997 and *assault* in 1999. Both offenses are classified as misdemeanors, but the court documents do not reveal an ultimate disposition regarding the charge of *disorderly conduct*. The *assault* charge was dismissed on June 24, 1999, because the complaining witness did not appear in court.