

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services

L2

FILE:

MSC-02-071-64521

Office: SAN FRANCISCO

Date: **MAR 12 2010**

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 if your case was remanded for further action, you will be contacted.

Elizabeth McCormack

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 of the San Francisco office, 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 had not met his burden of proof to establish eligibility to adjust to permanent resident status under the provisions of the LIFE Act. Specifically, the director determined that the applicant had been convicted a felony offense. The director therefore concluded that the applicant's felony conviction rendered him ineligible for permanent resident status. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.* In addition, the director found that the applicant was inadmissible because the applicant's felony conviction constituted a crime involving moral turpitude (CIMT). The director concluded that the applicant's felony conviction precluded his adjustment to permanent resident status under the LIFE Act. *See 8 C.F.R. § 245a.11(d)(1).*

On appeal, counsel for the applicant asserts that the applicant is eligible for permanent resident status.¹ The applicant has not submitted any additional evidence 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

¹ Based upon the director's instruction, counsel has submitted an I-694, Notice of Appeal, instead of submitting an I-290B, Notice of Appeal.

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).

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). 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.” *Lafarga v. INS*, 170 F.3d 1213, 1214-15 (9th Cir. 1999) (quoting 8 U.S.C. § 1182(a)(2)(A)(ii)(II)); *see also Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843-46 (9th Cir. 2003). For the purpose of the petty offense exception, “the maximum penalty possible’ . . . refers to the statutory maximum sentence, not the guideline sentence to which the alien is exposed.” *Mendez-Mendez v. Mukasey*, 525 F.3d 828, 835 (9th Cir. 2008)

(offense of bribery of a public official did not qualify for petty offense exception where statutory maximum for offense was 15 years).

The AAO has reviewed all of the documents in the file, including the criminal records and the federal statute under which the applicant was convicted. The record contains court documents that reveal that on September 14, 2004, the applicant was charged with one count of violating Title 18 U.S.C. section 1001, *Making False Statements to a Government Agency*, and one count of violating Title 18 U.S.C. section 1002, *Possession of False Papers to Defraud United States*. The basis for the charge were false statements made by the applicant in a loan application which he submitted to the Small Business Administration. The applicant deliberately understated the percentage ownership of business partners, in order for their assets not to be considered in qualifying for the loan. On May 18, 2006, the applicant pleaded guilty to both counts. On July 30, 2007, the defendant was adjudicated guilty of the offense of *Making False Statements*, and the *Possession of False Papers* charge was dismissed. The applicant was sentenced to 6 months of imprisonment, 2 years of probation, an assessment of \$100.00 and a fine of \$5000.00.(U.S. District Court, Northern District of California, [REDACTED])

The issue in this case is whether the applicant has been convicted of a felony which renders him ineligible for adjustment to permanent resident status. The AAO must also determine whether the applicant is otherwise admissible as a lawful permanent resident pursuant to the terms of the LIFE Act.

Title 18 U.S.C. § 1001 states:

- (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
 - (2) makes any materially false, fictitious, or fraudulent statement or representation; or
 - (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
- shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

The crime of which the applicant stands convicted is punishable by a term of imprisonment of more than one year. Therefore, the applicant has been convicted of a felony which renders him ineligible for adjustment to permanent resident status under the LIFE Act. As stated above, 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). Thus, the

applicant is not eligible to adjust to lawful permanent resident status under the LIFE Act on this basis. *See* 8 C.F.R. § 245a.18(a)(1).

In addition, since the applicant was convicted of a felony crime of making false statements, the director examined whether the applicant's conviction constitutes a CIMT. As stated above, an applicant convicted of a CIMT is inadmissible, and therefore ineligible for adjustment to permanent resident status. The director determined that the applicant was convicted of a CIMT. The AAO finds that the applicant's conviction does not involve moral turpitude under immigration law.

In general, crimes involving fraud, deceit, and theft are considered to be crimes involving moral turpitude. *See, e.g., Rashtabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994) (California conviction for grand theft is a CIMT); *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980) (per curiam) (conspiracy to affect the market price of stock by deceit with intent to defraud is a CIMT); *Winestock v. INS*, 576 F.2d 234, 235 (9th Cir. 1978) (dealing in counterfeit obligations is a CIMT); *see also United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999) (stating in illegal reentry case that petty theft constitutes a CIMT); *Neely v. U.S.*, 300 F.2d 67 (9th Cir.), cert. denied, 369 U.S. 864 (1962) (**construing 18 U.S.C. Section 1001**, the evil intent necessary for a finding that an offense is a CIMT is not satisfied by proof that a defendant did a forbidden act "willfully".) *Hirsch v. INS*, 308 F.2d 562 (9th Cir. 1962) (conviction for knowingly and willfully making false statements in a matter before a federal agency was not a crime of moral turpitude because the statute did not require that the Government prove that the defendant had an evil intent; a crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude). Accordingly, a conviction for willful conduct within the meaning of 18 U.S.C. Section 1001 does not by itself establish the evil intent required for a crime of moral turpitude.

