

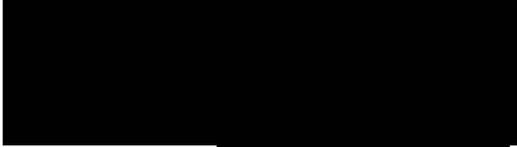
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FILE:

MSC 02 254 62414

Office: SAN FRANCISCO

Date: **AUG 26 2008**

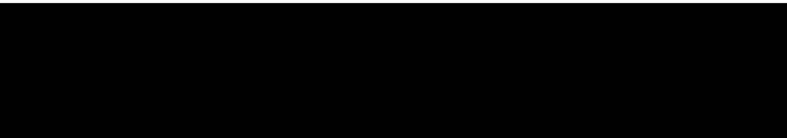
IN RE: Applicant:



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. 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 (director) in San Francisco, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that she resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988.

On appeal the counsel asserts that the director's finding was not supported by substantial evidence and violated the applicant's rights.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

“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.” (Emphases added.)

“Continuous physical presence” is described in section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and 8 C.F.R. § 245a.16(b), in the following terms: “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.” (Emphasis added.) The regulation further explains that “[b]rief, 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.” (Emphasis added.) 8 C.F.R. § 245a.16(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 its amenability to verification. See 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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant, a native of India who claims to have lived in the United States since October 1981, filed her application for legal permanent resident status under the LIFE Act (Form I-485) on June 11, 2002. As evidence of her residence in the United States during the 1980s the applicant submitted the following documentation:

- A letter from [REDACTED], Chairman of the Sikh Gurdwara (Temple) of Los Angeles, dated September 3, 2001, stating that he was a founding member and currently served as chairman of the temple at [REDACTED] in N. Hollywood, and that he had been a member since 1975 of another temple at 1966 [REDACTED] in Los Angeles. Mr. [REDACTED] stated that he has known the applicant since 1981, observed her performing various services during his visits to the Vermont Avenue temple, and learned that she was temporarily residing at the temple.
- A letter from [REDACTED] a resident of 2 Champlain in Irvine, California, dated September 6, 2001, stating that she met the applicant and (her husband) in November 1981 at the Sikh Temple on Vermont Avenue, Los Angeles, where they were staying at the time. According

to [REDACTED], the applicant performed housekeeping duties at her residence in Irvine from 1982 to 1987, residing there during the week, and spent the weekends with her husband at the Vermont Avenue temple.

- A notarized statement by [REDACTED], a resident of Winnetka, California, dated March 11, 2002, indicating that he was an active member and office-holder at the Sikh Temple on Vermont Avenue, and knew the applicant during the years 1988-1990 because she resided at the temple and performed a variety of services.

An affidavit by [REDACTED], a resident of Fremont, California, dated April 7, 2002, stating that he had known the applicant and her husband since January 1982, and that they moved to the San Francisco Bay Area in the early 1990s.

On July 15, 2003, the director issued a Notice of Intent to Deny (NOID) in which the applicant was requested to submit additional evidence of her continuous unlawful residence in the United States from January 1, 1982 through May 4, 1988, and her continuous physical presence in the country from November 6, 1986, and to submit lists of all her residential addresses and absences from the United States from January 1, 1982 through May 4, 1988.

The applicant responded on October 8, 2003 by listing her residences in the United States since the time she claims to have entered the country in 1981 as follows:

Mid-October 1981 to end of December 1981 – Sikh Temple of Los Angeles at [REDACTED]

- January 1982 to end of October 1987 – [REDACTED] California, and Sikh Temple of Los Angeles at [REDACTED].
- January 1988 to January 1990 – Sikh Temple of Los Angeles at [REDACTED]

The applicant listed her absences from the United States during the above time period as follows:

- End of June 1985 to mid-August 1985 – trip to India for premature birth of baby on July 16, 1985, then returned to the United States to rejoin her husband.
- End of October 1987 to January 1988 – trip to India due to her mother's medical emergency.

In support of the foregoing assertions the applicant submitted the following documentation:

An affidavit by the applicant's mother, [REDACTED], a resident of Punjab, India, dated August 12, 2003, stating that the applicant left India for the United States in

October 1981, came back at the end of June 1985 to give birth to a premature baby boy on July 16, 1985, and returned to the United States in August 1985, leaving her child with her mother. Ms. [REDACTED] states that when she had gallstone surgery in November 1987 the applicant came back to India again to care for her mother and son, before returning to the United States in January 1988.

An affidavit by [REDACTED] a resident of [REDACTED] in Irvine, California, dated August 22, 2003, stating that she got to know the applicant and her husband very well during the years 1982-1987, during which the applicant stayed with him and his wife [REDACTED] three days a week to assist with housekeeping duties, and that in January 1988 the applicant moved with her husband and young son to the Sikh Temple on Vermont Avenue in Los Angeles.

