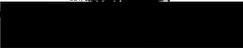




U.S. Citizenship  
and Immigration  
Services



FILE:



Office: National Benefits Center

Date:

JUN 7 2004

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. The file has been returned to the National Benefits Center. 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 District Director in Buffalo, New York. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be sustained.

The District Director concluded that the applicant had failed to establish his continuous physical presence in the United States between November 6, 1986 and May 4, 1988, as required in the Code of Federal Regulations, 8 C.F.R. § 245a.11(c), because he had two departures from the United States during that time period that did not qualify as “brief, casual, and innocent absences” as defined in 8 C.F.R. § 245a.16(b). In particular, the District Director determined that the applicant’s modes of departure and return were not consistent with U.S. immigration law policies.

On appeal counsel asserts that the applicant’s two absences from the United States between November 6, 1986 and May 4, 1988 (consisting of a three-week trip to Canada and a one-month trip to Senegal) were “brief, casual, and innocent,” within the meaning of 8 C.F.R. § 245a.16(b), because their “purpose . . . was consistent with the policies reflected in the immigration laws of the United States.” *Id.* Counsel asserts that the District Director erred in his reasoning because he focused on the manner of the applicant’s reentry to the United States, a subject not addressed in the regulation, in determining that the applicant’s absences were not consistent with the policies reflected in U.S. immigration laws.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in one of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“CSS”), *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“LULAC”), or *Zambrano v. INS*, vacated sub nom. *Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993) (“*Zambrano*”). See section 1104(b) of the LIFE Act and 8 C.F.R. § 245a.10.

The Missouri Service Center has previously determined that the applicant filed a timely claim for class membership in CSS.

To be eligible for adjustment to permanent resident status under the LIFE Act, however, the applicant must also establish his continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, and his continuous physical presence in the United States from November 6, 1986 through May 4, 1988. With respect to the latter requirement of “continuous physical presence,” the pertinent statutory provision reads as follows:

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.

This statutory provision is reiterated and further defined in the following pertinent regulations:

8 C.F.R. § 245a.11(c)

An eligible alien, as defined in § 245a.10, may adjust status to LPR [legal permanent resident] status under LIFE Legalization if [h]e or she was continuously physically present in the United States during the period beginning on November 6, 1986, and ending on May 4, 1988.

8 C.F.R. § 245a.16(b)

For purposes of this section, an alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, casual, and innocent absence(s) as used in this paragraph means temporary, occasional trips abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States.

In his decision the District Director drew extensively from the information provided by the applicant in an interview conducted by the Buffalo District Office in March 2003. In that interview the applicant, a native of Bangladesh, testified that he entered the United States illegally from Mexico in 1980 with a group of other people. From 1980 to 1987 he resided in New York City. In October 1987 the applicant paid \$2000 to be transported to Canada “concealed in a tractor trailer truck” to apply for asylum in that country. After being advised that he was ineligible for asylum the applicant “returned to the United States about three weeks later by the same route.” On March 28, 1988 the applicant flew to Dakar, Senegal, on a Bangladeshi passport “to look into import/export business with a friend there.” He returned to the United States on April 30, 1988, “[i]n what status is unclear. . . . The passport used for this trip is gone.”

Reviewing this testimony, the District Director concluded that the applicant had two absences from the United States during the time period November 6, 1986 - May 4, 1988. As described by the District Director, “[y]our departure to and return from Canada were by smuggling; you returned from Senegal without benefit of a visa. As such, these departures do not qualify as brief, casual and innocent absences from the United States as *they were not consistent with the policies reflected in the immigration laws of the United States.*” (Emphasis added.) The director ruled, therefore, that the applicant had “failed to maintain the continuous physical presence required by the statute,” making him “ineligible for adjustment of status under the LIFE Act provisions.”

In his appeal counsel for the applicant contends that the District Director’s reasoning was flawed because the regulation does not define “brief, casual, and innocent absences from the United States” in terms of *how* an alien departed and returned to the country. Rather, 8 C.F.R. § 245a.16(b) states that “temporary, occasional trips abroad” will be considered “brief, casual, and innocent absences” from the country “as long as the *purpose* of the absence . . . was consistent with the policies reflected” in U.S. immigration laws. (Emphasis added.) Counsel asserts that “the *purpose[s]* of the applicant’s absences were in fact consistent with the policies reflected in” U.S. immigration laws (emphasis in the original) because the first absence was “to seek asylum in Canada” and the second absence was “to explore business opportunities in Senegal.” In counsel’s view, therefore, the applicant’s absences were “brief, casual, and innocent” and thus did not interrupt his “continuous physical presence” in the United States between November 6, 1986 and May 4, 1988.

