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U.S. Citizenship and Immigration Services

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[redacted]

OCT 12 2007

FILE: [redacted] Office: BALTIMORE DISTRICT OFFICE Date:
MSC 02 246 60483

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 your case 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, Baltimore, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The district director denied the application because the applicant had not demonstrated that he had (1) continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988; or (2) maintained continuous physical presence in the in the United States during the period from November 6, 1986 through May 4, 1988.

On appeal, counsel states that the applicant has submitted substantial documentary evidence including letters from former employers and affidavits from friends and clergy. He asserts that the applicant has met his burden of proof and has established his eligibility for permanent resident status under the LIFE Act by clear and convincing evidence.

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 Citizenship and Immigration Services (CIS) 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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

In an attempt to establish continuous unlawful residence since May 1981 and continuous physical presence in the United States from November 6, 1986 through May 4, 1988, as claimed, the applicant furnished the following evidence:

(1) Employment letter from [redacted] owner of [redacted] of Bell, California, who states that the applicant worked for the company from November 1981 to February 1984 as an installer of panel systems.

(2) Employment letter from [redacted] from Travel Choices of Soltur, located in Redondo Beach, California, who states that the applicant worked for the company from May 1984 through June 1986 as a janitor.

(3) Employment letter from [redacted], Administrative Vice President of Red Lobster located in Norwalk, California, who states that the applicant worked for the company from August 6, 1986 to April 1989 as a dish-washer.

(4) Affidavit dated May 4, 1991 from [redacted]en, MCCJ, the pastor of Holy Cross Catholic Church located at [redacted], stating that the applicant has been a member of the church since 1981. He also states that to his personal knowledge, the applicant has resided in the United States since May 1981.

(5) Affidavit dated June 3, 1990 from [redacted] California, stating that the applicant left the United States on September 6, 1987 and returned to the United States on September 26, 1987. He further states that "[w]e came in to U.S.A.

together in the same date, and we have see each other ever since, we crossed the border together."

(6) Affidavit dated September 9, 1990 from [redacted] California, stating that the applicant has lived with him since 1981. Specifically, he states "he helps with the rent and I don't give him any receipt."

(7) Affidavit dated September 7, 1990 from [redacted] Angeles, California, who states that he has known the applicant since "we were little." He further states that the applicant has been in the country since 1981 and that he left the United States once, on September 6, 1987, and returned on September 26, 1987. The affiant claims to have knowledge of this trip because he drove the applicant to the bus station.

(8) Doctor's note and prescription dated March 22, 1983.

(9) Copy of the applicant's California Driver's License issued on January 16, 1990.

On October 20, 2003, CIS issued a Notice of Intent to Deny the application. The district director noted that despite the applicant's claim that he continually resided in the United States since May 1981 with the exception of one trip to Mexico, the record did not contain credible evidence to support a finding that the applicant was continually present from 1982 through 1988. The district director noted that the affidavits of [redacted] did not claim to have knowledge of the applicant's entry into the United States in 1981 nor of his continuous presence in the United States until September 6, 1987. The district director also noted that the applicant's youngest daughter was born on October 29, 1988 in Mexico. Noting that the applicant claimed only one trip to Mexico from September 6, 1987 to September 26, 1987, the district director concluded that the applicant must have made additional undisclosed trips outside of the United States. In accordance with *Matter of To*, 14 I&N Dec. 679 (BIA 1974), the applicant was afforded the opportunity to rebut this derogatory information and submit any additional evidence in support of the application.

In rebuttal, the applicant submitted a letter dated November 3, 2003. The applicant merely pointed out that the district director failed to acknowledge the letters submitted by his former employers. No additional documentary evidence was submitted.

The director denied the application on February 10, 2004, noting that while the evidence in the record supported a finding that the applicant was present in the United States in May 1982, there was insufficient evidence to show that he was unlawfully present in the United States from before January 1, 1982, the beginning of the qualifying period, through May 4, 1988. The director also noted that the applicant had failed to establish that he was continuously physically present in the United States from November 6, 1986 through May 4, 1998.

