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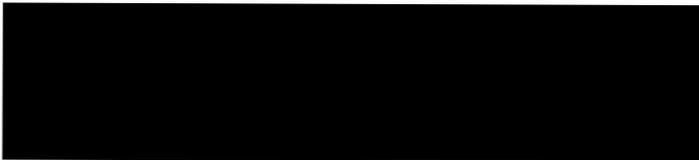
Office: LOS ANGELES

Date: **NOV 17 2009**

IN RE: Applicant: 

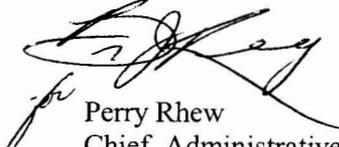
APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), *amended by* LIFE Act Amendments, Pub. L. 106-554. 114 Stat. 2763 (2000).

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 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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the grounds that the applicant (1) was convicted of three or more misdemeanors committed in the United States, (2) did not submit evidence that he fulfilled the basic citizenship skills required for legalization under the LIFE Act, and (3) failed to establish that he was continuously resident in the United States in an unlawful status from before January 1, 1982 through May 4, 1988.

On appeal counsel asserts that the applicant has not been convicted of three or more misdemeanors committed in the United States, satisfies the basic citizenship skills requirement for LIFE legalization, and was continuously resident in the United States in an unlawful status during the years 1981-1988. The applicant submits a brief and supporting documentation.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

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. *See* section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a)(1).

As defined in 8 C.F.R. § 245a.1(o):

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) [which defines “felony” generally as a crime punishable by imprisonment for more than one year, but makes an exception if such an offense is defined by the State as a misdemeanor and the sentence actually imposed is one year or less]. 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.

Under section 1104(c)(2)(E)(i) of the LIFE Act, regarding basic citizenship skills, an applicant for permanent resident status must also demonstrate that he or she:

- (I) meets the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. 1423(a))(relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

- (II) is satisfactorily pursuing a course of study (recognized by the [Secretary of Homeland Security]) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Secretary of Homeland Security may waive all or part of the above requirements for aliens who are at least 65 years of age or who are developmentally disabled. *See also* 8 C.F.R. § 245a.17(c).

An applicant may establish that he or she has met the requirements of section 312(a) of the Immigration and Nationality Act (Act) by demonstrating an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language, and by demonstrating a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States. *See* 8 C.F.R. § 245a.17(a)(1) and 8 C.F.R. §§ 312.1 – 312.3.

An applicant may also establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by providing a high school diploma or general educational development diploma (GED) from a school in the United States. *See* 8 C.F.R. § 245a.17(a)(2). The high school or GED diploma may be submitted either at the time of filing the Form I-485 LIFE Act application, subsequent to filing the application but prior to the interview, or at the time of the interview. *Id.*

Finally, an applicant may establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by establishing that:

He or she has attended, or is attending, a state recognized, accredited learning institution in the United States, and that institution certifies such attendance. The course of study at such learning institution must be for a period of one academic year (or the equivalent thereof according to the standards of the learning institution) and the curriculum must include at least 40 hours of instruction in English and United States history and government. The applicant may submit certification on letterhead stationery from a state recognized, accredited learning institution either at the time of filing Form I-485, subsequent to filing the application but prior to the interview, or at the time of the interview (the applicant's name and A-number must appear on any such evidence submitted).

8 C.F.R. § 245a.17(a)(3).

An applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the initial LIFE interview shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the required tests or to submit the evidence described above. *See* 8 C.F.R. § 245a.17(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 its amenability to verification. *See* 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.

The regulations provide an illustrative list of documents – which includes affidavits and “any other relevant document” – that the applicant may submit as evidence of continuous residence in the United States during the requisite period under section 245A of the Act. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant, a native of Mexico who claims to have lived in the United States since February 1981, filed his application for permanent resident status under the LIFE Act (Form I-485) on June 3, 2002.

On March 21, 2007, the applicant was interviewed. At the conclusion of the interview the applicant was issued a Form I-72 requesting additional documentation pertaining to his claim of continuous residence in the United States during the 1980s, his criminal record, and his fulfillment of the basic citizenship skills required for LIFE legalization. The applicant was granted 30 days to submit the requested documentation.

On June 14, 2007, the director issued a Notice of Intent to Deny (NOID) the application. The director indicated that the applicant had not responded to the Form I-72, that the evidence of record did not establish the applicant’s continuous residence in the United States during the years 1981-1988, and that the applicant had not submitted a “certificate of completion” of his basic

citizenship skills requirement. The director also listed four "arrests and/or convictions" of the applicant in California in the years 1981, 1983, 1990, and 1997, based on "Service records referencing pertinent court dispositions, DMV legal history abstracts, and other criminal records," and concluded that the applicant had been convicted of three or more misdemeanors committed in the United States, making him ineligible for permanent resident status. The director granted the applicant 30 days to submit additional evidence.

