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

U.S. Citizenship
and Immigration
Services

L2

[REDACTED]

FILE:

[REDACTED]

Office: NORFOLK, VA

Date: JUN 05 2009

MSC 01 275 60057

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 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, Norfolk, Virginia, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The director concluded that the applicant failed to demonstrate that he resided unlawfully in the United States throughout the statutory period. Specifically, the director asserted that the record indicated that the applicant was lawfully present in the United States after entering as a nonimmigrant F-1 student on January 9, 1985. Therefore, the director denied the application.

On appeal, the applicant indicated through counsel that if a legalization applicant was present in the United States prior to January 1, 1982, then exited the United States for less than 45 days during the statutory period and then re-entered on a valid visa, the applicant would remain eligible to adjust status under LIFE legalization. Counsel also indicated that he would submit a brief by June 19, 2003. The record indicates that as of May 19, 2009, no brief has been filed. The AAO will consider the record complete.

An affected party filing from within the United States has 30 days from the date of an adverse decision to file an appeal. An appeal received after the 30-day period has tolled will not be accepted. The 30-day period for submitting an appeal begins 3 days after the notice of decision is mailed. 8 C.F.R. § 245a.20(b)(1).

The record reflects that the director issued the notice of decision to the applicant at his address of record: [REDACTED] via certified mail on March 7, 2003. However, the decision was sent back to the director unclaimed. The applicant came in person to the Norfolk, Virginia District Office and received a copy of the notice of decision on May 12, 2003. The applicant then submitted the Form I-290B, Notice of Appeal to the Administrative Appeals Unit, on May 19, 2003. Attached to the Form I-290B is the Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated May 14, 2003 which also lists the applicant's address as [REDACTED] Virginia. Thus, the record indicates that the notice of decision was properly mailed to the applicant on March 7, 2003, but the applicant did not receive it.

It is also noted that the applicant asserted on the Form I-687, Application for Status as a Temporary Resident, filed on February 1, 1991 and the Affidavit for Determination of Class Membership in *League of United Latin American Citizens v. INS* signed under penalty of perjury on January 31, 1991 that he entered the United States without inspection in 1980 and did not depart again until November 1984. Later in this proceeding, the applicant modified this assertion and indicated that he did not depart the United States until December 1984. The Form I-94, Arrival-Departure Card, in the record establishes that on January 9, 1985, the applicant entered the United States as a nonimmigrant F-1 student. The applicant stated on the Form I-687 filed in 1991 and the Form I-687 filed in 2004 that the November/December 1984 through January 1985 absence was his only absence from the United States between 1980 and May 4, 1988. However, the copy of the applicant's passport in the record indicates that on September 22, 1981, he was in Enugu, Nigeria to obtain his passport. The copy of the applicant's vaccination record in the A-file indicates that on September 7, 1982, December 12, 1983 and December 19, 1984, the applicant received vaccinations in Benin City, Nigeria. Also, at the May 31, 2005 CSS/Newman legalization interview, the applicant signed a sworn statement in which he attested that the mother of his children had never been to the United States and that she gave birth

to the applicant's daughter [REDACTED] in Nigeria in 1982 and his son [REDACTED] in Nigeria in 1984. At that interview, the applicant also testified that he was outside the United States for approximately two months at the end of 1984/beginning of 1985. The applicant submitted extensive contemporaneous documentation of having resided in the United States after his January 9, 1985 entry; however, he provided no independent, objective evidence of having resided in the United States prior to that entry which might overcome the discrepancies in the record regarding his claim of having been in the United States between 1980 and November/December 1984 and of having never exited the United States during that period.

Counsel suggested on the Form I-290B that, even though he was filing the appeal more than 33 days after the issuance of the notice of decision, the appeal should be accepted as timely filed because the applicant did not obtain a copy of the notice of decision until May 12, 2003. This assertion is not correct. The notice of decision was properly sent by certified mail on March 7, 2003 to the applicant's address of record, but was not claimed by the applicant.¹ The appeal in this matter was received on May 19, 2003, 73 days after the date that the director mailed the notice of decision. The appeal must be rejected as untimely filed.

