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U.S. Citizenship and Immigration Services



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FILE: MSC-02-246-65279

Office: BALTIMORE

Date:

SEP 24 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 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.

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

The director denied the application based on the determination¹ that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because she had a Texas state court conviction for theft, and because she had not provided credible, probative evidence that she entered the United States on or before January 1, 1982, and resided here in an unlawful status for the requisite period. *Section 1104(c)(2)(D)(ii) of the LIFE Act.*

The applicant is represented by counsel on appeal. Counsel provides documentary evidence to establish that the applicant's Texas state conviction for theft is subject to the petty offense exception, and therefore does not disqualify the applicant for permanent residence. Counsel does not address the issues of entry and residence.

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).

¹ The AAO observes that the Notice of Intent to Deny (NOID) issued on January 6, 2006, states that the applicant failed to submit credible evidence of entry and continuous residence. The NOID was sent via certified mail to both the applicant and counsel of record. A certified mail receipt indicates that counsel received the NOID on January 9, 2006. However, the Notice of Denial (Denial) issued on May 13, 2006 and also sent via certified mail to both the applicant and counsel states that the Form I-485 was subject to denial for two reasons: (1) the applicant failed to respond to the NOID, and (2) on account of the theft conviction. A certified mail receipt indicates that the applicant received the Denial on May 17, 2006. Thus, the record suggests that the applicant and counsel intentionally disregarded the NOID.

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. 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)(II). A CIMT will meet the petty offense exception if the maximum penalty possible for the crime of which the alien was convicted does not exceed imprisonment for one year and the alien was not sentenced to a term of imprisonment in excess of 6 months. *Id.*

The issue in the appeal presently before the AAO is whether the applicant has established by a preponderance of credible, probative evidence that she entered the United States unlawfully on or before January 1, 1982, has resided continuously in the United States for the requisite periods, and is otherwise admissible. The AAO must first examine whether the applicant's Texas state conviction for theft is a CIMT amenable to disposition under the petty offense exception. We have reviewed the judgment of conviction documents submitted by the applicant and we conclude that the theft conviction is a CIMT and that the petty offense exception applies in this case. Thus, the conviction, in and of itself, does not disqualify the applicant for permanent resident status.

Because the applicant's conviction occurred in Texas, the law of the Fifth Circuit Court of Appeals is applicable in defining a CIMT. The Fifth 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." 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.

In general, misdemeanor theft convictions are considered to be crimes involving moral turpitude and the Fifth Circuit has stated as much. See generally, *De Hoyos v. Mukasey*, 551 F.3d 339 (5th Cir. 2008). The AAO has reviewed the conviction documents submitted by the applicant in support of her appeal. These include a certified certificate of disposition dated June 29, 2006, that indicates the applicant was convicted for theft on October 31, 1985, in Harris County, Texas, and was sentenced to three days in jail and a fine of \$200. The court docket no. is identified as 846665 and the offense is listed as a Class B misdemeanor. The applicant also includes a photocopy of the appropriate section of the Texas Penal Code. Section 12.22 of the Texas Penal Code identifies the range of punishments for a Class B misdemeanor to be up to 180 days in jail and/or up to a fine of \$2,000. Having reviewed the conviction documents and the statute in question, we agree with counsel that the applicant's Texas state conviction for a CIMT meets the petty offense exception in this instance. Thus, this conviction does not disqualify the applicant for permanent resident status.

However, the AAO affirms the director's conclusions regarding entry and continuous residence. Aside from the applicant's own assertions regarding entry and residence, the applicant submitted photocopies of her children's birth certificates from 1985 and 1994, federal income tax returns from 1991 to 2001, a savings account statement from 1984, a legalization fee receipt dated January 14, 1991, a letter from a legalization officer in Houston, Texas, dated January 18, 1991,

and a number of affidavits from friends. The federal tax returns and legalization documents are outside of the requisite period to establish entry and residence, and therefore carry no probative weight. The birth certificates establish nothing more than that the applicant was present in the United States on those particular dates, and as a result, the birth certificates, in and of themselves, have little probative value. Likewise, the savings account statement does not cover the entire requisite period for entry and residence and is assigned such probative value as is appropriate.

Ultimately, the affidavits submitted by friends and acquaintances are equally of little probative value. The 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 or all 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 file² the AAO concludes that the applicant has not met her burden of proof that she (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. Therefore, the application for permanent residence (Form I-485) must be denied.

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

² We note that the file also contains an application for temporary protected status (TPS) (Form I-821) prepared for the applicant by Nelly Tovar, and signed and submitted by the applicant on or about July 24, 2006 (Receipt no. EAC-06-297-74932). The AAO has no jurisdiction to adjudicate a Form I-821.