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FILE: [REDACTED]
MSC-02-239-65260

Office: CHICAGO

Date: **JAN 24 2008**

IN RE: Applicant: [REDACTED]

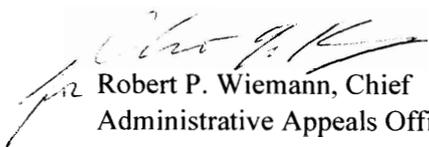
APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by LIFE Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

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. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the late legalization provisions of the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, Chicago, Illinois and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further action and consideration.

The district director determined that the applicant had not established that he resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. Specifically, according to the director, when the applicant entered the United States as an F-1 nonimmigrant during August 1986, he acquired lawful status in the United States. Thus, the director denied the application.

On appeal, counsel asserted that the applicant did maintain continuous unlawful residence in the United States during the statutory period. Counsel also indicated that Citizenship and Immigration Services (CIS) failed to specifically identify its reasons for denying the application, and that it rejected the applicant's evidence without first attempting to verify that evidence.

The regulation at 8 C.F.R. § 245a.2(b) provides in relevant part:

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

Misrepresentation.

(i) In General. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

An applicant for permanent resident status under section 1104 of the LIFE Act 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 through May 4, 1988. See LIFE Act § 1104(c)(2)(B) and 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).

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 “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 states that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. 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 or 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 or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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.

The regulation at 8 C.F.R. § 245a.20(a)(2) states in relevant part:

Denials. The alien shall be notified in writing of the decision of denial and of the reason(s) therefor. When an adverse decision is proposed, [CIS] shall notify the applicant of its intent to deny the application and the basis for the proposed denial. The applicant will be granted a period of 30 days from the date of the notice in which to respond to the notice of intent to deny. All relevant material will be considered in making a final decision. If inconsistencies are found between information submitted with the adjustment application and information previously furnished by the alien to [CIS], the alien shall be afforded the opportunity to explain discrepancies or rebut any adverse information.

On February 16, 1990, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On May 27, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

On September 25, 2003, the interim district director issued a Notice of Intent to Deny (NOID). In the NOID, the interim director stated that the record indicated that the applicant had entered the United States legally as a nonimmigrant on August 30, 1986 during the statutory period. From this, he concluded that the applicant had not demonstrated unlawful presence in the United States during the statutory period.

In response, counsel submitted a copy of an excerpt from *Felicity Mary Newman, et al., v. United States Citizenship and Immigration Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal., Feb. 17, 2004) (Newman Settlement Agreement). Counsel indicated, building on the excerpt from the Newman Settlement Agreement, that CIS may not claim that an applicant's continuous unlawful residence has been interrupted based strictly on the fact that during the statutory period a legalization applicant, such as the applicant in this matter, exited and then reentered the United States with a nonimmigrant, student visa in order to return to an unrelinquished, unlawful residence.

On May 24, 2005, the director issued a notice of decision. The director indicated that any claim that the applicant had violated the terms of his F1 student status by working at Clothes Castle in Chicago beginning in December 1981 was not supported by the record because the applicant's employment verification letter from Clothes Castle which the applicant had submitted was not amenable to verification. The director stated that it "is the belief of USCIS that [the applicant was] in [lawful] status" in the United States during the statutory period. Therefore, the director denied the application.

On appeal, counsel asserted that the applicant did maintain continuous unlawful residence in the United States beginning on June 16, 1981 when he first entered the United States and continuing through the statutory period. Counsel stated that the only time that the applicant was outside the United States during the statutory period was July 25, 1986 through August 30, 1986. Counsel indicated that the applicant began working without authorization in the United States during 1981, and that when he returned to the United States during 1986, he was returning to his unrelinquished unlawful residence. Therefore, according to counsel, the applicant did not interrupt his unlawful residence by entering as a nonimmigrant on August 30, 1986. In addition, counsel asserted that the Clothes Castle employment letter was verifiable in 1990 when the applicant submitted it into the record. Counsel also indicated that the applicant had submitted other evidence to support his claim that he resided in the United States in unlawful status from a date prior to January 1, 1982 and throughout the statutory period, and that the director had failed to identify any deficiencies in such evidence. Consequently, counsel asserted that the application should be approved.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO's *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

Certain language in the NOID and the denial notice might be interpreted as the director suggesting that the applicant's August 1986 entry into the United States as an F1 student, in and of itself, establishes that the applicant was lawfully present in the United States during the statutory period. This point in the NOID and the denial notice is withdrawn. Pursuant to the regulation at 8 C.F.R. § 245a.2(b)(9), an alien who reentered the United States as a nonimmigrant during the statutory period in order to return to an unrelinquished, unlawful residence might nonetheless be deemed eligible so long as he or she was otherwise eligible for

