

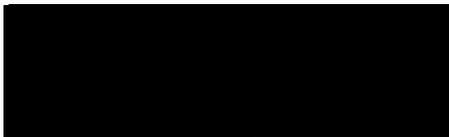
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEW YORK Date: APR 23 2008
MSC 02 121 60025

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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits Center. 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. If your appeal was sustained or remanded for further action, you will be contacted.


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, New York, New York, 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 not demonstrated 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 there was no port of entry where the applicant would have been inspected and, therefore, the applicant's entry is recognized as having entered the United States without inspection. Counsel asserts that the applicant submitted additional affidavits in response to the Notice of Intent to Deny, but the evidence was not handled pursuant to the regulations and the director did not call any of the affiants for verification. Counsel argues that the director issued a boilerplate denial and ignored the new documentation provided by the applicant.

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. Section 1104(c)(2)(B)(1) of the LIFE Act; 8 C.F.R. § 245a.11(b).

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 applicant 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 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.

Although the 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. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

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

- Medical receipts dated December 28, 1982, and January 8, 1983.
- Notarized affidavits from a cousin, [REDACTED] of Queens, New York, who indicated that in June 1981, he went to Miami, Florida and he brought the applicant back with him to New York. The affiant asserted the applicant “lived with me from then onwards until 1988.”
- A notarized affidavit from [REDACTED] of Bronx, New York, who indicated that the applicant visited him in August 1981 in the Bronx, and attested to the applicant’s residence since that time in the United States.
- Notarized affidavits from [REDACTED] of Brooklyn, New York, who indicated that he entered the United States in August 1985 and the applicant visited him in Jamaica, Queens, New York. The affiant asserted that he and the applicant would attend sporting events, go fishing, visit relatives and the applicant assisted in renovating his apartment in September 1987.
- Several photographs the applicant claimed were taken during the requisite period.

The applicant, in response to the Notice of Intent to Deny dated July 6, 2007, indicated that he was unable to provide evidence of his entry into the United States because he boarded a vessel in Guyana and made no stops until reaching the United States.

Citizenship and Immigration Services (CIS) has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E-- M--*, *supra*. In ascertaining the evidentiary weight of such affidavits, CIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--*, *supra*, the affidavits would not necessarily be fatal to the applicant's claim, if the affidavits upon which the claim relies are consistent both internally and with the other evidence of record, plausible, credible, and if the affiant sets forth the basis of his knowledge for the testimony provided. The statements issued by the applicant and counsel have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant continuously resided in the United States since before January 1, 1982, to May 4, 1988, as he has presented contradictory and inconsistent documents, which undermines his credibility. Specifically:

1. The affidavit from [REDACTED] only serves to establish that the applicant visited him in August 1981. The affiant attested to the applicant’s residence in the United States, but failed to include the address where the applicant resided throughout the period in which he claimed to have known the applicant, and provided no detail regarding the nature or origin of his relationship with the applicant or the basis for his continuing awareness of the applicant’s residence.
2. [REDACTED], in his affidavit, indicated that he went to Miami, Florida and brought the applicant back with him to New York where the applicant resided with him until 1988. The

affiant, however, does not provide the address where the applicant resided throughout the period in question. In addition, the applicant, on his Form I-687 application signed on May 30, 1989, claimed to have resided in Florida since 1982.

3. As [REDACTED] entered the United States in 1985, he can only attest to the applicant's claim of residence since that time. Nevertheless, the affiant failed to include the address where the applicant resided throughout the period in which he claimed to have known the applicant.
4. Although the director informed the applicant that photographs could be submitted, the photographs have no identifying evidence that could be extracted which would serve to either prove or imply that they were taken in the United States and during the requisite period.

It is noted that on his Form I-687 application, the applicant claimed to be married and listed a wife and three children on the application. However, on his LIFE application, the applicant indicated that he was single and did not list his children.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988).

Given the credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met his burden of proof. The applicant has not established, by a preponderance of the evidence, that he 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). Given this, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

An applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to permanent resident status. Section 245A(b)(1)(C) of the Immigration and Nationality Act (the Act); 8 U.S.C. § 1255a(b)(1)(C); 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

The record contains court dispositions, which reflect the applicant's criminal history in the state of New York:

1. On November 11, 1990, the applicant was arrested for violating VTL 1192.2, operating a motor vehicle while under the influence of drug or alcohol. On June 21, 1991, the applicant pled guilty to the offense. On August 6, 1991, the applicant was ordered to pay a fine, his license was revoked and he was placed on probation for three years. Docket no. [REDACTED]
2. On January 1, 1992, the applicant was arrested for violating VTL 1192.2, operating a motor vehicle while under the influence of drug or alcohol, and violating VTL 511.2, aggravated unlicensed operator of a motor vehicle in the second degree. On April 20, 1992, the applicant pled guilty to both offenses. On June 4, 1992, the applicant was sentenced to serve 60 days in jail and ordered to pay a fine. For violating VTL 1192.2, the applicant's license was revoked and he was placed on probation for five years. For violating VTL 511.2, the applicant was placed on probation for three years. Docket no. [REDACTED]

For immigration purposes, a misdemeanor is a crime punishable for a term of one year or less, regardless of the term such alien actually served, if any, with an exception for crimes which carry a maximum penalty of a jail sentence of five days or less. 8 C.F.R. § 244.1. Further, it was held in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 117 (1983) "that whether a conviction exists for purposes of a federal statute is a question of federal law and should not depend on the vagaries of state law."

Because the alien was convicted of a crime for which he could have received a jail sentence of more than five days in number one above, he has, for immigration purposes, been convicted of a misdemeanor.

The applicant is ineligible for the benefit being sought due to his three misdemeanor convictions. 8 C.F.R. §§ 245a.11(d)(1) and 18(a)(1). Therefore, the applicant is 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.