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U.S. Citizenship
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Services

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FILE:

MSC 02 057 65321

Office: NEW YORK Date:

OCT 30 2008

IN RE:

Applicant:

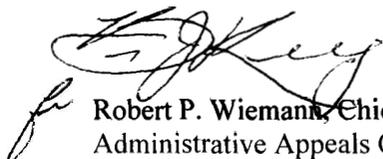
APPLICATION:

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 Director, New York, New York, 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. The director also denied the application because it was determined that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during the requisite period.

On appeal, counsel puts forth a brief disputing the director's findings.

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).

“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.]

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 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 first issue in this proceeding is whether the applicant's absence exceeded the 45-day limit for a single absence during the requisite period.

The director's determination that the applicant had been absent from the United States for over 45 days was based on the applicant's Form for Determination of Class Membership dated November 20, 1990. The applicant indicated at item 9, that she departed March 1986 to Columbia and returned to the United States on October 2, 1987. The applicant indicated that the purpose for her departure was "son had medical assistance." The director, in denying the application, determined that the applicant had exceeded the 45-day limit for a single absence during the requisite period and that the applicant had not established that this absence was for emergent reasons as no medical documentation was provided to corroborate her statement.

On appeal, counsel asserted, in pertinent part:

The present denial notice the Service has mailed has a new ground for denial based in a new review from the Service part. The office in charge has found new evidence which we strongly deny since the data and information related to absences from the United State from our client's part are clear and made our client eligible for legalization before and today. There is a big mistake made by the officer in charge.

Although the applicant did list a departure date of March 3, 1986, she also listed at item 8 of the Form for Determination of Class Membership that she last departed the United States on September 1, 1987.¹ In addition, at item 35 of the Form I-687 application, the applicant listed her absences as:

March 3, 1986 to April 5, 1986 to see her ailing son
September 1, 1987 to October 2, 1987 to assist her sick father.

The record contains a copy of an opened airline ticket from Avianca issued in the applicant's name on September 1, 1987 to travel from New York to Columbia. The record also contains a letter from Avianca airlines dated June 28, 1991; however, as the letter was not accompanied by the required English translation, it cannot be considered.

The AAO finds that the applicant's absence from the United States occurred on two separate occasions and each absence did not exceed the 45-day limit for a single absence during the requisite period. Accordingly, the director's finding in this matter is withdrawn.

¹ Item 8 of Form for Determination of Class Membership asks, "[w]hen did you last depart the United States after May 1, 1987?"

The second 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.

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

- A notarized affidavit from [REDACTED] of Corona, New York, who indicated that the applicant resided in her home at [REDACTED], Corona, New York from March 1986 to November 1988. The affiant asserted that in exchange for rent, the applicant did minor housekeeping and babysitting duties.
- An undated letter from [REDACTED], executive director of American Composers Orchestra, Inc., in New York, New York, who indicated that the applicant was employed to clean its offices during 1987 and 1988.
- A notarized affidavit from [REDACTED] and [REDACTED] of Woodside, New York, who indicated that the applicant was in their employ as a babysitter from October 1983 to December 1985.
- A letter from [REDACTED] of Church of St. Sebastian in Woodside, New York, who indicated that the applicant appeared before him and swore that she has resided in the United States since March 1981 and has attended religious services at the church since residing in Woodside.
- A notarized affidavit from [REDACTED] of Bronx, New York, who indicated that the applicant was in her employ as a babysitter and housekeeper from November 1981 to September 1983.
- A notarized affidavit from [REDACTED] of Astoria, New York, who indicated that the applicant was in her employ twice a week as a cleaning lady from October 1981 to December 1982.

The applicant also submitted additional affidavits; however, they will not be considered as they serve to attest to the applicant's physical presence and residence in the United States subsequent to the requisite period.

On April 27, 2007, the director issued a Notice of Intent to Deny, which advised the applicant that the affidavits submitted appeared to be neither credible nor amenable to verification and that no evidence was submitted demonstrating that the affiants had direct personal knowledge of the events testified in their respective affidavits. The applicant was also advised of her statement indicating that she arrived in the United States by plane from Columbia on March 29, 1981; however, no evidence of her entry was submitted.

Counsel, in response, asserted that the applicant has submitted sufficient documents, which were affidavits of circumstances from individuals who were able to testify to the applicant's residence and employment during the requisite period. Counsel asserted the applicant "came without inspection and she has no record of that entry." Counsel submitted:

- An additional notarized affidavit from [REDACTED] who reaffirmed the applicant's employment, twice a week from 1981 to 1982 as a cleaning lady and child sitter.
- A notarized affidavit from [REDACTED] of Astoria, New York, who indicated that the applicant was in his employ twice a week as a housekeeper from 1981 to 1982.

- An additional notarized affidavit from [REDACTED] who reaffirmed the applicant's employment as a babysitter from 1983 to 1985.

Counsel also provided affidavits from two affiants; however, they serve no purpose in this proceeding as they attest to the applicant's residence and employment subsequent to the requisite period.

The director, in denying the application, noted that the affidavits submitted in response to the Notice of Intent to Deny were insufficient to overcome the grounds for denial.

On appeal, counsel argued that the documents submitted in response to the Notice of Intent to Deny are sufficient to overcome the adverse decision. Counsel asserts that the applicant had no additional documents to submit at this time and provides copies of documents that were previously submitted.

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 entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988, as she has presented contradictory and inconsistent documents, which undermines her credibility. Specifically:

1. The airline ticket from Avianca airlines only serves to establish the applicant's presence in the United States on September 1, 1987.
2. The letter from [REDACTED] and the affidavit from [REDACTED] raise questions to their authenticity as the applicant did not claim either employment on her Form I-687 application or on her Form G-325A, Biographic Information. Further, the letter and the affidavit failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiants also failed to 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.
3. The letter from [REDACTED] has little evidentiary weight or probative value as it does not conform to the basic requirements specified in 8 C.F.R. § 245a.2(d)(3)(v). Most importantly, the pastor does not explain the origin of the information to which he attests. Furthermore, the applicant did not list any affiliation with a religious organization during the requisite period at item 34 on her Form I-687 application.
4. The employment affidavits from [REDACTED] and [REDACTED] and [REDACTED] and [REDACTED] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiants also failed to 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.

5. The applicant claimed to have resided in Bronx and Woodside, New York during the requisite period; however, no evidence such as lease agreements, rent receipts, utility bills or affidavits from affiants were submitted to corroborate her residences from November 1981 to December 1985.
6. The applicant submitted two Form I-687 applications dated November 20, 1990 and October 28, 1993. Item 33 on the Form I-687 application instructs the applicant to list *all* residences in the United States since her first entry. The applicant on her application dated November 20, 1990 did not claim any residence from January 1986 to February 1986 and on her application dated October 28, 1993, the applicant did not claim any residence during 1987.

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 regulation at 8 C.F.R. § 245a.12(e) provides that “[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods.” Preponderance of the evidence is defined as “evidence which as a whole shows that the fact sought to be proved is more probable than not.” *Black’s Law Dictionary* 1064 (5th ed. 1979). See *Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991). Given the credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met her burden of proof. The applicant has not established, by a preponderance of the evidence, that she 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.

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