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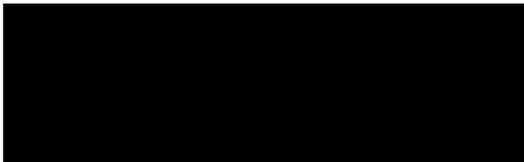
Office: HOUSTON Date:

JUL 26 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:



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, Houston, Texas, 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 she had resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988. This decision was based on the director's conclusion that the applicant had exceeded the forty-five (45) day limit for a single absence during this period as set forth in 8 C.F.R. § 245a.15(c)(1). The director also denied the application because the applicant had failed to establish that she was continuously physically present in the United States during the period beginning November 6, 1986 through May 4, 1988. This decision was based on the director's conclusion the applicant had exceeded the thirty (30) day limit for a single absence during this period as the director stated was set forth in 8 C.F.R. § 245a.16(b). The director also concluded that the applicant had failed to establish that her absence was due to an emergent reason.

On appeal, counsel submits a brief disputing the director's findings.

To be eligible for adjustment to permanent resident status under the LIFE Act, 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. 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 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.]

It must be noted that the director erred in applying a thirty (30) day limit for a single absence in the period from November 6, 1986 to May 4, 1988 as set forth in 8 C.F.R. § 245a.16(b). This regulation has since been amended and the previous reference to a “thirty (30) day limit” on absences has been removed. The current, amended regulation reads as follows:

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.

As the director applied an incorrect standard in determining that the applicant's absence interrupted her continuous physical presence in this country, the applicant's absence must be examined utilizing the standard set forth in 8 C.F.R. § 245a.15(c)(1), which provides a forty-five (45) day limit for a single absence from the United States, 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.

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 director's determination that the applicant had been absent from the United States for over 45 days was based on the applicant's own testimony taken under oath at the time of her interview on October 24, 2002. The applicant asserted that she entered the United States in December 1981 with a valid passport and departed the United States in 1983 to visit her ailing mother and gave birth to her daughter¹ while in Mexico. The applicant stated that she re-entered the United States using her passport approximately three to four weeks later. The applicant asserted that she departed again from the United States in April 1987 in order to bring her daughter to the United States. The applicant stated that she remained in Mexico for approximately three months and re-entered the United States by using her passport.

The applicant presented her daughter's passport, which reflects that it was issued on April 10, 1987, the United States visa was issued on June 19, 1987, and the daughter entered the United States on July 7, 1987.

On January 13, 2003, the applicant was advised in writing of the director's intent to deny the application. In his notice of intent, the director indicated that, due to the applicant's absence from the United States from April 1987 to July 7, 1987, she had failed to establish continuous residence in the United States. The applicant was also advised that in order to have received a B-2 visa, she had to have resided in Mexico for 90 days prior to receiving said visa and convinced an official of the State Department that she had maintained her residency and citizenship in Mexico.

In response, counsel claimed that at the time of the applicant's interview, she was nervous and intimidated by the interviewing officer. Counsel contended that the applicant denied informing the interviewing officer that she stayed in Mexico for three months in 1987. Counsel asserted part:

In fact, after careful reflection, [the applicant] specifically recalls informing the Officer that her stay in Mexico was short, that being less than 30 days because she had a job in the United States and that her employer would not allow her to be gone for such a long period of time. [The applicant] had a family in the United States and she did not want to be apart from her family for a long period of time.

Counsel asserted that after the applicant applied for her daughter's visa, she departed and returned to the United States in less than 30 days. Counsel claimed that the applicant did not inform the interviewing officer

¹ According to evidence in the record, the applicant's daughter was born on December 22, 1983.

that she remained in Mexico in order to obtain a B-2 visa for herself. Counsel asserted, "it is clear that the officer clearly misunderstood [the applicant] or took her response out of context." Without documentary evidence to support the claim, the assertion of counsel will not satisfy the applicant's burden of proof. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also submitted a letter dated May 6, 1987, in the Spanish language with English translation from an attorney in Mexico, who indicated that the applicant gave her mother power of attorney to continue the process of attaining her daughter's passport and visa. The letter indicated that due to work reasons the applicant had to return to the United States. As previously mentioned, the applicant's daughter's passport was issued on April 10, 1987; 26 days before the applicant purportedly gave her mother a power of attorney to obtain the child's passport and visa.

