U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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FILE: [redacted] Office: LOS ANGELES Date: JUN 26 2007

MSC-01-356-62974

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]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the National Benefits Center. 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 Legal Immigration Family Equity (LIFE) Act was denied by the District Director in Los Angeles, California. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The district director concluded that the information submitted by the applicant had failed to overcome all the grounds for denial stated in the Notice of Intent to Deny. These grounds were that the applicant had not established that he was continuously physically present in the United States from November 6, 1986 through May 4, 1988, as required by section 1104(c)(2)(C) of the LIFE Act, and that the applicant was convicted of three misdemeanors committed in the United States.

On appeal, the applicant explained the difficulty in obtaining documentation due to the passage of time and sought an opportunity to submit additional evidence to prove his eligibility for permanent resident status under the LIFE Act.

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his continuous physical presence in the United States from November 6, 1986 through May 4, 1988. The pertinent statutory provisions read as follows:

Section 1104(c)(2)(C) – Continuous Physical Presence

(i) In general – The alien must establish that the alien was continuously physically present in the United States during the period beginning on November 6, 1986, and ending on May 4, 1988, except that -

(I) an alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of this subparagraph by virtue of brief, casual, and innocent absences from the United States; and

(II) brief, casual, and innocent absences from the United States shall not be limited to absences with advance parole.

The "continuous physical presence" provision of the statute is further defined in the following pertinent regulation:

8 C.F.R. § 245a.16(b)

> For purposes of this section, an alien shall not be considered to have failed to maintain continuous physical presence in the United States [between November 6, 1986 and May 4, 1988] by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, 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.

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 petitioner 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 (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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he was continuously physically present in the United States during the period beginning November 6, 1986 and ending May 4, 1988, except for brief, casual and innocent absences. Here, the submitted evidence is not relevant, probative, and credible.

The applicant submitted a Form I-485 Application to Register Permanent Residence or Adjust Status to Citizenship and Immigration Services (CIS) on September 21, 2001. On page 2, where applicants were asked to list all their sons and daughters, the applicant listed multiple children. This included one child who was born during the period in which continuous residence is required of applicants for permanent resident status under the LIFE Act. Specifically, the applicant's son, [redacted] was born in Mexico on May 2, 1988.

With his I-485 application, the applicant also submitted a copy of his Form I-687 application, together with copies of supporting documents. At part #33 of the Form I-687 where applicants were asked to list all residences in the United States since first entry, the applicant listed [redacted] Oxnard, California from July 1987 until the time Form I-687 was signed on March 28, 1996; and [redacted] Santa Ana, California, from May 1981 to June 1987. At part #34 where applicants were asked to list all affiliations or associations with churches or other organizations, the applicant said "none." At part #35 where applicants were asked to list absences from the United States since entry and after January 1, 1982, the applicant indicated that he took a trip to Mexico to

visit relatives from June to July 1987. The applicant did not list additional trips. At part #36 where applicants were asked to list employment in the United States, the applicant indicated he worked for [redacted] from May 1981 to January 1990.

The applicant included three affidavits in support of his I-485 application that were prepared by [redacted], and [redacted] Although not required, none of these affidavits were accompanied by documentation of the affiant's presence in the United States during the statutory period. Each affidavit stated that the applicant resided at [redacted] Santa Ana, California from 1985 to 1990; and at [redacted] Oxnard, California, from 1995 to the present time. These affidavits indicated that, during the described period, the longest period in which the affiant had not seen the applicant was zero years and zero months. These affidavits are found to be inconsistent with the applicant's written statements on Form I-687. Specifically, all the affiants indicated the applicant moved to the [redacted] address in 1995, rather than in 1987 as indicated by the applicant. The affiants also listed the [redacted] house number incorrectly as [redacted] instead of [redacted] Lastly, all the affiants indicated there was no period between 1985 and the time the affidavit was signed in 2001 in which they had not seen the applicant. However, the applicant indicated on Form I-687 that he was absent from the United States for one month in 1987.

