



U.S. Citizenship  
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[REDACTED]

FILE:

MSC-01-345-69766

Office: LOS ANGELES

Date: NOV 25 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.

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, Los Angeles, 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 he had not met his burden of proof that he entered the United States on or before January 1, 1982, and had resided here in an unlawful status for the requisite period of time. *See* 8 C.F.R. § 245a.15(d). Specifically, the director noted that the applicant could not establish continuous residence and that he failed to submit final court dispositions for his criminal record. The director concluded that the applicant was not eligible for adjustment to permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.11(d)(1).

The applicant, who is represented by counsel on appeal, filed a timely Notice of Appeal (Form I-290B). Counsel asserts that the United States Citizenship and Immigration Services (USCIS) has crossed the applicant's file with another alien of a similar sounding name and as a result, has erroneously denied the application for permanent residence (Form I-485). Counsel also discusses documentary evidence previously submitted and maintains that the applicant is eligible for status as a permanent resident under the LIFE Act because he has provided sufficient evidence of continuous residence for the requisite period of time. No new evidence is submitted on appeal. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.<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 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

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<sup>1</sup> 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).

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 issue in this proceeding is whether the applicant has established that he (1) entered the United States on or before January 1, 1982, (2) has continuously resided here in an unlawful status for the requisite period of time, and (3) is otherwise admissible. The documents that the applicant submits in support of his claim to have arrived in the United States on or before

January 1, 1982 and lived in an unlawful status during the requisite period include affidavits of witnesses, statements from employers, and a variety of receipts for part of the qualifying period.

The applicant submitted witness affidavits from [REDACTED] and [REDACTED]. The AAO will not quote from each individual affidavit, except to state that each witness attests to having known the applicant for all or part of the qualifying period of time. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; 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.

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The applicant submitted two letters from employers, J.C. Ureta Trucking and Horizon Board and Care. Both letters state that the applicant has been employed for part of the requisite time period. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where the records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F).

The two letters of employment submitted by the applicant do not fully comply with the above cited regulation because they do not provide the applicant's address at the time of employment or provide the applicant's exact periods of employment in 1981 and 1984. *See* 8 C.F.R. § 245a.2(d)(3)(i) (2007). Thus, we assign these documents little probative weight.

The applicant also submitted two sales receipts from 1983 and 1984, as well as a statement from the California Department of Motor Vehicles indicating the issuance of a driver's license in 1982. The AAO considers these documents to be some evidence of physical presence during the

qualifying period, but not evidence of continuous residence for the entire statutory period. Thus, they are assigned such weight as is appropriate.

As stated previously, to meet his or burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Here, the applicant has failed to provide probative and credible evidence of his entry and continuous residence in the United States for the duration of the requisite period, and his applicant for permanent resident status must be denied on this ground.<sup>2</sup>

Lastly, the AAO finds in its *de novo* review that the record contains evidence of a criminal conviction. The record contains a Petition and Order Under Section 1203.4 of the California Penal Code. This document indicates that the applicant was convicted on May 27, 1993 for one count of violating section 245(a)(1) of the California Penal Code – assault with a deadly weapon likely to produce great bodily injury. Our review of the California Penal Code reveals that a violation under this subsection is considered a felony offense. The applicant's petition to dismiss the conviction was granted by the court on November 9, 2000.

Nonetheless, the applicant's conviction remains valid for immigration purposes. 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. See Section 101(a)(48)(A) of the Immigration and Naturalization Act (Act), 8 U.S.C. § 1101(a)(48)(A).

Furthermore, as this case arises within the jurisdiction of the Ninth Circuit Court of Appeals, the law of that circuit is applicable. The Ninth Circuit Court of Appeals has deferred to the Board of Immigration Appeals' (BIA) determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. Section 1203.4 of the California Penal Code is a state rehabilitative statute. The provisions of section 1203.4 allow a criminal defendant to withdraw a plea of guilty or *nolo contendere* and enter a plea of not guilty subsequent to a successful completion of some form of rehabilitation or probation. It does not function to expunge a criminal conviction because of a procedural or constitutional defect in the underlying proceedings. In this case, there is no evidence in the record to suggest that the applicant's conviction was expunged because of an underlying procedural defect in the merits of the case, and the vacated judgment remains valid for immigration purposes. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).

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<sup>2</sup> Counsel's contention that USCIS has crossed the applicant's file with a different alien is without merit. A forensic analysis of both sets of fingerprints in both alien registration files indicates they are one and the same individual. Also, both alien registration files have identical photos on several different forms.

As noted above, 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).

The AAO concludes that the applicant has not established by a preponderance of credible, probative evidence that he has continuously resided in the United States for the requisite period of time, and his felony conviction renders him inadmissible to the United States pursuant to the terms of the LIFE Act.

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