The AAO agrees with counsel that the manner of the applicant’s departures from and returns to the United States in 1987 and 1988 is not determinative of whether his absences were “brief, casual, and innocent” in the eyes of the statute. In *Catholic Social Services, Inc. v. Edwin Meese III* (“CSS I”), 685 F.Supp. 1149 (E.D. Cal. 1988) [aff’d 956 F.2d 914 (9<sup>th</sup> Cir. 1992), vacated and remanded sub nom. *Reno v. CSS*, 509 U.S. 43 (1993), *supra*], the U.S. district court declared that “[i]llegal entry or reentry into the

United States . . . was not, without more, the type of unlawful conduct that would necessarily render an absence not innocent.” 685 F.Supp. at 1158. Since the applicant was an illegal resident of the United States, any return to the country following a departure without advance parole would, as a matter of course, also have been illegal. The record in this case indicates that the applicant crossed the U.S.-Canadian border in both directions “concealed in a tractor trailer truck.” There is nothing in this mode of action that distinguishes it from any number of alternative and relatively benign ways to illegally cross a border (like walking through the woods, or swimming across a lake, or jumping ship at a coastal port). The applicant’s payment of \$2,000 for the trip to Canada does not, in and of itself, make his departure from the United States any less “innocent.” It was presumably a personal fee and does not appear to have involved any other criminal conduct (like smuggling *others* across the border) that could be deemed inconsistent with the policies reflected in U.S. immigration laws. Under the statute, section 1104(c)(2)(C) of the LIFE Act, “brief, casual, and innocent” absences by *illegal* U.S. residents *without advance parole* are specifically allowed. It is hard to imagine what sort of border crossing by an illegal alien without advance parole *would* pass statutory muster if the applicant’s actions in the case at bar are judged *not* to be “consistent with the policies reflected in the immigration laws of the United States.”

Having decided that the applicant’s two returns to the United States in 1987 and 1988 are not inherently disqualifying, we must now determine whether those two absences from the country meet the statutory requirement of “brief, casual, and innocent.” The term “brief” is not defined in section 1104(c)(2)(C) of the LIFE Act, or its implementing regulations, as a precise period of time. It is noteworthy, however, that the regulation implementing the statutory requirement of “continuous unlawful residence” in the United States (from before January 1, 1982 through May 4, 1988) defines that term as no single absence from the United States exceeding 45 days and an aggregate of all such absences during the six-year time period not exceeding 180 days. *See* section 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.15(c)(1). Accordingly, the term “continuous physical presence” could be read as implying shorter time frames for individual and aggregate absences from the United States during the 18-month time period November 6, 1986 to May 4, 1988. The term “casual” is likewise not defined in the statute, though its parameters can be gleaned in the regulatory guideline that “temporary, occasional trips abroad” are not inconsistent with an alien’s “continuous physical presence” in the United States. *See* 8 C.F.R. § 245a.16(b). Nor is the term “innocent” defined in the statute. It seems logical, however, that an absence would be “innocent” if it does not involve illegal activities or other conduct in conflict with U.S. national interests and is “consistent with the policies reflected in the immigration laws of the United States,” as the regulation requires. *See id.*

There is no judicial case law interpreting the term “brief, casual, and innocent absences” in the context of the LIFE Act. In the earlier legalization program – conducted under section 245A of the Immigration and Nationality Act (enacted as part of the Immigration Reform and Control Act of 1986) – the meaning of the term “brief, casual, and innocent absences” in section 245A(a)(3) was addressed in the 1988 district court case of *CSS v. Meese (CSS I)*, *supra*. In *CSS I* district court discussed the historic meaning of the phrase dating from a Supreme Court decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). In that earlier case the Supreme Court determined that an afternoon trip to Mexico by a permanent resident alien was “innocent, casual, and brief” and therefore not an “intent to depart” the United States that could “be regarded as meaningfully interruptive of the alien’s permanent residence.” *CSS v. Meese*, 685 F.Supp. at 1158 (quoting from *Rosenberg v. Fleuti*, 374 U.S. at 461-62). “Factors relevant in finding such an interruption,” the district court continued, “included the length of the absence, the purpose of the visit, and whether an object of the visit was to ‘accomplish some object . . . contrary to some policy reflected in our immigration laws.’ (quoting *Rosenberg v. Fleuti*, 374 U.S. at 462).” *Id.* In other words, “the question of whether an absence was brief, casual and innocent was one of fact to be resolved . . . on a case-by-case basis.” *Id.* at 1159. *See also Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1274 (C.A. 9<sup>th</sup> Cir. 1996).

