



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] MSC 02 099 62262

Office: BALTIMORE

Date: FEB 07 2007

IN RE: Applicant: [Redacted]

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:
[Redacted]

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. Any further inquiry must be made to that office.

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, Baltimore, Maryland, 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 he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. The director further concluded that the applicant had exceeded the forty-five (45) day limit for a single absence, as set forth in 8 C.F.R. § 245a.15(c)(1).

On appeal, counsel states that the applicant has resided in the United States in an unlawful status since January 1980 except for a "brief" departure at the end of December 1981 to obtain his F-1 nonimmigrant student visa and that his extended stay for that purpose was beyond his control. Counsel provides additional documentation in support of the appeal.

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. Section 1104(c)(2)(B) of the LIFE Act; 8 C.F.R. § 245a.11(b).

"Continuous residence" is defined in the regulations at 8 C.F.R. § 245a.15(c)(1), as follows:

Continuous residence. An alien shall be regarded as having resided continuously in the United States if:

- (1) 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. [Emphasis added.]

The director's determination that the applicant had been absent from the United States for over 45 days was based on the applicant's statements that he left the United States in December 1981 and returned in April 1982. On his Form I-687, Application for Status as a Temporary Resident, the applicant stated that the purpose of his trip was to obtain an F-1 visa.

An absence of more than 45 days must be "due to emergent reasons" significant enough that the applicant's return "could not be accomplished." Although the 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." In other words, the reasons must be unexpected at the time of departure from the United States and of sufficient magnitude that they made the applicant's return to the United States more than inconvenient, but virtually impossible.

However, in the instant case, that was not the situation. On appeal, the applicant submits a statement in which he stated that his stay in Nigeria was prolonged because of the time it took him to get an appointment with the American Embassy and the time that it took him to receive the additional information requested by the U.S. Consulate to support his visa application. While some of the circumstances regarding the applicant's application and receipt of his student visa were beyond his control, e.g., the scheduling of his appointments, there is no evidence that these circumstances could not

have been anticipated or expected prior to the applicant's departure from the United States. We note that the applicant stated that he left the United States in December 1981 and that his first appointment with the Consulate was in March 1982. The applicant advances no reasons and provides no documentation that these events were not and could not have been expected at the time he left the United States or that they were so significant they prevented his return within 45 days.

Accordingly, the applicant's four-month stay in Nigeria during 1981 and 1982 interrupted his "continuous residence" in the United States. The applicant has, therefore, failed to establish that he resided in the United States in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required by the statute, section 1104(c)(2)(B)(i) of the LIFE Act, and the regulations, 8 C.F.R. § 245a.11(b) and 15(c)(1). Given this, he is ineligible for permanent resident status under section 1104 of the LIFE Act.

Assuming, *arguendo*, that the applicant could establish that his prolonged absence from the United States was due to emergent reasons, he has failed to establish that he resided unlawfully in the United States from prior to January 1, 1982 to May 4, 1988.

The applicant stated in a July 11, 2002 affidavit that he entered the United States without inspection in 1980, "departed briefly in December 1981," and returned in April 1982 pursuant to an F-1 nonimmigrant student visa. The applicant stated on his Form I-687 application, which he signed under penalty of perjury on May 1, 1991, that he violated his student status by working without authorization.

The applicant indicated on his Form I-687 application that, during the qualifying periods, he worked as follows:

March 1980 – December 1981	[REDACTED]
January 1982 – August 1985	Self-employed cab driver
September 1985 – January 1986	[REDACTED]
March 1986 – December 1989	Independent contractor - Courier

The applicant submitted a copy of his Nigerian passport, reflecting that he received an F-1 visa from the U.S. Consulate in Lagos on April 8, 1982 to attend school at Southeastern University in Washington, DC. The visa was valid for multiple entries until April 8, 1983. The passport also shows that the applicant was lawfully admitted into the United States on April 30, 1982.

The director determined that as the applicant was lawfully admitted to the United States in April 1982 pursuant to his F-1 visa, he is statutorily ineligible for benefits under the LIFE Act.

On appeal, counsel states that during the time the applicant was enrolled at Southeastern University, he "continued to work variously outside the campus without authorization," working variously as a cleaner, cab driver, farm hand, courier and messenger.