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

legalization. *See Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 51 (1993) (which explains further that this eligibility is qualified at 8 C.F.R. § 245a.2(b)(10) by obliging such an applicant to obtain a waiver of a statutory provision requiring exclusion of aliens who enter the United States by fraud or willful misrepresentation.) *See also* sections 1104(a) and 1104(c) of the LIFE Act (indicating that all legalization provisions of section 245A of the Act, except as modified by section 1104(c) of the LIFE Act, shall apply to aliens who seek to adjust status under section 1104 of the LIFE Act.)

Thus, were the applicant in this matter able to show: 1) that he first entered the United States prior to January 1, 1982; 2) that he was here unlawfully prior to January 1, 1982; and 3) that his intent at the time of his August 1986 entry was to return to an unrelinquished, unlawful residence in the United States, CIS could find that he did not interrupt his continuous, unlawful residence in the United States, begun prior to January 1, 1982, when he exited and then reentered in 1986.

Regarding whether the applicant has established the three points listed above in the instant case, this office concurs with certain statements made by counsel on appeal which indicate that the applicant did submit more documentation than the Clothes Castle employment letter dated November 25, 1984 to support his claim that he was continuously and unlawfully residing in the United States from a date prior to January 1, 1982 and throughout the statutory period; however, the director did not address this additional evidence.² If the director found deficiencies in this evidence, he did not identify these deficiencies as bases for his denial in the notice of decision dated May 24, 2005 or in the NOID dated September 25, 2003, such that the applicant might be afforded the opportunity to explain the discrepancies, to rebut any adverse information and to provide a meaningful appeal. *See* 8 C.F.R. § 245a. 20(a)(2).

Thus, the director's decision to deny is withdrawn. The matter will be remanded such that the director might issue a new decision that appropriately identifies the reasons underlying his decision for the applicant, including an analysis of any deficiencies in the evidence of record.

Regarding these deficiencies, this office would note the following. In the record is the applicant's affidavit dated January 5, 1990 in which the applicant attested that he first entered the United States on **November 12, 1981**. Yet, in the brief submitted on appeal in this matter, the applicant specified through counsel that he first entered the United States on **June 16, 1981**.

The record also shows that the applicant submitted a Form I-687 and Supplement to CIS on January 5, 2006. He signed this document under penalty of perjury on December 29, 2005. At part #30 of the Form I-687 where the applicant was asked to list all of his residences in the United States since his first entry, the applicant showed his first address in the United States to be at [REDACTED] Chicago, Illinois

² Moreover, regarding the Clothes Castle employment letter, the record indicates that the director attempted to telephone this employer subsequent to the filing of the Form I-485. However, at that time, the telephone number provided on the employer's letter was not in service. This office would concur that the director may find a document non-probative if it is no longer amenable to verification. Yet, this office would note that this letter includes an address and the record does not indicate that the director ever attempted to verify the contents of the letter using that address. Finally, this office would note incidentally that CIS shall draw no negative inference regarding a document's credibility when a document which was drafted more than twenty years previously is no longer amenable to verification using the telephone number or address on that document.

60640, from 1981 to 1986.³ At part #33, where he was asked to list all his previous employment in the United States dating back to January 1, 1982, he listed only the following employment during the statutory period:

1982-1984: [REDACTED]
1984-1989: [REDACTED]

The record also includes the statement of [REDACTED] dated October 24, 2001 (and dated November 5, 2001 by the notary) which indicates that from **July 1981** through April 1986 the applicant lived with Mr. [REDACTED] at [REDACTED], Chicago, Illinois 60640. Yet, another statement written by [REDACTED] in the record which is dated February 4, 1990 (and dated February 9, 1990 by the notary) specifies that the applicant did not begin living in the United States until **November 1981**. In that document, [REDACTED] also stated that the applicant lived with him at [REDACTED] Chicago, Illinois for four years. In addition, the record includes the statement of [REDACTED] dated February 6, 1990 which indicates that the applicant did not begin living in the United States until **November 1981**. [REDACTED] states further that the applicant lived at [REDACTED] Chicago, Illinois 60640, then at [REDACTED] Chicago, Illinois 60640 between November 1981 and February 1990 when [REDACTED] signed this document.

