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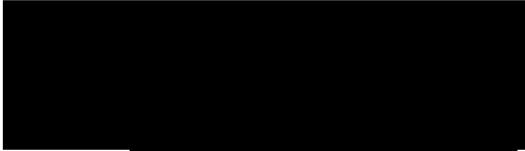
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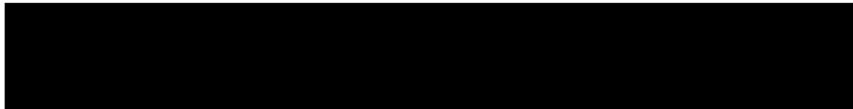


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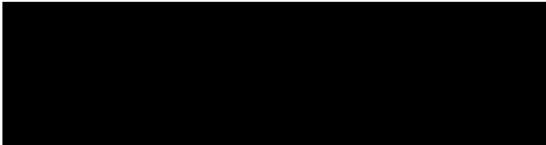
Date: MAY 17 2007

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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The director denied the application because the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The director determined that the applicant had presented inconsistent accounts concerning the events that resulted in her arrests and convictions. The director also found the applicant inadmissible to the United States because of two convictions for crimes involving moral turpitude.

Counsel contends on appeal that the applicant has presented consistent testimony concerning the events that led to her arrests. Counsel maintains that the applicant's convictions are not for crimes involving moral turpitude. Counsel asserts that the applicant has submitted sufficient evidence of eligibility, and that the director's findings to the contrary are too vague to allow for a meaningful rebuttal.

An applicant for permanent resident status must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date and through May 4, 1988. 8 C.F.R. § 245a.11(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 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 petitioner 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 petitioner 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 or petition.

Although Citizenship and Immigration Services (CIS) 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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

While there is no specific regulation which governs what third party individual affidavits should contain to be of sufficient probative value, the regulations do set forth the elements which affidavits are to include. 8 C.F.R. § 245a.2(d)(3). These guidelines provide a basis for a flexible standard of the information which an affidavit should contain in order to render it probative for the purpose of comparison with the other evidence of record.

According to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3), a signed attestation should contain (1) an identification of the applicant by name; (2) the dates of the applicant's continuous residence to which the affiant can personally attest; (3) the address(es) where the applicant resided throughout the period which the affiant has known the applicant; (4) the basis for the affiant's acquaintance with the applicant; (5) the means by which the affiant may be contacted; and, (6) the origin of the information being attested to. See 8 C.F.R. § 245a.2(d)(3)(v).

Nevertheless, an affidavit not meeting all the foregoing requirements may still merit consideration as "any other relevant document" pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must be on employer letterhead stationery, if the employer has such stationery, and must include the following:

- (A) Alien's address at the time of employment;
- (B) Exact period of 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 records are located and whether the Service may have access to the records.

The regulation further allows that if official company records are unavailable, an affidavit form-letter stating that the alien's employment records are unavailable and explaining why such records are unavailable may be submitted in lieu of meeting the requirements at (E) and (F) above.

Here, the submitted evidence is not sufficiently relevant, probative, and credible.

In an attempt to establish continuous unlawful residence since before January 1, 1982 through May 4, 1988, the applicant provided the following evidence throughout the application process:

- An affidavit notarized on May 27, 2002 from [REDACTED] of Sun Valley, California stating that she knows the applicant has resided in the United States from March 11, 1980 to that date.

- A letter dated May 22, 2002 from [REDACTED] of Aquaria, Inc. in Moorpark, California stating that the applicant was employed there in 1987 as a production worker.
- An affidavit notarized on December 29, 1989 from [REDACTED] stating that he has known the applicant from 1981 to that date.
- A letter dated December 28, 1989 from [REDACTED] Personnel Director of Aquaria Inc. in Simi Valley, California, stating that the company employed the applicant from November 20, 1986 to February 21, 1988.
- A letter dated December 26, 1989 from [REDACTED] Personnel Assistant at Red Lion Inn in Ontario, California, stating that the applicant was employed there from July 20, 1985 to October 15, 1986.
- An affidavit notarized on December 28, 1989 from [REDACTED] stating that the applicant worked for her as a housekeeper from July 1981 to February 1984.
- A receipt dated December 26, 1989 from the California Department of Motor Vehicles showing that the applicant was issued an identification card on June 20, 1987.
- A Form W-2 showing that the applicant worked for Aquaria, Inc. in Simi Valley, California in 1987.

