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U.S. Citizenship
and Immigration
Services

L2



FILE: [REDACTED] Office: LOS ANGELES Date: OCT 29 2008
MSC 02 250 63561

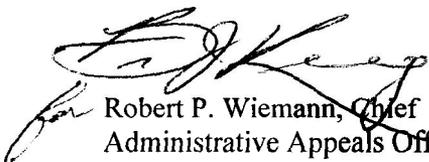
IN RE: Applicant: [REDACTED]

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: Self-represented

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.


for 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 Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988. This decision was based on the director's determination that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during this period and had entered the United States with a B-2 visa in 1985.

On appeal, the applicant puts forth a brief disputing the director's findings. The applicant asserts that additional information will be submitted to the AAO within 30 days. However, more than a year later, no additional correspondence has been presented 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)(i) 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).

"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.]

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

On her Form I-687 application signed April 5, 1990, the applicant indicated, at item 35, that she was absent from the United States from July 1984 to April 1985. The applicant indicated she departed the United States to Nigeria in order to get married and have her child.

Along with her Form I-687 application, the applicant provided a partial copy of her Nigerian passport which reflects: 1) she was issued a B-2 visa in Lagos, Nigeria on September 17, 1981 and entered the United States as a nonimmigrant visitor on November 12, 1981. The visa expired on December 17, 1981; 2) an endorsement issued on March 20, 1985, from the passport control officer in Nigeria reflecting the applicant's name change pursuant to her marriage on April 7, 1984 and information pertaining to her son who was born on July 23, 1984; and 3) on March 28, 1985, the applicant was issued a B-1/B-2 visa in Lagos, Nigeria. The applicant entered the United States as a nonimmigrant visitor on April 13, 1985. The applicant also provided a copy of her son's July 23, 1984 birth certificate and her marriage certificate issued on April 7, 1984.

The record reflects that the applicant was in removal proceedings in 1997 and had filed a Form EOIR-42B, Application for Cancellation of Removal. At Part 3, items 19 and 22, the applicant indicated that she first arrived in the United States on April 13, 1985 and was admitted as a nonimmigrant from April 13, 1985 to October 12, 1985. At Part 3, item 25, the applicant indicated that she had not departed the United States since her original date of arrival.

On June 15, 2007, the director issued a Notice of Intent to Deny, which advised the applicant of what she had indicated at items 19 and 22 on her Form EOIR-42B. The applicant was advised that during her removal proceedings, the Service's appeal brief noted that the applicant had entered the United States on April 13, 1985 as a visitor and had overstayed, and that the Board of Immigration Appeals, in its decision, noted that the applicant had entered the United States in 1985. The director indicated, "this has not been disputed or opposed by you nor has it been shown by your testimony or documentary evidence on record that it was not the truth."

The director acknowledged the applicant's 1981 entry into the United States, but indicated that the applicant had not met her burden of proof in establishing she had resided in an unlawful status during the requisite period as she had entered the United States in 1985 with a visitor's visa.

The director further advised the applicant that her absence from July 1984 to April 1985 exceeded the 45-day limit for a single absence during the requisite period.

The applicant, in response, provided a copy of the instructions for filing the Form EOIR-42B and indicated, in pertinent part:

It states one needed to establish one had maintained continuous physical presence in the United States. Not very familiar at the time with immigration rules and regulations, we were advised [sic] by an immigration attorney, [REDACTED], that our last legal entry into the United State [sic] with a visa constituted our first legal entry preceeding [sic] our continuous physical stay in the United States. [REDACTED] represented us in the proceeding whereby our application was granted, though Immigration appealed the Judge's decision. During the proceedings, he did state that we had entered prior to 1985 and had filed for amnesty but were turned away. My entry on 4/13/85, was with a visa and because I did not remember exact days of all entries before that, counsel consider that as our first legal entry for the purpose of showing 10 years continuous presence. My amnesty application was rejected initially because I stated I returned in April 1985 with a visting [sic] visa which expired in October 1985. The Board's decision referred to my last entry based on the 10 years continuous physical presence. I know now that counsel's advice was erroneous.