On appeal, counsel argues that the applicant was questioned under pressure and without the benefit of her attorney. Counsel submits an affidavit from the applicant's daughter, [REDACTED] who detailed the stress associated with the applicant's interview. Counsel cites several decisions issued by the Board of Immigration Appeals including *Matter of Arai*, 13 I&N Dec. 494 498 (BIA1970) and argues:

Even assuming that there are adverse factors in this case, which is not being admitted, the Service has failed to even consider the principles or standards mandated by the Board of Immigration Appeals. For instance, here, the Service has failed to enunciate any countervailing reasons, such as family ties, hardship, and length of residence in the United States that would put this case in a favorable light.

[REDACTED] in her affidavit, asserts that at the time of the applicant's interview, the interviewing officer did not want to wait for counsel to arrive and informed the applicant that she would be rescheduled if she did not proceed with the interview.

[The interviewing officer] would ask the same questions twice or three times. It seems as though she was expecting a different answer each time. And since the questions were worded differently it seemed to confuse my mother. For example, when [the interviewing officer] asked how I arrived in the United States, my mother told her on a B2 visa. [The interviewing officer], stated so you stayed in Mexico until you got the Visa? My mother told her, No, and that she came back to the United States while her B2 Visa was in process. The officer turned around again and asked what did you do in Mexico while the Visa was being processed? My mother tried to explain to her again that she had her own Passport and that she could travel back and forth to the United States and that she did not stay in Mexico for a long time.

* * *

I felt really helpless in the interview. At one point I felt that it was so unfair how my mother was being treated that tears came into my eyes and I had to leave the room. When I came [the interviewing officer] pushed a paper in front of my mother and demanded that she sign it. [the interviewing officer] did not attempt to explain to my [sic] what it was she was signing. My mother thought that if she not sign the paper she would not be able to leave the Immigration office, so naturally she signed it.

The interviewing officer gave the applicant the opportunity to have her interview be rescheduled once it was apparent that counsel was not present. The applicant, however, chose to proceed with the interview and counsel makes no assertion that he eventually appeared on October 24, 2002, for the applicant's interview. If the applicant had felt uncomfortable without the presence of counsel, she could have requested that the interview be stopped and rescheduled.

The AAO does not view the statements and documents discussed above as substantive enough to support a finding that the applicant did not exceed the 45-day limit for a single absence or that she resided in the United States from prior to January 1, 1982 through May 4, 1988.

Item 35 of the Form I-687 application requests that the applicant list all of her absences from the United States since her entry. The applicant, on said application dated December 7, 1990, listed the only departure from the United States as June 1987 through July 7, 1987. The applicant's failure to disclose her 1987 departure to Mexico in order to apply for her daughter's passport and visa and her 1983 departure to Mexico to visit her ailing mother and that she had been outside of the United States during the period she had given birth to her daughter, diminishes her credibility of her claim to have continuously resided in the United States during the requisite period.

These facts are a strong indication that the applicant was outside the United States beyond the period of time allowed by regulation and diminish the credibility. In addition, the AAO concludes these absences were not due to any "emergent reason."

As the applicant exceeded the 45-day limit for a single absence for purposes of continuous residence as set forth in 8 C.F.R. § 245a.15(c)(1), her April 1987 absence cannot be considered as brief and innocent in determining whether she was continuously physically present in the United States from November 6, 1986 to May 4, 1988 pursuant to 8 C.F.R. § 245a.16(b).

The regulation at 8 C.F.R. § 245a.12(e) provides that "[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods." Preponderance of the evidence is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* 1064 (5th ed. 1979). See *Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991). Based on the evidence in this case, the AAO determines that the applicant has not met her burden of proof. The applicant has not established, by a preponderance of the evidence, that she entered the United States before January 1, 1982 and resided in this country in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act.

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