On January 27, 2005, the director issued a (NOID) finding the documents submitted by the applicant insufficient to establish residency. The director did not list specific deficiencies in the evidence of residency submitted by the applicant, but stated that inconsistencies in the applicant's testimony concerning the events that led to her arrest in 1999 called into question the applicant's credibility generally. The director noted that the applicant presented differing accounts of these events at two separate interviews on May 26, 2004 and January 5, 2005.

In response to the NOID, counsel submitted additional evidence of residency. Counsel also asserted that the applicant did not present conflicting testimony at her interviews as claimed by the director. Counsel maintained that the applicant was referring to two completely different events in her interviews, only one of which resulted in charges being brought against her.

In a decision to deny the application dated February 28, 2005, the director disputed counsel's assertion that the applicant was referring to two completely different events in her interviews. The director noted that in her first interview, the applicant did not admit to being arrested in 1990, but stated during her second interview that her friends stole from a store in 1990 and she was arrested as a bystander. The director also observed that in her first interview, the applicant testified that she was arrested in 1999 after retrieving a co-worker's jewelry from her locker at Macy's, but stated during her second interview that she was arrested when she tried to leave wearing new jewelry she had forgotten she tried on in the store.

Counsel contends on appeal that the applicant has admitted to being arrested and convicted in 1990 and 1999, but has presented consistent testimony concerning the events that led to these arrests. Counsel maintains that there is no evidence in the record of the applicant's conviction in 1985. Counsel asserts that the conviction in 1990 was for trespass, which is not a crime involving moral turpitude. Counsel contends that the applicant's conviction for petty theft in 1999 also does not constitute a crime involving moral turpitude. Counsel also argues that the director failed to address information submitted in response to the Notice of Intent to Deny (NOID). Counsel asserts that the director "misstates the evidence presented," claiming this misstatement reinforces the conclusion that insufficient consideration was given to the applicant's testimony and evidence. Counsel maintains that the applicant has submitted sufficient evidence of eligibility, and that the director's findings to the contrary are too vague to allow an opportunity for rebuttal.

As stated above, the director did not list specific deficiencies in the evidence of residency submitted by the applicant, but indicated that the discrepancies in the applicant's testimony concerning events resulting in her arrests and convictions raised doubts as to the applicant's credibility generally. Notes from the applicant's interviews found in the record support the director's contention that the applicant testified inconsistently concerning her arrest in 1999, but not the assertion that the applicant also testified inconsistently about her 1990 arrest. Consequently, the director's finding that the applicant presented inconsistent testimony concerning her 1990 arrest must be withdrawn.

Nevertheless, doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988).

The applicant has not submitted evidence to resolve the inconsistencies observed by the director concerning her arrest in 1999. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, it is noted that the applicant failed to indicate that she had been arrested on the appropriate lines of her Form I-485, Application to Register Permanent Resident or Adjust Status.

Furthermore, after reviewing the evidence of residency submitted by the applicant, the AAO finds other significant discrepancies and insufficiencies in the evidence that lend further support to the director's decision. Specifically:

- The applicant presented two affidavits from representatives of Aquaria Inc., one attesting to the applicant's employment from November 20, 1986 to February 21, 1988 and the other attesting to employment only in 1987. The Form W-2 submitted by the applicant shows only employment in 1987. Neither affidavit contains the applicant's address during the period of employment or states whether or not the information in the affidavit was

taken from official company records, where these records are located and whether USCIS may have access to the records.

- The affidavit from [REDACTED] of Red Lion Inn does not contain the applicant's address or duties during the period of employment or state whether or not the information in the affidavit was taken from official company records, where these records are located and whether USCIS may have access to the records
- The affidavit from [REDACTED] does not contain the address(es) where the applicant resided throughout the period which the affiant has known the applicant, the basis for the affiant's acquaintance with the applicant, the means by which the affiant may be contacted, or the origin of the information being attested to.

Given the discrepancies in the applicant's testimony and in other evidence submitted by the applicant, combined with other inadequacies in the evidence as noted herein, the AAO determines that the applicant has not met her burden of proof of establishing, by a preponderance of the evidence, that she entered the United States before January 1, 1982, and resided in this country in an unlawful status continuously since that time through May 4, 1988.