The applicant also cited a relevant court case, *Castrejon-Garcia v. Immigration and Naturalization Service* (“*Castrejon*”), 60 F.3d 1359 (C.A. 9<sup>th</sup> Cir. 1995), in a letter to the District Office in Buffalo. *Castrejon* involved an alien’s petition for review of a decision of the Board of Immigration Appeals (BIA) denying suspension of an order of deportation under a statute (8 U.S.C. § 1254) permitting suspension for an individual who, among other things, had been “physically present in the United States for a continuous period of not less than seven years.” Although the statute was subsequently repealed in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), it contained language similar to section 1104(c)(2)(C) of the LIFE Act (“[an] alien shall not be considered to have failed to maintain continuous physical presence in the United States . . . if the absence from the United States was brief, casual, and innocent and did not meaningfully interrupt the continuous physical presence”) whose analysis by the Court of Appeals is applicable to the instant LIFE application.

The petitioner in *Castrejon* was an illegal U.S. resident since 1970 who returned to his native Mexico for eight days in 1988 to seek a visa for legal entry into the United States and was arrested at the border when he tried to return before obtaining it. In the view of the Court of Appeals, “[t]he evident statutory purpose is to recognize that a person who lives for seven continuous years in the United States does not destroy his eligibility by actions that do not affect his commitment to living in this country.” 60 F.3d at 1362. The court went on to offer some examples of some actions by an alien that would *not* qualify as “brief, casual, and innocent” absences. A departure “for a long period of time” would not be “brief.” *Id.* Leaving the United States “in order to plan a crime” would not be “innocent.” *Id.* at 1362-63. Leaving the country “to serve a foreign government” would be a “meaningful interruption” of his physical presence in the United States. *Id.* at 1363. If the alien “regularly crosses the border to run a business” his absence is not “casual.” *Id.* Turning to the case before it, the Court of Appeals reasoned as follows: “When [the alien’s] absence is for no more than eight days as it was here, his absence is brief. When the purpose of his absence, as here, is to obtain a visa, his absence is innocent. When the purpose of his absence is to regularize his status in this country, he has not meaningfully interrupted his physical presence. And when his absence is on a single occasion it is casual in the sense of Webster’s definition 2(a), ‘performed without regularity’ or ‘occasional’.” *Id.* The Court granted the petition to review and remanded the case to the BIA.

As indicated in the foregoing case law, the question of whether the applicant’s two absences from the United States in 1987 and 1988 were “brief, casual, and innocent” is one of fact that must be resolved based on the specific circumstances of his case. Neither of the applicant’s two absences from the country – approximately 21 days and 33 days, respectively – was of such an extended duration as to constitute a significant interruption in the applicant’s continuous physical presence in the United States. Each absence was considerably shorter than the 45-day absence allowed by the statute without interrupting the alien’s “continuous unlawful residence” in the United States. *See* section 1104(c)(2)(B) of the LIFE Act. In the AAO’s view, the trips to Canada and Senegal both qualify as “brief” absences. They also qualify as “casual” absences because they were “occasional” (only two absences from the United States during the 18-month time period of November 6, 1986 – May 4, 1988) and each appears to have been for a distinct purpose that did not involve repeated visits to the foreign country. The applicant’s trip to Canada to inquire about political asylum might raise a question as to whether his three-week absence from the United States in 1987 was “innocent,” since he would presumably have ceased to live in the United States if he had been granted asylum in Canada. The applicant indicates that he was only trying to obtain legal status somewhere because, after seven years in the United States, he “was tired of living here illegally.” When he failed to get asylum in Canada, the applicant states that he returned to the United States “because this was the only place where one can make his living as an illegal immigrant.” The applicant states that he then tried to file a legalization application before the initial filing deadline of May 4, 1988 (under section 245A of the INA) but was told by an INS officer in New York City that his trip to Canada disqualified him. There is no evidence that the applicant’s trip to Canada involved any illegal activities (aside from the illicit border crossings previously discussed) or other conduct contrary to the policies

reflected in the immigration laws of the United States. Viewed in its total context, the AAO concludes that the applicant's three-week trip to Canada in October 1987 was an "innocent" absence from the United States. As for the applicant's subsequent trip to Senegal in 1988, it was apparently an effort to establish business contacts in that country for the purpose of building an export-import business the applicant would run from the United States. Like the trip to Canada, there is no evidence that the applicant's trip to Senegal involved any illegal or other objectionable activities contrary to the policies reflected in U.S. immigration laws. Accordingly, the trip to Senegal also qualifies as an "innocent" absence from the United States.

Based on the foregoing analysis, the AAO determines that the applicant's two trips abroad in 1987 and 1988, respectively, were "brief, casual, and innocent absences from the United States" within the meaning of the statute, section 1104(c)(2)(C) of the LIFE Act, and the regulation, 8 C.F.R. § 245a.16(b). Accordingly, those absences did not meaningfully interrupt the applicant's "continuous physical presence" in the United States between November 6, 1986 and May 4, 1988, as required by section 1104(c)(2)(C) of the LIFE Act and 8 C.F.R. § 245a.11(c). The applicant's appeal must therefore be sustained.

**ORDER:** The appeal is sustained. The matter is remanded for further consideration consistent with this decision.