Finally, the record indicates that the applicant was arrested and/or charged five times. He was also summoned to appear on September 11, 2001.

On June 16, 1996, the Virginia Beach Police Department arrested the applicant under the name [REDACTED] and charged him with assault/battery of a family member under § 18.2-57.2 of the Code of Virginia in case number 384674. The Virginia Beach Juvenile and Domestic Relations District Court dismissed the charge on motion of the victim after examination by the court, and upon payment of costs by the applicant.

On March 14, 1997, the Virginia Beach Police Department charged the applicant with failure to appear on a misdemeanor charge. The applicant has not submitted the certified court disposition which relates to this charge or any other documentation relating to the outcome of this charge.

On March 20, 1998, the Norfolk Police Department arrested the applicant and charged him with possession of more than ½ ounce but less than five pounds of marijuana with the intent to distribute. On December 21, 1998, the judge of the Circuit Court of the City of Norfolk acquitted the applicant of this charge in case number [REDACTED].

On November 7, 1998, the Norfolk Police Department arrested the applicant and charged him with failure to appear on a felony charge. On December 8, 1998, on motion by the attorney for the

¹ On January 31, 2003, the director mailed the notice of intent to deny (NOID) in this matter to the same address of record: [REDACTED] also by certified mail. The applicant signed for and received the NOID. The director explained in the NOID that the applicant had 30 days to respond, and that if he did not respond, the director would deny the application for the reasons set forth in the NOID. The applicant did not respond to the NOID. The director then sent out the notice of decision to the applicant's address of record 35 days after having sent the NOID.

Commonwealth of Virginia, the judge of the Circuit Court of the City of Norfolk entered a *nolle prosequi*² with regard to this charge in case number [REDACTED]

On December 22, 2001, the Mineola County, New York Police Department arrested the applicant and charged him with driving while intoxicated in case number [REDACTED]. The applicant has not submitted the court disposition which relates to this charge, nor any other documentation relating to the outcome of this charge. However, the Federal Bureau of Investigation (FBI) report in the record indicates that at court the applicant was charged with operating a motor vehicle while one's ability is impaired by alcohol under New York Vehicle and Traffic Law (NY VTL) § 1192.1 and with operating a motor vehicle without a license under NY VTL § 509.1. The applicant was convicted of both charges upon a plea of guilty and made to pay a \$300 fine and a \$100 fine, respectively. The applicant was granted a conditional discharge and had his license suspended for 90 days. The maximum, possible jail sentence for driving while ability is impaired under NY VTL § 1192.1 is 15 days. *See* NY VTL § 1193. The maximum sentence for driving without a license under NY VTL § 509.1 is also 15 days. *See* NY VTL § 509.11.

The applicant was also summoned to appear on September 11, 2001 for trial on his misdemeanor appeal relating to charges: of having no city license; of improper use of tags; of having no registration; and of having expired temporary tags. The summons warned that willful failure to appear at such trial is a separate offense. The applicant did not submit into the record any documentation relating to the outcome of this trial which has case number: [REDACTED].

There is no indication in the record that the applicant was asked to submit additional documentation relating to these arrests/charges.

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). 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). The applicant's two convictions each carried a maximum, potential sentence of 15 days. Thus, the record indicates that the applicant has been convicted of at least two misdemeanors.

Two misdemeanor convictions do not make the applicant ineligible for benefits under the LIFE Act. *See* 8 C.F.R. § 245a.18(a)(1). This office also notes that the offense of driving while one's ability is impaired and driving without a proper license are not specific intent crimes, and as such are not crimes involving moral turpitude.

The record is not complete in that it does not include documentation relating to all of the charges which have been brought against the applicant. If the applicant has been convicted of an additional

² *Nolle prosequi* is an order to abandon a prosecution; to dismiss charges. *Black's Law Dictionary Seventh Edition* (1999) West Publishing Co. The record does not indicate what the underlying felony charge was in this matter.

misdemeanor or of a felony, he is not eligible to adjust under the LIFE Act, and the appeal would need to be dismissed on that basis as well.

ORDER: The appeal is rejected as untimely filed.