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

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NOV 23 2004

FILE:



Office: Houston

Date:

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

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director denied the application because the applicant had failed to establish that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988.

On appeal, counsel asserts that the district office's decision to deny his client's application was based on an incorrect assessment of the evidence of record. Counsel also submits a brief in which he argues that any departures the applicant may have made from the U.S. during the period in question were of the nature of brief and casual trips to visit family, none of which exceeded forty-five days.

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).

"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.

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).

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E-- M--*, 20 I&N Dec. 77 (Comm. 1989).

Although 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).

In his notice of intent to deny, the district director determined that the applicant's statements at his May 8, 2003 adjustment interview contradicted his previously-submitted documentation. However, according to the notice of intent, the applicant's Indian passport indicated he previously traveled on [REDACTED] which was issued January 9, 1986 at Ahmedabad, India. Yet the applicant failed to mention this trip in his documentation or during his adjustment interview, at which time he specified to the examining CIS officer that, after his initial entry to the U.S., he resided continuously until May 1987, when he traveled to India for two or three weeks for the purpose of getting married. The applicant also testified at his interview that, following this brief trip in 1987, he made no further departures from the U.S. until 1996.

The district director, in his notice of intent, also cited a background investigation which revealed that, on May 26, 1989, the applicant made a legal entry into U.S. on a B-2 visa issued by the U.S. State Department. This is at variance with the applicant's testimony at his adjustment interview, at which time he stated that he had never been granted a State Department visa. Based on these inconsistencies and contradictions, the district director determined that the evidence provided by the applicant could not be accorded credibility and that the applicant had therefore failed to establish his burden of proof of continuous residence in the U.S. during the period in question.

In his response to the notice of intent and on appeal, counsel acknowledges the district director's determination that the applicant did in fact make a legal entry into the U.S. in 1989 on a B-2 visitor visa. In order to address any consequences arising from the applicant having misrepresented this fact, counsel has submitted a completed Form I-690, Waiver for Grounds of Inadmissibility. However, counsel denies the district director's contention that the applicant had made a trip to India in 1986. Instead, counsel asserts that the applicant obtained the passport in 1986 through the assistance of his family in India, but that he did not use the passport that year to travel to India. However, counsel's argument that the applicant's passport was issued in India in 1986 despite the fact that he himself was purportedly not present in India on the occasion it was issued is less than credible. Nor has counsel submitted any additional independent, corroborative evidence to provide support for his argument or to credibly rebut the district director's determination.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAC even if the Service Center [or other office] does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). While not mentioned in the district director's decision or notice of intent, further examination of the record discloses that, according to information included on the applicant's own Form I-687 Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (INA), the applicant departed the U.S. for India in August 1987 in order to visit his mother who was ill and did not return until October 1987. This information is supported by the applicant's response on his Form For Determination of Class Membership in *CSS v. Meese*, in which the applicant indicated that he departed the U.S. for India on August 10, 1987 after learning his mother was ill and did not reenter the U.S. until October 15, 1987.

It is determined that the applicant's admitted absence from August 10, 1987 to October 15, 1987 exceeded the 45-day period allowable for a single absence. Nevertheless, though not dealt with in the district director's decision, there must also be a further determination as to whether the applicant's prolonged absence from the U.S. was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988) holds that *emergent* means "coming unexpectedly into being."

The applicant indicated on his I-687 and class membership determination form that he undertook his 1987 visit to India after hearing of his mother's illness from coronary disease. While this suggests there may have been a valid basis for the applicant's departure from the United States (the onset of his mother's coronary illness), it also suggests the applicant intended to remain outside of the U.S. for as long as it took to complete the purpose of his trip, *i.e.* for an indefinite period or, at least, for the duration of his mother's treatment and recovery from the symptoms of heart disease. The applicant has, therefore, failed to provide any clear evidence of an intention to return to the U.S. within 45 days. Accordingly, in the absence of clear evidence that the applicant intended to return within 45 days, it cannot be concluded that an emergent reason "which came suddenly into being" delayed or prevented the applicant's return to the United States beyond the 45-day period.

It should also be noted that the information included on the applicant's I-687 application as well as his class membership determination form is not congruent with that provided at the applicant's May 8, 2003 adjustment interview, in which he stated that he departed the U.S. for India in May 1987 for only two to three weeks for the purpose of getting married.

As his 1987 departure for India has been determined to exceed the 45-day period allowable for single absences from the U.S. from January 1, 1982 to May 4, 1988, the applicant has failed to establish having resided in continuous unlawful status in the U.S. during the period in question. The applicant is therefore ineligible for adjustment to permanent resident status under section 1104(c)(2)(B) of the LIFE Act.

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