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).

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

1. A February 27, 1980 and a March 4, 1980 letter from Strayer College to an apartment on Jackson Street in Washington, DC. The applicant’s name is handwritten in the salutation; however, the letters do not include a name in the addressee block. Therefore, it cannot be determined to whom the letters were initially addressed. A handwritten note at the bottom of the February letter reads “I am personally looking forward to welcoming [the applicant] to Strayer College. We are looking forward to having him join us.” The copy of the document truncates the signature of the person making this annotation. We note that the wording of the letter refers to the applicant in the third person with no clear reasoning in the record. Thus, the statement is not credible evidence that the letter was addressed to the applicant.
2. A December 22, 2001 sworn statement from the applicant’s sister, [REDACTED], in which she stated that the applicant lived with her at [REDACTED] in Washington, DC from March 1980 until December 1981, and again when he returned from Nigeria in April 1982. [REDACTED] stated that the applicant lived with her family rent-free while he was attending school.
3. A December 27, 2001 notarized statement from [REDACTED], in which he attested that he was the applicant’s supervisor at Metropolitan Office Cleaners from 1980 through November 1981. In response to the director’s Notice of Intent to Deny (NOID) issued on January 9, 2004, [REDACTED] reiterated his statement, stating that the company went out of business over 18 years earlier, and that the applicant’s employment with the company lasted through October 1985. This statement is inconsistent with the applicant’s statement on his Form I-687 application, in which he stated that he worked as a self-employed cab driver from January 1982 to August 1985. It also is inconsistent with [REDACTED]’s earlier statement, dating the applicant’s employment through November 1981. It is

incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). [REDACTED]'s letter did not comply with the provisions of 8 C.F.R. § 245a.2(d)(3)(i), as it did not indicate the source of the information regarding the applicant's employment or the applicant's address at the time of his employment.

4. A December 26, 2001 letter from the Church of the Nativity of Our Lord Jesus, in which its pastor, [REDACTED] verified that church records include the applicant in the household of his sister and her husband for the period 1979 through 1983. As noted by the director, as this statement spans several years, it is not probative evidence that the applicant was present and living in his sister's house prior to January 1982. This observation is supported by the statements of the applicant and his sister, who both state that he first came to the United States in 1980 and therefore could not have been included in the household registry in 1979. In response to the NOID, the applicant submitted another statement from [REDACTED] dated January 28, 2004, in which he stated that he met the applicant in 1980, when the reverend was an associate pastor in charge of family life and liturgy at the church.
5. A statement of earnings from the Social Security Administration, reflecting earnings for the applicant in the qualifying period from 1983 to 1988.

Contrary to counsel's arguments, the applicant has not established that he violated the terms of his student visa status and therefore continuously resided illegally in the United States as a result. The record contains no competent evidence of any employment by the applicant during 1982 while the applicant was attending school pursuant to his F-1 visa. [REDACTED]'s statement that the applicant worked with him through 1985 is not credible, as it is inconsistent with his prior statement and that of the applicant. The applicant submitted no other evidence of employment during this period.

Accordingly, the applicant failed to establish that he resided *continuously* in an unlawful status from prior to January 1, 1982 through May 4, 1988.

Counsel requests that the application also be considered pursuant to 8 C.F.R. § 245a.6, which provides, in pertinent part:

If the district director finds that an eligible alien as defined at § 245a.10 has not established eligibility under section 1104 of the LIFE Act (part 245a, Subpart B), the district director *shall* consider whether the eligible alien has established eligibility for adjustment to temporary resident status under section 245A of the Act, as in effect before enactment of section 1104 of the LIFE Act (part 245a, Subpart A).

(Emphasis added).

However, the evidence of record does not establish that the applicant is eligible for adjustment of status under section 245A of the Immigration and Nationality Act. Accordingly, we also find that the applicant is ineligible for adjustment of status to temporary resident under section 245A of the Act, as in effect before enactment of section 1104 of the LIFE Act (part 245a, Subpart A).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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).

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa application proceedings, the burden of proving eligibility for the benefit sought remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

The record reflects that the applicant was arrested by the Arlington County Police Department on January 24, 1988 for stolen property. The charge was a *nolle prosequi* by the prosecutor on February 5, 1988.

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