A letter from [REDACTED], a resident of Los Angeles, dated August 19, 2003, stating that he met the applicant at the Sikh Temple on Vermont Avenue in 1981, that they would often sit together during various activities at the temple, and that he remembers the applicant returning to the United States from India with her husband and young son in January 1988. Mr. [REDACTED] states that he associated with the applicant on a regular basis at the temple until early 1990, and also outside the temple.

On December 21, 2005, the director denied the application. In his decision the director noted that a call was made to the Sikh Temple which confirmed that a [REDACTED] had stayed at the temple, but only for a few (two to six) months. According to the respondent, no wife or child stayed with [REDACTED]. Based on this information the director concluded that the applicant's claim of continuous residence in the United States during the years 1981-1988 lacked credibility.

Counsel filed a timely appeal, pointing out that the applicant was not advised of the derogatory information obtained in the telephone call to the Sikh Temple and therefore had no opportunity to rebut it, in accordance with 8 C.F.R. § 245a.2(b)(16). Counsel asserts that the applicant may have been able to show that the respondent in the temple lacks personal knowledge, may have confused the applicant's husband with someone else, or is biased. According to counsel, the information obtained from the respondent at the temple is not reliable and should not be considered in the adjudication of this application.

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).

The AAO agrees with counsel that the information obtained in the telephone call to the Sikh Temple, in and of itself, was not an adequate basis on which to deny the application. The ultimate issue in this proceeding, however, is whether the applicant has met her burden of proof by furnishing sufficient credible evidence to establish that she entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The AAO determines that she has not.

There is no contemporary documentation from the 1980s that shows the applicant to have resided continuously in the United States during the requisite time period for LIFE legalization. For someone claiming to have lived and worked in the United States since October 1981, it is noteworthy that the applicant is unable to produce a solitary piece of primary evidence during the following seven years through May 4, 1988.

The AAO notes that the applicant's claim in this proceeding to have resided from October 1981 to January 1990 at the Sikh Temple on [REDACTED] in Los Angeles and at [REDACTED] in Irvine, California, conflicts with the information she provided on an application for temporary resident status (Form I-687) she prepared in connection with her application for class membership in the CSS v. Meese class action lawsuit¹ in 1990. On the Form I-687, dated February 19, 1990, the applicant listed her then current address – [REDACTED], in Chatsworth, California – as her only residence in the United States since entering the country in October 1981.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92, (BIA 1988). Moreover, doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

In this case, the applicant has not explained the inconsistent residential information discussed above. Since the letters and affidavits submitted in support of the current application for permanent resident status are in line with the applicant's current claim to have resided in the Sikh temple and in Irvine during the 1980s, they all conflict with the applicant's earlier claim to have resided in Chatsworth, California, during those years. In view of this basic contradiction, the AAO concludes that the letters and affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as required for legalization under the LIFE Act.

Furthermore, even if the AAO accepted the applicant's claim of continuous unlawful residence since October 1981, it appears that her two trips to India during the 1980s may both have exceeded the 45-day maximum for a single absence from the United States allowed in 8 C.F.R.

¹ *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993)

§ 245a.15(c)(1). According to the applicant, her first absence was from late June to mid-August 1985, which may have just exceeded 45 days, and her second absence was from late October 1987 to January 1988, which definitely exceeded 45 days. An absence of such duration interrupts an alien's continuous residence in the United States unless (s)he can show that a timely return to the United States could not be accomplished due to emergent reasons. While the term "emergent reasons" is not defined in the regulations, there is some pertinent case law. In *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), the Board of Immigration Appeals held that *emergent* means "coming unexpectedly into being."

While the premature birth of the applicant's son on July 16, 1985 might constitute an "emergent reason" that prevented the applicant's return to the United States until mid-August 1985, no medical records or other evidence has been submitted documenting the birth of the child, and that it was a premature birth. As for the gallstone operation of the applicant's mother in November 1987, which the applicant indicates was the reason she traveled to India in late October of that year, no documentary evidence has been submitted of this operation. Nor has the applicant provided any explanation as to what unexpected development(s) prevented her from returning to the United States until January 1988 – two months after the operation. For the reasons discussed above, the AAO determines that the applicant has not shown that "emergent reason(s)," within the meaning of 8 C.F.R. § 245a.15(c)(1), prevented her from returning to the United States within 45 days of the date she departed on her first trip to India in late June 1985, and within 45 days of the date she departed on her second trip to India in late October 1987.

Based on the foregoing analysis of the record, the AAO determines that the applicant has failed to establish that she entered the United States before January 1, 1982, and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B)(i) of the LIFE Act. Accordingly, the applicant is ineligible for permanent resident status under the LIFE Act.

The appeal will be dismissed, and the application denied.

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