The [REDACTED] rent receipts in the record indicate that the applicant paid rent for [REDACTED] at the [REDACTED] [REDACTED] Chicago, Illinois 60611 for the month of November 5, 1981 through December 5, 1981, the month of December 6, 1981 through January 5, 1982, the month of February 6, 1982 through March 5, 1982, the month of April 6, 1982 through May 5, 1982, and the month of June 6, 1982 through July 5, 1982. Thus, the receipts which the applicant submitted as contemporaneous evidence of his unlawful residence during the statutory period suggest that the applicant was living on [REDACTED] in Chicago during November 1981 through July 1982. Yet, certain statements and affidavits in the record summarized in this analysis indicate that the applicant was living in an apartment on [REDACTED] in Chicago during this period.

Also, in the record is the applicant's Form I-687 submitted on February 16, 1990. The applicant signed this form under penalty of perjury on February 5, 1990. At part #33 of this form where he was asked to list all his residences in the United States, he stated that his first residence in this country was at [REDACTED] Chicago, Illinois where he resided from November 1981 through July 1986.

At part #36 of the Form I-687 submitted on February 16, 1990, where the applicant was asked to list all his employment since arriving in the United States, he stated that he had done only **maintenance work** from December 1981 through October 1989, and that subsequent to that he was unemployed. This contradicts the information which the applicant entered on the Form I-687 submitted on January 5, 2006 as well as the applicant's affidavit dated July 22, 1990 in the record on which he attested to having run a **weekend business in the [REDACTED] at [REDACTED] [Chicago]** between February 1982 and June 1986. Moreover, the applicant also submitted into the record a document which purports to be an employment verification letter from [REDACTED] Chicago, Illinois 60632 that indicates that the applicant was employed as a **sales person** at this store from **December 15, 1981 through November 25, 1984**, the date that letter was signed.

On another Form I-687 in the record, which the applicant submitted on March 1, 1990 and which he signed under penalty of perjury, but failed to date, the applicant stated at part #36 that he did not begin working in the United

³ In fact, the Form I-687 indicates that the applicant was at this address from [REDACTED] until [REDACTED]. This office will assume for purposes of this analysis that the applicant intended to write [REDACTED] rather than [REDACTED].

States until **September 1985**. On this form, regarding the specific jobs that he had had in the United States, he listed that he had only been **self-employed** from September 1985 until the date that he submitted the form. In keeping with this statement, the record also includes the applicant's affidavit dated March 1, 1990 in which the applicant attested to having worked **selling newspapers** on [redacted] and [redacted] [Chicago, Illinois] from September 1985 until the date that he signed that document. In addition, on the Form I-687 submitted on March 1, 1990 at part #33 where the applicant was to list all his residences since entering the United States, he indicated that he lived at [redacted] Chicago, Illinois from July 1981 until **April 1988**, and that he lived at [redacted] Chicago, Illinois from May 1988 through the date that he submitted the form.

Regarding the applicant's claim that he was residing unlawfully in the United States and then departed during the statutory period, the record also includes the following inconsistencies. On the Form I-687 submitted on January 5, 2006, the applicant stated that he first departed the United States during July 1986 and returned during August 1986. On the Form I-687 submitted on March 1, 1990, the applicant stated that he first departed the United States during July 1985 and returned during August 1985. On the Form I-687 submitted on February 16, 1990, the applicant stated that he first departed the United States on July 20, 1986 and returned on August 30, 1986.

Regarding these inconsistencies, this office would underscore that doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

This office notes that thus far the applicant has failed to provide credible, contemporaneous evidence that might be considered independent, objective evidence of his having resided in the United States from a date prior to January 1, 1982 and throughout the statutory period to overcome the inconsistencies in the record. Given the applicant's contradictory statements on his various applications and the contradictory information included in his supporting documents, the applicant has not established continuous residence in an unlawful status in the United States for the requisite period under both 8 C.F.R. § 245a.12(e) and *Matter of E- M--*, *supra*. However, because the May 24, 2005 notice of decision and the September 25, 2003 NOID did not identify inconsistencies in the record or other appropriate bases for a denial to afford the applicant the opportunity to explain discrepancies and to provide a meaningful appeal, the matter is remanded for the director to issue a new decision that addresses deficiencies in the evidence such as those referred to here as well as any other deficiencies or bases of denial that the director may identify. *See* 8 C.F.R. § 245a. 20(a)(2).

ORDER: The May 24, 2005 decision of the director is withdrawn. The application is remanded to the director for further action in accordance with the foregoing discussion. The director shall issue a new decision that is to be certified to the Administrative Appeals Office for Review.