On July 23, 2007, the director issued a decision denying the application. The director indicated that the applicant had not responded to the NOID during the 30-day period allowed and denied the application for the reasons stated in the NOID.

Counsel filed a timely Form I-290B, Notice of Appeal or Motion, on August 27, 2007, together with a brief captioned as a motion to reopen and supporting documentation. According to counsel, the applicant did respond to the Form I-72 with all requested information on April 26, 2007, but did not respond to the NOID because he never received it. Counsel asserts that the documentation of record, including the materials submitted with the Form I-290B, establishes the applicant's eligibility for legalization under the LIFE Act.

On November 9, 2007, the director denied the motion to reopen. The director indicated that the NOID had been mailed to correct addresses of the applicant and counsel, and that the applicant had not submitted a compelling reason to reopen the case. While denying the motion to reopen, the director ordered that the applicant's Form I-290B be forwarded to the AAO for review as an appeal.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The documentation of record clearly shows that the applicant was convicted of two misdemeanors in the State of California. They include the following:

On February 13, 1991, in the Municipal Court of Compton, the applicant was convicted of violating section 648 of the California Penal Code (PC), a misdemeanor offense committed on November 18, 1990, and was sentenced to 30 days in jail and three years probation [REDACTED]

- On April 28, 1998, in the Municipal Court of Compton, the applicant was convicted of violating section 23152(B) of the California Vehicle Code (VC), a misdemeanor offense committed on September 22, 1997, and was sentenced to three days in jail and three years probation ([REDACTED])

On June 26, 2001, after completion of the probationary period, the court issued an order setting aside the conviction under VC section 23152(B) and dismissing the criminal complaint in accordance with PC section 1203.4.

Counsel argues that the dismissal of the second offense pursuant to PC section 1203.4 reduces the applicant's convictions to one. The AAO does not agree. PC section 1203.4 gives California judges the discretion to expunge a conviction after a defendant is no longer on probation. Such action does not represent a finding of innocence, however, and the conviction can be pleaded and proved anew if the defendant is later prosecuted for another offense.

Section 101(a)(48)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(48(A), defines "conviction" as follows:

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.

Under the statutory definition of "conviction" at section 101(a)(48)(A) of the INA, no effect is to be given in immigration proceedings to a state action which purports to reduce, expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. See *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528. See also *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379 (BIA 2000) (conviction vacated under a state criminal procedural statute, rather than a rehabilitative provision, remains vacated for immigration purposes). In *Matter of Pickering*, a more recent precedent decision, the Board of Immigration Appeals reiterated that if a court vacates a conviction for reasons unrelated to a procedural or substantive defect in the underlying criminal proceedings, the alien remains "convicted" for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003).

Thus, the applicant has been convicted for immigration purposes in the State of California under VC section 23152(B), as well as under PC section 648.

In the NOID of June 14, 2007, the director listed two other misdemeanor "arrests and/or convictions" of the applicant, based on U.S. Citizenship and Immigration Services (USCIS) records, for violations of section 23152(A) of the California Vehicle Code in August 1981 and August 1983. In the RFE on March 21, 2007, the applicant was advised to submit a "DMV

Printout” showing his “violations/convictions history” as well as final original court certified disposition(s) of his arrests or, if court records are no longer available, information on such records from the California Department of Justice, Bureau of Criminal Identification.

The various court records submitted by the applicant – which identify a number of charges that were subsequently dismissed – do not refer to any arrests or convictions in 1981 or 1983. The materials submitted with the applicant’s Form I-290B include (1) a printout from the California Department of Motor Vehicles, dated March 23, 2007, in response to an information request from the applicant, which does not refer to any vehicular arrests or convictions in 1981 and 1983, and (2) a printout from the California Department of Justice, Bureau of Criminal Identification and Information, dated April 20, 2007, confirming the applicant’s arrest in 1990 and conviction in 1991 for a violation of PC section 648. The printout does not list any other arrests or convictions for the applicant in California, which is consistent with the state’s dismissal in 2001 of his vehicle code conviction from 1998.

Based on the foregoing documentation, which comports with the evidentiary materials requested in the Form I-72, the AAO determines that the applicant has met his burden of proof, by a preponderance of the evidence, that he was not convicted of any vehicle code violations in 1981 or 1983. Thus, as far as the record shows the applicant has only been convicted of two misdemeanors in the State of California. Since two misdemeanor convictions do not make an alien *ipso facto* ineligible for LIFE legalization, the AAO will withdraw that ground for denial of the application.

With regard to the basic citizenship skills requirement for LIFE legalization, the applicant was advised in the Form I-72 issued at the conclusion of his interview on March 21, 2007, that he would be re-interviewed in about 180 days, at which time he would have another opportunity to demonstrate his basic citizenship skills. In the meantime, the applicant was advised to submit documentary proof of his claimed enrollment in and completion of a course of instruction in English language and U.S. history and government.

