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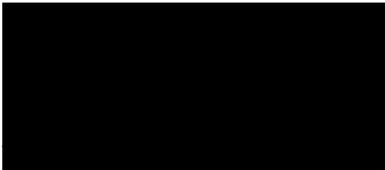
Applicant:



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. 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 Acting District Director, Dallas, 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 he 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).

On appeal, counsel asserts that no specific dates of departure or return were included in the applicant's sworn statement. Counsel argues that the director failed to either acknowledge whether the applicant responded to the Notice of Intent to Deny. Counsel asserts that the applicant's departure was an emergent situation that reasonably necessitated his presence with his family.

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 his 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.

At the time of his interview to determine class membership under *Catholic Social Services, Inc*, the applicant was placed under oath and admitted in signed sworn statement dated August 9, 1993 that he left the United States in November 1987 and returned January 1988.

At the time of his LIFE interview, in the presence of an officer of Citizenship and Immigration Services, the applicant was placed under oath and admitted in a signed sworn statement on March 7, 2003 that he arrived in the United States in 1982 and listed his absence from the United States from November 1987 to January 1988.

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 in the above mentioned sworn signed statement on March 7, 2003.

The director issued a Notice of Intent to Deny dated March 17, 2004, which advise the applicant of his prolonged absence. The applicant was granted 30 days in which to rebut the director's finding. On appeal, counsel contends that the applicant responded to the notice on April 10, 2004, and provided a copy of the applicant's affidavit.

The record, however, does not reflect that the applicant submitted a response. Nevertheless, the applicant's affidavit will be considered on appeal. The applicant, in his affidavit, indicated although he departed the United States on "November 30, 1987 and returned January 1, 1988," he was not aware that he was not to depart the United States during the requisite period.

On appeal, counsel asserts that it can be construed the applicant departed in late November as the letter advising him of his mother's illness was dated November 21, 1987. Counsel asserts that no specific dates of departure and return were included in the applicant's sworn statement of March 7, 2003.

The AAO agrees that neither sworn statement specifies the actual dates of the applicant's departure or return. However, as counsel received a copy of the record of proceedings pursuant to his Freedom of Information request, he is aware of the Form to Determine of Class Membership dated June 2, 1993, which the applicant indicated he departed the United States on November 25, 1987 and returned on January 15, 1988. Therefore, the applicant's affidavit indicating his absence from November 30, 1987 through January 1, 1988 is questionable at best.

Accordingly, the applicant's absence from November 25, 1987 through January 15, 1988 exceeded the 45 day limit for a single absence during the requisite period.

While not dealt with in the district director's decision, there must, nevertheless, be a determination as to whether the applicant's prolonged absence from the United States 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."

An absence of more than 45 days must be "due to emergent reasons" significant enough that the applicant's return "could not be accomplished." 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. There is no evidence to indicate that an emergent reason delayed the applicant's return to the United States within the 45-day period. The applicant does not provide any independent, corroborative, contemporaneous evidence to support the events that occurred while in Mexico. The applicant's prolonged absence would appear to have been a matter of personal choice, not a situation that was forced upon him by unexpected events. It is noted that the applicant indicated on his Form for Determination of Class Membership the purpose for his 1987 departure was to visit family.

Accordingly, the applicant's November 25, 1987 to January 15, 1988 absence 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 regulation, 8 C.F.R. §§ 245a.11(b) and 245a.15(c)(1).

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