On appeal, counsel for the applicant makes three arguments. First, counsel asserts that the failure of CIS to notify the applicant within a reasonable time of the deficiency with regard to the employment letter from Manuel's Furniture Service put him at a disadvantage, since that employer is no longer in business and thus records are no longer available. Second, counsel attempts to refute the director's finding that the applicant had not maintained unlawful status in the United States for the entire period from January 1, 1982 through

May 4, 1988. Specifically, counsel refers to the affidavits from [redacted] and [redacted] and claims that each affidavit confirms the unlawful presence of the applicant in the United States from 1981 until at least 1990. Counsel further asserts that the regulation at 8 C.F.R. § 254a.2(d)(3)(v) specifically confirms that the attestation of churches is acceptable evidence to establish the applicant's unlawful presence in the United States. Finally, counsel addresses the issue with regard to the birth of the applicant's child over one year after his brief trip to Mexico, where his wife continually resided during his presence in the United States. Counsel submits an affidavit with certified translation from the applicant's wife, which states that she accompanied her husband back to the United States on September 26, 1987, and remained in the United States until May 25, 1988. At the time of her departure, she claims she was four months pregnant.

The first issue on appeal is whether the applicant has demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988, as required by 8 C.F.R. § 245a.11(b).

The director acknowledged the employment letter from [redacted] Furniture Service, which claimed that the applicant began working for the company in November 1982, but noted that the letter lacked the necessary information required by 8 C.F.R. § 245a.2(d)(3)(i), such as the applicant's address at the time, whether or not the information in the letter was obtained from official company records, or the location of company records and whether CIS could have access to those records. Furthermore, the district director noted that the record was devoid of evidence to establish that the applicant maintained unlawful status in the United States for the entire period from January 1, 1982 through May 4, 1988. Finally, the district director noted that the applicant had not demonstrated that he maintained continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Specifically, the director noted the discrepancy regarding the applicant's trip home to Mexico in relation to the birth of his daughter, and noted that despite being afforded the opportunity to address this inconsistency, the applicant failed to do so.

As stated in 8 C.F.R. § 245.15(b)(1), a list of evidence that may establish an alien's continuous residence in the United States can be found at § 245a.2(d)(3).

The *Matter of E-- M--* , 20 I&N Dec. 77 (Comm. 1989) provides guidance in assessing evidence of residence, particularly affidavits. In that case, the applicant had established eligibility by submitting (1) the original copy of his Arrival Departure Record (Form I 94), dated August 27, 1981; (2) his passport; (3) affidavits from third party individuals; and (4) an affidavit explaining why additional original documentation is unavailable. Furthermore, the officer who interviewed that applicant recommended approval of the application, albeit, with reservations and suspicion of fraud. In this case, the interviewing officer recommended denial of the application, and there is no Form I-94 or admission stamp in a passport establishing the applicant entered the United States prior to January 1, 1982.

Although the applicant claims he entered the United States in May 1981, he likewise claims that he entered without inspection. As a result, there is no documentary evidence in the form of an arrival-departure record or stamped passport to verify the exact date of entry. The applicant provided a letter from [redacted] Furniture Service, which states that he began his employment with the company in November 1981, in support of the claim that he was present in the United States as of January 1, 1982. This letter, however, is insufficient to support a finding that the applicant was present in the United States

on January 1, 1982. Specifically, the letter fails to comply with the regulatory requirements, since it omits the applicant's address at the time of employment and fails to state whether the information contained in the letter was taken from official company records. In addition, the letter fails to state where the records are located and whether the service may have access to the records. It is further noted that the company is no longer in business, so independent attempts by the service to verify the employment of the applicant were unsuccessful.

