U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-S-

DATE: JAN. 12, 2018

APPEAL OF OKLAHOMA CITY FIELD OFFICE DECISION

APPLICATION: FORM I-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

The Applicant, a native and citizen of Pakistan, seeks to adjust status to that of a lawful permanent resident (LPR) under the LIFE Act. *See* section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. No. 106-553, 114 Stat. 2762 (2000), *amended by* LIFE Act Amendments, Pub. L. No. 106-554, 114 Stat. 2763 (2000). The LIFE Act allows eligible foreign nationals who resided unlawfully in the United States during specified time periods, and who submitted membership claims in certain class-action lawsuits, to become LPRs, if they are admissible to the United States, have not been convicted of a felony or three or more misdemeanors in the United States, and can demonstrate basic citizenship skills.

The Director of the Oklahoma City Field Office denied the Form I-485, Application to Register Permanent Residence or Adjust Status, concluding that the record did not establish that the Applicant entered the United States before January 1, 1982. The Director further determined that the Applicant was ineligible for LPR status under the LIFE Act based on his criminal record.

On appeal, the Applicant submits a brief asserting that he has only one misdemeanor conviction and a preponderance of the evidence shows that he entered the United States in 1981.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

An applicant who has applied for adjustment of status to lawful permanent residence under section 1104 of the LIFE Act must establish, among other requirements, that he or she entered the United States prior to January 1, 1982, and thereafter resided continuously in the United States in an unlawful status until May 4, 1988, and was physically present in the United States from November 6, 1986, until May 4, 1988. An applicant must also be admissible to the United States as an immigrant and not convicted of a felony or three or more misdemeanors committed in the United States. Section 1104(c) of the LIFE Act; 8 C.F.R. § 245a.11.

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the

United States in an unlawful status since prior to January 1, 1982, the submission of any relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The term *misdemeanor* generally means a crime committed in the United States punishable by imprisonment for a term of one year or less, regardless of the term actually served. 8 C.F.R. § 245a.1(o). Any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. *Id.*

The Applicant bears the burden of proving, by a preponderance of the evidence, that he resided in the United States for the requisite periods, is admissible to the United States, and is otherwise eligible for adjustment of status. 8 C.F.R. § 245a.12(e). The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility, and amenability to verification. *Id.* To meet his burden of proof, the Applicant must provide evidence of eligibility apart from his own testimony, and the sufficiency of all evidence will be judged according to its probative value and credibility. 8 C.F.R. § 245a.12(f).

II. ANALYSIS

The issues within this appeal relate to: (1) whether the Applicant has established that he entered the United States before January 1, 1982; and (2) whether his convictions render him ineligible for adjustment of status under the LIFE Act provisions. After serving a notice of intent to deny, the Director denied the application, determining that the record contained several inconsistent claims from the Applicant, and the two affidavits on record were not probative and did not establish by a preponderance of the evidence that the Applicant entered the United States before January 1, 1982. The Director further concluded that the Applicant had not offered sufficient evidence to demonstrate his eligibility despite his criminal record.

A. The Applicant Has Not Demonstrated His Entry Prior to January 1, 1982, and Continuous Residence in the United States During the Requisite Period

The Applicant claims that he has established by a preponderance of the evidence that he entered the United States in 1981 as a nonimmigrant visitor.[1] In support of his claim, the Applicant relies on what he identifies as the "Notice to Appear [Form I-265, Notice to Appear, Bond and Custody Processing Sheet]" and two affidavits. The Form I-265 was one of several forms U.S. Immigration and Customs Enforcement (ICE) completed to initiate removal proceedings on the Applicant in 2002. The Applicant characterizes the information with the Form I-265 as "a document prepared by the government and it states in allegation number III that [the Applicant] was admitted in New York on or about 1981 as a B2 visa holder." The Applicant continues stating the Form I-265 was utilized by the immigration court and it operates in his favor to show that he entered the United States in 1981 by a preponderance of the evidence. However, the information within the Form I-265 was

[1] As the Applicant claims he entered the United States as a nonimmigrant, section 1104(c)(2)(B)(ii) of the LIFE Act requires that he establish that his period of authorized stay as a nonimmigrant expired before January 1, 1982.

based on testimony the Applicant provided to ICE officials that interviewed him and transposed that information to the document. The Applicant has not established that he provided documentary evidence of his entry into the country, and that ICE officials relied on such evidence when completing the Form I-265. We are therefore not persuaded that the Form I-265 demonstrates the Applicant's eligibility.