Among the materials submitted with the Form I-290B in August 2007 (which counsel asserts were originally submitted in April 2007) was a photocopied letter dated April 6, 2006, on the letterhead of the Compton Unified School District, Compton Adult School, signed by [REDACTED] an adult education instructor at the school. According to [REDACTED] the applicant attended more than 95 hours of “citizenship classes” from January 2006 to April 6, 2006, in which “the importance of individual freedom is stressed” and “emphasis is placed on how individuals and events have shaped the nation.”

The foregoing letter does not fully comport with the requirements of 8 C.F.R. § 245a.17(a)(3). It states only that the applicant attended “citizenship classes” without specifying whether the coursework included an English language component. The letter does not identify the applicant’s A-number. Furthermore, the applicant did not supplement the teacher’s letter with other

documentation expressly requested in the Form I-72, including a “registration/enrollment form with printout of attendance” and a “completion certificate on school letterhead.”

Thus, the applicant has not satisfied the basic citizenship skills for LIFE legalization under any of the three options set forth in the regulations. He did not pass an examination, in accordance with 8 C.F.R. § 245a.17(a)(1). He did not provide a high school diploma or GED from a school in the United States, in accordance with 8 C.F.R. § 245a.17(a)(2). Nor has the applicant shown that he attended a state recognized, accredited learning institution in the United States, following a course of study which spans one academic year and that includes 40 hours of instruction in English and United States history and government, in accordance with 8 C.F.R. § 245a.17(a)(3).

The applicant is not 65 years old or older and there is no evidence in the record that he is developmentally disabled. Thus, the applicant does not qualify for either of the exceptions listed in section 1104(c)(2)(E)(ii) of the LIFE Act.

The applicant has failed to demonstrate that he meets the basic citizenship skills requirement as described at 1104(c)(2)(E) of the LIFE Act. Accordingly, he is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act. The AAO concurs with the director’s denial on this ground.

The final issue on appeal is whether the applicant has submitted sufficient credible evidence to establish that he resided continuously in the United States in an unlawful status during the years 1981-1988. As evidence of his residence during the requisite time period the applicant has submitted the following documentation:

- A series of affidavits and declarations, dated between 1990 and 2007, from individuals who claim to have lived or worked with the applicant, prepared his income taxes during the 1980s, or otherwise known the applicant during those years.
- Photocopies of two letter envelopes with postmark dates of June 4, 1985, and May 9, 1986.
- Two letters dated in 1989 from the president and office manager, respectively, of A & S Wood Turning in Gardena, California, and American Synapse Inc. (location unidentified), stating that the applicant was employed by those businesses from May 16, 1981 to May 8, 1982, and from May 21, 1984 to April 26, 1987, respectively.

The affidavits and declarations from individuals who claim to have known the applicant in California during the 1980s all have minimalist formats with little personal input by the authors. Considering how long each of these individuals claims to have known the applicant, it is remarkable how little information they provide. The authors offer few if any details about the

applicant's life in the United States during the 1980s, and the extent of their interaction with him over the years. Some of the applicants claim that they knew the applicant in the United States in 1979 and 1980, which conflicts with the applicant's own claim to have come to the United States for the first time in February 1981. None of the affidavits and declarations is accompanied by any documentary evidence of the author's personal relationship with the applicant in the United States during the 1980s. In view of these myriad substantive shortcomings, the AAO finds that the affidavits and declarations have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States during the years 1981-1988.

The photocopied letter envelopes in the record have little evidentiary weight. Since the originals were not submitted, it is impossible to verify the authenticity of the envelopes and their postmark dates of 1985 and 1986. The AAO notes that the handwriting on the envelopes, ostensibly the applicant's since he is identified as the sender, does not appear to match the applicant's signature and other handwriting in the current application.

As for the letters from two individuals who claim to have employed the applicant during the years 1981-82 and 1984-87, the regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant's employment must (1) provide the applicant's address at the time of employment; (2) identify the exact period of employment; (3) show periods of layoff; (4) state the applicant's duties; (5) declare whether the information was taken from company records; and (6) 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 employment letters in this case do not meet most of these criteria. Neither provides the applicant's address at the time of employment, and neither describes the applicant's duties. Furthermore, neither letter states whether the information about the applicant was taken from company records and whether such records are available for review. No pay statements or tax records have been furnished to bolster the applicant's claim of employment at either business. Due to the infirmities discussed above, the employment letters have little probative value. They are not persuasive evidence of the applicant's residence in the United States during the years 1981-1988.

In the RFE issued on March 21, 2007, the applicant was requested to submit a Social Security printout for the years 1981-1988 as evidence of his employment in the United States during those years. Counsel asserts that the requested evidence was submitted in April 2007, but no such document is in the file.

Based on the foregoing analysis of the evidence, the AAO determines that the applicant has failed to establish that he resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. On this ground as well, therefore, the applicant is ineligible for permanent resident status under the LIFE Act. The AAO concurs with the director's denial on this ground.

For the reasons discussed above, the appeal will be dismissed, and the application denied.

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