The applicant also included a letter signed by [redacted] of Mary Star of the Sea Church in Oxnard, California. In this letter, [redacted] stated that the applicant came to [redacted] office. [redacted] confirmed that the applicant's son was baptized at [redacted] church in 1995 and that the applicant is one of the church's parishioners. [redacted] also stated of the applicant, "[h]e says that he is coming here since January 1984." [redacted] provided no evidence of his presence in the United States during the statutory period. In addition, [redacted] did not specifically confirm the applicant's presence in the United States during the statutory period. It is also noted that the applicant did not list Mary Star of the Sea Church when asked on Form I-687 to list affiliations or associations with churches.

The applicant submitted multiple documents related to his employment with [redacted] These documents included Forms W-2 for 1986 indicating total earnings of $2593.09 and for 1987 indicating total earnings of $2243.64. The applicant also provided copies of employee badges in his name for 1987 and 1988. Lastly, the applicant provided pay stubs for the following employment periods: March 8 to March 14, 1986; May 17 to May 23, 1986; March 21 to March 27, 1987; April 4 to April 10, 1987; April 11 to April 17, 1987; April 18 to April 24, 1987; January 30 to February 5, 1988; February 13 to February 19, 1988; February 20 to February 26, 1988; February 27 to March 4, 1988; March 5 to March 11, 1988; March 26 to April 1, 1988; and April 9 to April 15, 1988.

It is noted that the applicant provided no salary documentation for the four and one-half month period at the start of the statutory period on November 6, 1986 to March 21, 1987, and for the nine-month period from April 24, 1987 to January 30, 1988. It is also noted that the total earnings to date listed on the pay stub for May 17 to May 23, 1986 match the total earnings listed on the Form W-2 from 1986, indicating that the applicant did not undertake additional employment for [redacted] Inc. in 1986 anytime after May 1986. This calls into question whether the applicant was continuously present in the United States for the period beginning on November 6, 1986. In

addition, the total earnings to date listed on the pay stub for April 18 to April 24, 1987, were $1883.94. There is a difference of $359.70 between the applicant's total earnings for 1987 with this employer and the total earnings listed on his pay stub for the last pay period in April 1987. Since the applicant's earnings ranged from approximately $265 to $285 per week, this indicates the applicant worked no more than two additional pay periods in 1987. The lack of documentation of the applicant's presence from November 6, 1986 to March 21, 1987 and from April 24, 1987 to January 30, 1988 calls into question whether the applicant was continuously present in the United States for the statutory period.

The applicant also provided a money order receipt from February 24, 1988. This receipt lists the applicant as the purchaser, and lists [redacted], Santa Ana as the applicant's address. This document is found to be inconsistent with the information the applicant provided on Form I-687, which indicates the applicant moved away from the Santa Ana address in June 1987.

The applicant provided an envelope with an illegible postage cancellation date, as well as an envelope with a postage cancellation date of April 22, 1988.

At his interview with a CIS officer on October 24, 2003, the applicant stated that he first entered the United States in November 1981. He stated that he visited Mexico three times to tend to his sick mother. This included a visit for two weeks in July 1986, a visit for 15 days in June 1987, and a visit for 20 days in October 1988. The applicant stated that he entered the United States without his wife, and that his wife entered the United States for the first time in 1990. When the officer asked the applicant about his children who were born outside of the United States, the applicant stated that his wife entered the United States in 1983. The applicant also stated that the birthdates of his children do not reflect their real dates of birth. The record does not indicate the applicant provided a reason for the inaccuracy of his children's dates of birth as listed. In fact, with his I-690 waiver application the applicant subsequently submitted birth documentation reconfirming that his son German was born in Mexico on May 2, 1988.

On February 7, 1994, the applicant appeared for an interview to determine his eligibility for class membership. The record of this interview indicates the applicant stated he first entered the United States on May 10, 1981. The applicant stated that his wife came to the United States for the first time in 1989. The applicant stated that he left the United States only once, from June 2 to July 1, 1987. Initially, the applicant stated that he had only one child. When the officer mentioned the other four children listed on the applicant's Forms 1040, the applicant stated he had five children but could not remember their dates of birth. The applicant attempted to state the ages of his children and indicated they were born in Mexico. When asked how this could be possible, the applicant then stated that his wife had actually come to the United States prior to 1989.

