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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:



Office: Houston

Date: DEC 22 2004

IN RE:

Applicant:



PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Interim District Director, Houston, Texas. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained.

The district director decided that the applicant had not established that he resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. This decision was based on the district director's determination that the applicant had exceeded the limit for absences from the United States during the period in question, as set forth in 8 C.F.R. § 245a.15(c)(1).

On appeal, counsel for the applicant argues that the district office's determination in its notice of intent to deny regarding the absence associated with the applicant's purported departure in February 1988 was the result of confusion on the part of the examining district office interviewer at the time of the applicant's adjustment interview.

To be eligible for adjustment to permanent resident status under the LIFE Act, however, the applicant must also establish his or her continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, and his or her continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 1104(c)(2)(B)(i) of the LIFE Act reads as follows:

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 that were most recently in effect before the date of the enactment of this Act shall apply.

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if no single absence from the United States has exceeded *forty-five (45) days*, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, and May 4, 1988, unless the alien can establish that due to *emergent reasons*, his or her return to the United States could not be accomplished within the time period allowed.

Section 1104(c)(2)(C) – Continuous Physical Presence

- (i) In general – The alien must establish that the alien was continuously physically present in the United States during the period beginning on November 6, 1986, and ending on May 4, 1988, except that -
 - (I) an alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of this subparagraph by virtue of brief, casual, and innocent absences from the United States; and
 - (II) brief, casual, and innocent absences from the United States shall not be limited to absences with advance parole.

The district director's determination that the applicant had been absent from the United States in excess of the time allowed during the period in question was purportedly based on the applicant's testimony at the time of his adjustment interview at the Houston District Office. According to the notes of the Citizenship and

Immigration Services (CIS) interviewing officer, the applicant indicated that having made the following departures from the U.S.:

- For “no more than 30 days” in 1986, to Colombia, to visit family;
- For a period of 25 days in July/August 1987, to Colombia, visit his family and to be with his father, who was ill; and
- From February 1988 for 30 days to Mexico to obtain a visa, and for an additional 30 to 45 days to Colombia to visit family.

Subsequently, in rebuttal to the district office’s notice of intent, the applicant submitted a personal statement in which he acknowledged having departed the U.S. in 1986 and 1987, but emphatically denied ever having informed the interviewer that he had departed the U.S. in February 1988 for a period of 75 days. According to the applicant, after his 1987 trip to Columbia, he did not depart the U.S. until October 1988. As such, during the period from January 1, 1982 through May 4, 1988, the applicant’s only departures from the U.S. were in 1986 and 1987 to visit family in Colombia for periods of no more than 30 days for *each* visit.

In support of his rebuttal, the applicant also provides photocopies of his nonimmigrant visa and his I-94 Arrival/Departure Record. An examination of this material discloses stamped dates of “October 31, 1988” and “November 4, 1988.” The applicant’s assertions on rebuttal are also supported by information contained in his previously-completed Form I-687 Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act, which was signed by the applicant on December 1, 1995. At item 35, in which an applicant is requested to provide all absences from the U.S. since his or her first entry, the applicant listed the following departures:

- From December 10, 1986 to January 5, 1987 to visit family; and
- From July 20, 1987 to August 10, 1987 to visit his family and to be with his father, who was ill;
- From October 20, 1988 to November 4, 1988; and
- From December 1, 1988 to December 16, 1988.

The district director’s determination regarding the applicant’s February 1988 absence is supported only by the interviewer’s handwritten notes, which are neither signed nor attested to by the applicant. The information previously provided by the applicant on his I-687 application regarding the first *two* absences (those occurring in 1986 and 1987, respectively) is in conformance with that included in the CIS officer’s notes at the applicant’s adjustment interview. However, the I-687 application contains no reference whatever to the applicant ever having undertaken any departure from the U.S. in February 1988. The applicant’s assertions on rebuttal and on appeal regarding his departures from the U.S. are supported not only by information previously provided on his I-687 application but also by the stamped dates included on photocopies of his visa and I-94.

In his notice of intent to deny, the district director concluded that the applicant’s departures from the United States in 1986, 1987 and 1988 demonstrate a failure to maintain continuous residency as the total of these departures was “greater than the time period allowed.” However, in rendering this determination, the district

director failed to specify the *extent* of the time period allowable according to the applicable regulations. Based on the record, it can be concluded that during the period from January 1, 1982 through May 4, 1988, the applicant made two departures from the U.S., neither exceeding 20 to 25 days in duration. In the absence of additional, independent, corroborative information, it *cannot* be concluded that the applicant had exceeded the forty-five (45) day limit for single absences from the United States during this period, as set forth in 8 C.F.R. § 245a.15(c)(1), or that the applicant's departures in December 1986 and July 1987 constituted other than brief, casual and innocent absences congruent with having maintained continuous physical presence in the U.S. during the period from November 6, 1986 through May 4, 1988.

It must, therefore, be concluded that the applicant has met his burden of proof of establishing continuous unlawful residence in the U.S. since prior to January 1, 1982 through May 4, 1988. It must now be determined whether the applicant is otherwise eligible for permanent resident status under section 1140 of the LIFE Act. Accordingly, the matter will be forwarded to the appropriate district office for further processing and adjudication of the LIFE Act application.

ORDER: The appeal is sustained. The director shall forward this matter to the proper district office for the completion of adjudication of the application for permanent residence.