The AAO now turns to the issue of the applicant's criminal record.

As stated above, 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 is admissible to the United States.

Any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime is inadmissible under section 212(2)(A)(i) of the Immigration and Nationality Act (the Act). Under section 212(2)(A)(ii)(II) of the Act, a "petty offense" exception exists for an alien who has committed only one crime where the maximum penalty possible for the crime does not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months.

Also, any alien who has been convicted of three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status under the LIFE Act. 8 C.F.R. § 245a.18(a)(1). "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 of term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o). The regulation at 8 C.F.R. § 245a.1(p) also defines as a misdemeanor a crime "punishable by imprisonment for a term of more than one year 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."

In the NOID, the director observed that evidence in the record, including court dispositions and an FBI report, shows that the applicant "participated in elements" of "Petty Theft 488 PC-1985" and "Theft of Personal Property 484A-1999," crimes involving moral turpitude. The director notes that the applicant was also convicted of "602 PC Trespass/Injury to Property" resulting from an arrest for theft and burglary in 1990.

Counsel asserts on appeal that the record shows only two convictions, the convictions in 1990 and 1999. Counsel also contends that the applicant's conviction for petty theft in 1999 falls within the petty offense exception found in the Act and the conviction for trespass is not a crime involving moral turpitude.

The record contains evidence that the applicant has three misdemeanor convictions.

Court documents in the record show that the applicant was convicted in the Municipal Court of Los Angeles of misdemeanor theft of property under California Penal Code (PC) § 484(a) (Case # [REDACTED]) on October 22, 1999 and sentenced to one day in jail and probation for a period of 12 months.

Court documents also show that the applicant was convicted of misdemeanor trespass/injure property under PC § 692(j) (Case # [REDACTED]) on September 13, 1990. The applicant was also charged with misdemeanor theft of property under PC § 484A and misdemeanor burglary under PC § 459 in connection with the same offense, but these charges were dismissed following plea negotiations resulting in the trespass conviction.

An FBI report based on the applicant's fingerprints shows that the applicant was also arrested on July 25, 1985 and convicted in the Municipal Court of Rancho Cucamonga of petty theft under PC § 488 and sentenced to one day in jail and probation for a period of 24 months.

Although the record does not contain a final court disposition for the 1985 conviction, the applicant was given notice that the record contained evidence of this conviction and failed to obtain and submit court documents related to this conviction. Counsel states on appeal that the applicant denies any conviction for any offense in 1985. However, as stated above, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Given the evidence in the record showing that the applicant was convicted of petty theft in 1985, the denial that the applicant committed and was convicted of this crime is an inconsistency the applicant must reconcile through competent objective evidence. As stated above, it is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988).

The director correctly found that the 1999 conviction constitutes a crime involving moral turpitude and renders the applicant inadmissible to the United States. Theft crimes under California law,

including the crime of petty theft, are crimes involving moral turpitude. *See United States v. Esparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999). Counsel contends that the petty offense exception applies to the applicant's 1999 conviction, but offers no further explanation. Given the evidence in the record showing that the applicant was also convicted of a theft offense in 1985, the applicant has failed to prove that the petty offense exception applies in this case. This exception does not apply where an alien has been convicted of more than one crime involving moral turpitude. *See Ostolaza-Ayala v. Gonzales*, 133 Fed.Appx. 434, 435 (9th Cir. 2005).

In addition, there is evidence in the record showing that the applicant has been convicted of three misdemeanors. In the absence of a final court disposition of the applicant's 1985 conviction, the AAO does not make a finding that these convictions also render the applicant ineligible for adjustment under the LIFE Act pursuant to 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a). Nevertheless, it is noted that the applicant may also be ineligible to adjust status under the LIFE Act because of three misdemeanor convictions.

The applicant has not established, by a preponderance of the evidence, that she entered the United States before January 1, 1982, and resided in this country in an unlawful status continuously since that time through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). Also, the applicant is inadmissible to the United States under INA § 212(a)(2)(A)(i) because of a conviction for a crime involving moral turpitude. Accordingly, the applicant has not established eligibility to adjust status to Legal Permanent Resident under section 1104 of the LIFE Act.

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