In reference to the "affidavits," the letters that the Applicant provides are not affidavits as each was not sworn to by the declarant before an officer authorized to administer oaths who, having confirmed the declarant's identity, administered the requisite oath. *See Black's Law Dictionary* 58 (10th Ed., West 2014) (defining "affidavit"). Nor, in lieu of having been signed before an officer authorized to administer oaths, do the letters contain the requisite statement, permitted by federal law, that those signing the statements, certify the truth of the statements, under penalty of perjury. *See* 28 U.S.C. § 1746 (defining unsworn declarations under penalty of perjury). Regardless, we will consider the probative value of each letter.

The first letter from is dated July 7, 2001. indicated that he knew the Applicant since 1982 in Florida and briefly spoke of the Applicant's principles. However, this affidavit lacks salient and detailed information that might garner additional evidentiary value. Specifically, it does not indicate how was acquainted with the Applicant, or how he was aware that the Applicant was in the United States at the time. The second letter from is dated July 5, 2001. letter is very similar to in its content and format, except that it was acknowledged before a notary public. While both letters reflect the author knew the Applicant since an unspecified date in 1982, neither provides the detail necessary to sufficiently support the Applicant's eligibility claims. Most importantly, neither author claimed that the Applicant was in the United States before January 1, 1982. Furthermore, the letters are not supported by primary, credible documentation within the record that might accord them greater probative value and corroborate the authors' assertions. As a result, while the letters are not without any evidentiary value, they fall short of sufficiently sustaining the Applicant's burden of proof.

Additionally, the Director questioned the Applicant's credibility based on discrepant claims within the record.[2] The following chart and analysis addresses some of the incongruent information within the record:

[2] Information from the Applicant's previous legalization forms may factor into the current application as all such filings are an application for legalization under section 245A of the Act. *See* Memorandum from Dea Carpenter, Acting Principal Legal Advisor, HQCOU 70/10.14, *Adjudication of LIFE Legalization Applications* page 2 (Dec. 5, 2003), a copy of which is incorporated into the record of proceedings.

Timeframe form filed or completed	Form Number and/or Document Title	Date of First Entry into the United States	Date of Last Entry into the United States	Location of Last Entry into the United States
March 1991	Affidavit for Determination of Class Membership in League of United Latin American Citizens v. INS[3] (LULAC)	July 18, 1981	March 17, 1983	[redacted] Florida
January 2002	Form I-213, Record of Deportable/Inadmissible Alien		1981	[redacted] New York
January 2002	Form I-265, Notice to Appear, Bond and Custody Processing Sheet		1981	[redacted] New York
May 2006	Form I-102, Application for Replacement/Initial Nonimmigrant Arrival – Departure Document		July 18, 1981	[redacted] New York
July 2009	Form I-485		March 17, 1982	[redacted] Florida
November 2010	Form I-485		March 17, 1983	[redacted] New York

The Applicant has offered varying accounts of the date that he last entered the United States, as well as the location or port of entry where he entered. Moreover, the Applicant has not explained why in May 2010 on the Form G-325A, Biographic Information, he listed his last address outside the United States to be in [redacted] Pakistan from April 1962 until March 1983. This further calls into question his claims of entering and continuously residing in the United States before January 1, 1982. In addition, evidence in the record reflects the Applicant was in [redacted] Pakistan in [redacted] 1991 for his marriage, but all of his immigration forms and documents list his last date of entry into the United States as between 1981–1983.

The Applicant must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.* The Director notified the Applicant of inconsistencies in the dates of his residence in the United States, including the information the Applicant provided on his Form G-325A showing that he lived in Pakistan until March 1983. On appeal, the Applicant asserts that he has established that he entered the United States in 1981 by a preponderance of the evidence, but he does not submit additional evidence or address the

[3] The former Immigration and Naturalization Service (INS).

inconsistencies identified in the denial notice. Therefore, the Applicant has not provided probative, credible evidence to establish that he entered the United States prior to January 1, 1982. The record also contains conflicting information regarding the Applicant's dates of residence in the United States, including his statement on his G-325A that he resided in Pakistan until 1983. Consequently, he has not shown his continuous unlawful residence in the United States until May 4, 1988, as required under the LIFE Act.