The Board of Immigration Appeals (BIA) and U.S. courts have found that it is the "inherent nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction" and not the facts and circumstances of the particular person's case that determines whether the offense involves moral turpitude. *See, e.g., Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989); *Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993). Before one can be convicted of a crime of moral turpitude, the statute in question by its terms, must necessarily involve moral turpitude. *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of L-V-C*, 22 I&N Dec. 594, 603 (BIA 1999) (finding no moral turpitude where the "statutory provision ... encompasses at least some violations that do not involve moral turpitude"). Where a statute is divisible (broad or multi-sectional), *see, e.g., Matter of P-*, 6 I&N Dec. 193 (BIA 1954); *Neely v. U.S.*, 300 F.2d 67 (9th Cir. 1962), the court looks to the "record of conviction" to determine if the crime involves moral turpitude. A review of the statute section under which the applicant was convicted reveals that 18 U.S.C. Section 1001 is broad and multi-sectional, encompassing some violations that do not involve moral turpitude. Therefore, it is necessary to look to the record of conviction to determine if the crime involves moral turpitude. A narrow, specific set of documents comprises the record: "[the] charging document, written plea agreement, transcript of plea colloquy, and any explicit factual

finding by the trial judge to which the defendant assented.” *Shepard v. U.S.*, 125 S.Ct. 1254, 1257 (2005).

The record contains a copy of the applicant’s plea agreement, which was reviewed to determine how the crime was set forth and whether the applicant assented to intent to defraud. A review of the plea agreement reinforces the conclusion that the applicant was not convicted of a crime involving moral turpitude. The elements to which the applicant pleaded are as follows:

- (1) I knowingly made a false statement in a matter within the jurisdiction of a government agency or department, in this case the Small Business Administration;
- (2) I acted willfully, that is deliberately and with knowledge that the statement was untrue; and
- (3) The statement was material to the government agency or department, in this case the Small Business Administration.

The applicant was not required to plead guilty to intent to defraud, in order to plead guilty to the offense defined in the plea agreement. Therefore, the AAO finds, based on the record and the relevant case law, that the applicant’s conviction for a violation of 18 U.S.C. section 1001, *Making False Statements*, does not involve moral turpitude under immigration law.

In addition, the record reveals that the applicant is not eligible for benefits pursuant to the terms of the LIFE Act, because he has failed to establish that he resided in the United States throughout the statutory period. More specifically, the applicant has failed to furnish sufficient credible evidence to demonstrate that he entered the United States before January 1, 1982, and that he continuously resided in the United States in an unlawful status since such date and through May 4, 1988. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of several documents. The AAO has reviewed each document in its entirety to determine the applicant’s eligibility. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant has submitted a copy of several documents from the Internal Revenue Service in Santa Rosa, California, showing taxes, interest and penalties paid for the years from 1981 for the duration of the requisite statutory period. However, it appears from the documents that the taxes, interest and penalties for each of these years were not submitted until 2003. Therefore these documents have minimal probative value.

The record contains a copy of an immunization record for one of the applicant’s children, showing immunizations administered to the child in the United States on October 21, 1981, December 16, 1981, February 2, 1982, February 2, 1985, March 14, 1985 and March 14, 1987. Although these

documents are some evidence in support of the applicant's presence in the United States on October 21, 1981, December 16, 1981, February 2, 1982, February 2, 1985, March 14, 1985 and March 14, 1987, they do not establish the applicant's continuous residence for the duration of the requisite period.

The applicant has submitted school records of the attendance of one of his children at school in California beginning in 1987 for the duration of the requisite statutory period. These documents are some evidence in support of the applicant's presence in the United States from 1987 for the duration of the requisite statutory period.

The remaining evidence in the record is comprised of copies of the applicant's statements, the I-485 application and a Form I-687, application for temporary resident status filed in 1990 to establish the applicant's CSS class membership. The AAO finds in its *de novo* review that the record of proceedings contains materially inconsistent statements from the applicant regarding his residences in and absences from the United States during the requisite statutory period.

At the time of his interview on January 16, 2003, the applicant stated that he first came to the United States in November 1981, and that he had no absences from the United States during the requisite statutory period.

However, in the I-687 application filed in 1990, the applicant stated that he was absent from the United States from March 1985 for the duration of the requisite statutory period. In addition, the applicant listed residences in the United States from November 1981 to March 1985 only. The birth certificate of the applicant's daughter indicates that the applicant resided in Pakistan on August 13, 1985. Further, the applicant stated that his last entry into the United States was on May 20, 1989.

These contradictions are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States for the duration of the requisite period. As stated above, doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho, supra*. The contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

The applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates the applicant resided at a particular location and was absent from the United States are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the

application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various documents currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

Therefore, based upon the foregoing, the applicant has failed to establish continuous residence in an unlawful status in the United States for some time prior to January 1, 1982 and through May 4, 1988. The applicant has also been convicted of a felony. The applicant is, therefore, not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act. The appeal is dismissed

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