The applicant's statements in the two CIS interviews are found to be inconsistent with each other and with the applicant's written statements included in his I-687 application. Specifically, the applicant initially stated he only departed the United States one time, and then he later stated he departed the United States three times. In the first interview, the applicant initially stated his wife entered the United States for the first time in 1989, and then he corrected this statement to indicate

she entered prior to 1989. In his second interview, the applicant stated that his wife entered the United States for the first time in 1990, and then he corrected his statement to indicate she entered in 1983. The applicant indicated on his I-687 application that the only time he departed the United States during the statutory period was from June to July 1987. However, Form I-485 indicates the applicant's son German was born on May 2, 1988 in Mexico. The applicant's conflicting statements regarding his wife's first entry to the United States, as well as statements regarding his absences from the United States, suggest that the applicant was actually in Mexico nine months prior to the birth of his son, German. This calls into question whether the applicant was continuously present in the United States during the statutory period.

In response to the Notice of Intent to Deny (NOID) issued on January 29, 2004, the applicant provided court dispositions from his past criminal convictions. These dispositions confirm that the applicant was convicted of two misdemeanors and one infraction. This documentation is found to overcome the finding in the NOID that the applicant had been convicted of three misdemeanors and was, therefore, not eligible for adjustment of status.

The applicant's attorney also included a brief in response to the NOID. The brief attempted to explain the apparent inconsistencies in the applicant's statements. The applicant's attorney explained that the applicant had stated that his wife visited the United States prior to 1990 without intent to remain in the United States permanently, and it was not until 1990 that the applicant's wife entered the United States for the first time with the intent to remain permanently. The applicant did not provide a statement from himself or his wife, or any other evidence, to support the explanation given by his attorney.

Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence in the record indicating that the applicant actually made the statements his attorney credits to him. The applicant provided no explanation of his initially stating his wife had not entered the United States prior to 1989 or 1990, and then later stating his wife in fact had entered the United States at an earlier time. The applicant also presented no supporting evidence indicating that his wife entered the United States prior to 1989. Such evidence might have provided an explanation of the apparent inconsistencies related to his son's birth. Since the statements of the applicant's attorney do not constitute evidence, the applicant has not overcome these inconsistencies.

In denying the application the director noted that the applicant failed to overcome all grounds for denial as stated in the NOID.

On appeal, counsel submitted a brief in which he explained the difficulty in obtaining documentation after the passage of time and requested an opportunity to present additional evidence of the applicant's eligibility for permanent resident status under the LIFE Act. As of the date of this decision, the applicant has failed to submit any additional evidence in support of his application.

In summary, the applicant provided affidavits to support his claim of continuous presence that are found to be inconsistent with each other and with the applicant's statements. The applicant's statements in his CIS interviews were also found to contradict each other as well as the applicant's statements on Form I-485 and Form I-687. The applicant provided evidence that his son was born in Mexico on May 2, 1988. However, the applicant's statements regarding his absences from the United States and his wife's presence in the United States are inconsistent with his son's date and place of birth. In addition, other documentation provided by the applicant including pay stubs, tax documents, an envelope with dated cancellation of postage, and a money order receipt, fail to confirm the applicant's presence in the United States between November 6, 1986 and March 21, 1987; and between April 24, 1987 and January 30, 1988. The director determined and the AAO affirms that the applicant's two absences in length of four and one-half months and nine months respectively, are not brief, casual and innocent.

The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his burden of proof, the applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245A.12(f). Given the contradictory statements contained in the applicant's I-687 application, the records of his CIS interviews, and supporting affidavits, as well as two gaps totaling thirteen months in other supporting documentation, it is concluded that he has failed to establish continuous presence in the United States from November 6, 1986 to May 4, 1988, as required under section 1104(c)(2)(C) of the LIFE Act.

Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

Beyond the decision of the director, the applicant has not established continuous residence in the United States in an unlawful status since before January 1, 1982 through May 4, 1988 as required by section 1104(c)(2)(B) of the LIFE Act. For this additional reason, the application may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F. 3d 683(9th Cir. 2003); *see also Dor v. INS*, 891 F. 2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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

[redacted]