Regarding her absence from the United States, the applicant indicated, in pertinent part:

As I stated during my interview I did depart and return to the United States. The Service argues that those entries cannot be considered brief and therefore disqualifies me. I have attached Exhibit 3, a page of the Federal Register which refers to absences. Any reference to specific length of time is just guideline. Each case is determined on it's [sic] own merits on a case by case analysis. If an alien can establish that her purpose could not be accomplished within that period of time and it is obvious that there was no intent not to return, then the length of stay would not disqualify the alien. I departed briefly out of the country except when I went to get married. I was pregnant and due to stress of the travel I almost lost the baby. We did get married, my husband got his visa back, I was on bed rest and unable to return immediately. The baby was ultimately born before his due date and due to health risk for the baby I could not return with him immediately though I did travel without him for a brief period before going to get him and return finally with a visa for him as well on April 1, 1985.

Eligibility exists for an alien who would otherwise be 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 in order to return to an unrelinquished unlawful residence. 8 C.F.R. § 245a.2(b)(9). An alien described in this paragraph must receive a waiver of the inadmissibility charge as an alien who entered the United States by fraud. Section 212(a)(6)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C), 8 C.F.R. § 245a.2(b)(10).

As a result of the applicant's misrepresentation in procuring a B-2 non-immigrant visa in 1985, the applicant is inadmissible under section 212(a)(6)(C) of the Act. However, such inadmissibility may be waived. The record reflects that along with her Form I-687 application, the applicant filed a Form I-690, Application for Waiver of Grounds of Excludability.

The applicant's statements have been considered. However, as conflicting information has been provided, it is reasonable to expect an explanation from [REDACTED] in order to resolve the discrepancy. No statement from [REDACTED] has been submitted to dispute the director's finding and corroborate the applicant's statement. Simply going on record without supporting documentary evidence is not sufficient

for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, the information provided in the Federal Register page dated June 1, 2001 specifically referred to the guidelines in establishing physical presence from November 6, 1986 to May 4, 1988 in the United States. As the applicant's absence from the United States occurred *prior to* November 6, 1986, it is not necessary to determine if the absence was brief, casual and innocent. As the applicant's absence did exceed 45 days, her absence will be examined utilizing the standard set forth in 8 C.F.R. § 245a.15(c)(1).

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. That was not the applicant's situation in this case. There is no evidence to indicate that an emergent reason delayed the applicant's return to the United States within the 45-day period. Except for her own statement, the applicant does not provide any independent, corroborative, contemporaneous evidence to support the statements made in response to the Notice of Intent to Deny. *Id.*

The applicant's continued stay in Nigeria would appear to have been a matter of personal choice, not a situation that was forced upon her by unexpected events. The applicant's extended absence from the United States – far beyond the 45 days allowed by 8 C.F.R. § 245a.15(c)(1) – was not "due to emergent reasons" outside of her control that prevented her from returning far sooner.

Further, the applicant's claim to have been absent from the United States from July 1984 raises questions to her credibility. The applicant indicated the purpose for her departure was to get married and to have her child; however, her marriage certificate indicates that her marriage occurred three months prior to her alleged departure in July 1984.

Accordingly, the applicant's absence from the United States exceeded the 45-day period allowable for a single absence and interrupted her "continuous residence" in the United States. The applicant has, therefore, failed to establish that she 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 by the regulations, 8 C.F.R. §§ 245a.11(b) and 245a.15(c)(1). Accordingly, 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).

The documents regarding the applicant's removal proceeding have been consolidated into her LIFE application. Among the documents, is the applicant's passport, which reflects: 1) arrival stamps from Ikeja, Nigeria dated May 25, 1982 and April 3, 1983; 2) departure stamps from Ikeja, Nigeria dated May 19, 1982 and December 5, 1982, 3) immigration stamps dated December 5, 1982, February 13, 1983, March 23 and 28, 1983 from Heathrow International Airport in England; and 4) on March 18, 1983, the

applicant was issued a B-1 multiple entry non-immigrant visa in Lagos, Nigeria valid until March 17, 1987.

The applicant's significant omission of these absences, is a strong indication that the applicant was not in the United States subsequent to the expiration of her B-1 visa issued on September 17, 1981 or may have been outside the United States beyond the period of time allowed by regulation.

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).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal

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