B. The Applicant is Statutorily Ineligible for LIFE Act Adjustment Based on His Three Misdemeanor Convictions

An individual convicted of three misdemeanors, or one felony, is ineligible for adjustment to LPR status under the LIFE Act. 8 C.F.R. § 245.18(a). The Applicant asserts that he has only one misdemeanor conviction for selling beer to a minor, and this conviction does not affect his eligibility for adjustment of status under the LIFE Act. However, the record shows that the Applicant has three misdemeanor convictions, and even if he established his entry into the United States prior to January 1, 1982, and continuous unlawful residence in the United States until May 4, 1988, he would still be statutorily ineligible for adjustment of status based upon those convictions.

The Applicant was convicted in 1999 and 2001 for battery in violation of section 784.03 of the Florida Statutes. The Applicant subsequently obtained court orders granting his motions to vacate the plea and sentencing for each case.[4] In regard to the Applicant's second battery conviction, in 2010 the court ordered the plea and the sentencing to be set aside, and subsequently entered a *nolle prosequi* and closed the case. However, the Applicant remains convicted of a misdemeanor even after the *vacatur* of his first battery conviction. In 2009, the court vacated the battery conviction, and accepted the State's amended charge of breach of the peace/disorderly conduct in violation of section 877.03 of the Florida Statutes, which is a misdemeanor. *See* Fla. Stat. Ann. §§ 877.03, 775.082 (West 2009) (breach of the peace/disorderly conduct is a second degree misdemeanor, which is punishable by a term of imprisonment not to exceed 60 days). The Applicant pled no contest, or *nolo contendere*, to this charge and the court imposed a sentence in the form of time previously served in confinement. Such a plea and punishment satisfies the immigration law definition of conviction found in section 101(a)(48)(A) of the Act.

In addition, in 2007, the Applicant was convicted of improper passing of a stationary emergency vehicle in [redacted] in violation title 47, section 11-314 of the Oklahoma Statutes. Although this charge is a traffic violation, it is also designated as a misdemeanor under title 47,

[4] In his motions to vacate the convictions, the Applicant stated that he was not informed of the immigration consequences of his pleas. Because the convictions were vacated as a result of defects in the underlying proceedings, rather than as a result of a state rehabilitative statute, they are no longer convictions for immigration purposes. *See Matter of Adamiak*, 23 I&N Dec. 878, 881 (BIA 2006) (holding that a conviction vacated because of a defect in the underlying criminal proceedings, i.e., the failure of the court to advise of the possible immigration consequences of a guilty plea, should not be recognized for immigration purposes); *Alim v. Gonzales*, 446 F.3d 1239, 1257 (11th Cir. 2006) (holding that a plea which was vacated because the defendant was not informed of the immigration consequences of his plea, as required by Florida law, is not a conviction for immigration purposes).

section 11-102 of the Oklahoma Statutes and punishment for this offense constitutes imprisonment for not more than six months. *See* Okla. Stat. Tit. 47 § 17-101 (West 2007) (penalties for misdemeanor traffic violations). The Applicant was also convicted in Oklahoma in 2008 of selling beer to a minor, a violation of title 37, section 241 of the Oklahoma Statutes, which is designated as a misdemeanor offense punishable by one year imprisonment. These offenses constitute the Applicant's second and third misdemeanor convictions.

Consequently, the Applicant has three misdemeanor convictions, as defined under 8 C.F.R. § 245a.1(o), and he is statutorily ineligible for adjustment of status under the LIFE Act on this basis.

III. CONCLUSION

The Applicant is ineligible for adjustment of status under the LIFE Act because he was convicted of three misdemeanors and has not established by a preponderance of the evidence that he entered the United States prior to January 1, 1982, and thereafter resided continuously in the United States in an unlawful status until May 4, 1988.

ORDER: The appeal is dismissed.

Cite as *Matter of M-S-*, ID# 730931 (AAO Jan. 12, 2018)