

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

L2

FILE: [REDACTED] Office: NEW YORK
MSC-02-245-63031

Date: **SEP 02 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.

A handwritten signature in black ink, appearing to read "John 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, New York, 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 been convicted of a crime involving moral turpitude (CIMT) in New York. Specifically, the director observed that the applicant pleaded guilty to mail fraud on or about November 7, 1997, and that a conviction for a CIMT rendered the applicant ineligible for permanent residence under the terms of the LIFE Act. The director also determined that the applicant failed to establish by a preponderance of credible evidence that he unlawfully entered the United States on or before January 1, 1982, and resided continuously in the United States for the requisite period. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel does not contest the applicant's conviction for a CIMT. Counsel maintains that the applicant is entitled to a waiver of his conviction on humanitarian grounds. Counsel also argues that the affidavits submitted by the applicant are sufficient to meet the burden of proof regarding entry and residence. No new evidence is submitted on appeal.

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 “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.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).

Additionally, an applicant who has been convicted of a crime involving moral turpitude (CIMT) is inadmissible, and therefore ineligible for permanent resident status. Inasmuch as this case arises within the Second Circuit Court of Appeals, the law of that circuit is applicable in defining a CIMT. The Second Circuit, like its sister circuits, has generally deferred to the Board of Immigration Appeals (BIA) in defining moral turpitude. The BIA has defined moral turpitude generally to encompass “conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Rodriguez v. Gonzales*, 451 F.3d 60, 63 (2d Cir.2006) (per curiam) (internal quotation marks omitted); see *In re Fualaau*, 21 I. & N. Dec. 475, 477 (B.I.A.1996). Whether a crime is one involving moral turpitude depends on “the offender's evil intent or corruption of the mind.” *In re Serna*, 20 I. & N. Dec. 579, 581 (B.I.A.1992). “[C]rimes in which fraud was an ingredient have always been regarded as involving moral turpitude.” *Jordan v. De George*, 341 U.S. 223, 232, 71 S.Ct. 703, 95 L.Ed. 886 (1951); see also *Omagah v. Ashcroft*, 288

F.3d 254, 260 (5th Cir.2002) (“In the wake of *Jordan*, the courts of appeals have interpreted ‘moral turpitude’ as including a wide variety of crimes that involve some fraud or deceit.”); *United States ex rel. Berlandi v. Reimer*, 113 F.2d 429, 431 (2d Cir.1940) (“An intent to steal or defraud . . . has repeatedly been held to render an offense one which involves moral turpitude.”). And generally, where intent is not an element of a crime, that crime is not one involving moral turpitude. *See, e.g., In re Serna*, 20 I. & N. Dec. at 586 (possession of forged immigration documents is not a crime involving moral turpitude because the statute requires only knowledge that they were forged, not any intent to use them unlawfully); *In re Balao*, 20 I. & N. Dec. 440, 443-44 (B.I.A.1992) (knowingly passing bad checks is not a crime involving moral turpitude where there is no need to prove an intent to defraud); *In re Di Filippo*, 10 I. & N. Dec. 76, 77-78 (B.I.A.1962) (making false statements to an unemployment agency is not a crime involving moral turpitude where there is no need to prove an intent to mislead).

Bearing these precepts in mind, the Second Circuit has recently ruled that a state conviction for a crime involving some form of fraud or deceit involves moral turpitude. *Mendez v. Mukasey*, 547 F.3d 345 (2nd Cir. 2008). The AAO has reviewed the evidence in the file regarding the applicant’s conviction and we note that the applicant was arrested by the U. S. Postal Inspector, New York, and charged with conspiracy and mail fraud. The record does not cite a specific federal statute under which the applicant was charged. Additional documents from the U. S. Attorney’s Office, Eastern District of New York, dated August 14, 1997, identify the applicant’s arrest and criminal proceedings with [REDACTED]. These documents and the probation report issued to the United States District Court, Eastern District of New York reveal that the applicant cooperated with authorities in the investigation and prosecution of a sham operation for the processing of fraudulent no-fault automobile insurance claims issued by two medical clinics located in the Bronx and Brooklyn. In exchange for his cooperation, the applicant’s five year prison sentence was suspended; he was ordered to serve five years probation and three months of monitored home confinement. On the basis of this information contained in the record, the AAO concludes that the applicant’s conviction is for a CIMT and that conclusion remains unchallenged on appeal.

Also, because it appears from the probation report that the applicant’s conviction carries a maximum prison sentence in excess of one year, we note that the petty offense exception does not apply. *See* 8 U.S.C. § 1182(a)(2)(A)(ii).¹

¹ 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. 8 U.S.C. § 1182(a)(2)(A)(ii)(II). An applicant for admissibility who stands convicted of a CIMT may be eligible for the youthful offender exception if: the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States. 8 U.S.C. § 1182(a)(2)(A)(ii)(I). The applicant

The AAO concludes that the applicant is ineligible for permanent resident status pursuant to the terms of the LIFE Act, as he cannot establish that he is otherwise admissible to the United States on account of his conviction for a crime involving moral turpitude for which no waiver is available.²

The AAO also affirms the director's conclusions regarding entry and residence. Aside from the applicant's own assertions that he entered the United States unlawfully on or about November of 1981, and resided here continuously for the requisite period, the applicant submitted affidavits from [REDACTED] and [REDACTED]. Neither affidavit carries much probative value. Mr. [REDACTED] states that he arrived in the United States "in mid 1982" and that he met the applicant "in New York in 1983". Mr. [REDACTED] states that he has known the applicant "since March of 1982." Although both affiants aver that they have known the applicant for several years and attest to the applicant being physically present in the United States for part of the qualifying period. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the entire 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.

Having reviewed all of the evidence in the file the AAO concludes that the applicant has not met his burden of proof that he (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time.

does not assert that he is eligible for the youthful offender exception and we note the offense was not committed when the applicant was under 18 years of age.

² Congress has provided no waiver for a conviction involving a CIMT, humanitarian or otherwise.

Therefore, the application for permanent residence (Form I-485) must be denied on that ground also.

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