The applicant also relies on two affidavits from [redacted] and one affidavit from [redacted] which indicate that the applicant has been present in the United States since 1981. No additional information regarding specific knowledge of his entry into the United States or his continuous unlawful presence in the United States is included.

Finally, the applicant relies on the affidavit of [redacted] MCCJ of Holy Cross Catholic Church in Los Angeles as evidence that the applicant was present in the United States as of May 1981 and continually resided in the United States through May 4, 1991. Counsel correctly contends that the attestation of a church is acceptable evidence under the regulations, and upon review of the affidavit, the document appears to comply with the regulatory requirements. However, the applicant has not submitted any credible contemporaneous documentation to establish presence in the United States from the time he claimed to have commenced residing in the U.S. through May 4, 1988. In light of the fact that the applicant claims to have continuously resided in the United States, this inability to produce contemporaneous documentation of residence raises serious questions regarding the credibility of the claim.

As stated above, the inference to be drawn from the documentation provided shall depend on the extent of the documentation. The minimal evidence furnished cannot be considered extensive, and in such cases a negative inference regarding the claim may be made as stated in 8 C.F.R. § 245a.12(e).

The above negative factors 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.

While there is no specific regulation which governs what third party individual affidavits should contain to be of sufficient probative value, the regulations do set forth the elements which affidavits from organizations are to include. 8 C.F.R. § 245a.2(d)(3). These guidelines provide a basis for a flexible standard of the information which an affidavit should contain in order to render it probative for the purpose of comparison with the other evidence of record.

According to the guidelines set forth in 8 C.F.R. § 245a.2(d)(3), a signed attestation should contain (1) an identification of the applicant by name; (2) the dates of the applicant's continuous residence to which the affiant can personally attest; (3) the address(es) where the applicant resided throughout the period which the affiant has known the applicant; (4) the basis for the affiant's acquaintance with the applicant; (5) the means by which the affiant may be contacted; and, (6) the origin of the information being attested to. *See* 8 C.F.R. § 245a.2(d)(3)(v).

While these standards are not to be rigidly applied, an application which is lacking in contemporaneous documentation cannot be deemed approvable if considerable periods of claimed continuous residence rely entirely on affidavits which are considerably lacking in such basic and necessary information.

The affidavits submitted in support of this application fall far short of meeting the above criteria. The affidavits of [redacted] are somewhat confusing and are not supported by any objective, verifiable documentary evidence. Specifically, the affidavit dated June 3, 1990 attesting to the applicant's trip to Mexico in September 1987 indicates that he and the applicant "crossed the border together" and that they entered the United States on the same date. There is no indication, however, if [redacted] is referring to the applicant's return to the United States on September 26, 1987, or if he refers to their initial entry into the United States. Nevertheless, [redacted] fails to provide specific information, such as the date he refers to with regard to their entry. Furthermore, the second affidavit, dated September 9, 1990, claims that the applicant has been living with him since 1981, yet this affidavit makes no mention of their entry together into the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the affidavit of [redacted] is not supported by any objective, verifiable documentary evidence. While the affiant claims that he drove the applicant to the bus station, he does not indicate whether he drove him to the station in Mexico or the United States. Furthermore, the applicant indicates that he re-entered the United States via airplane on September 26, 1987, yet [redacted] makes no reference to the applicant's mode of re-entry or the reason he knows that the trip lasted twenty days. This document, therefore, does not state the basis of the affiant's knowledge or the origin of the information being attested to. 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. *Id.* at 582.

The applicant submitted a copy of his Form I-687 application for temporary residence status in which he claimed that he began residing at [redacted], California, in May 1981. The affidavit of [redacted] corroborates the applicant's claim by attesting that the applicant resided at the same address from May 1981 until October 1990. However, the applicant has submitted no documentary evidence, including but not limited to utility bills, hospital or medical records, bank books with dated transactions, money order receipts for money sent out of the country, receipts, or contracts to which the applicant has been a party dated prior to 1982.

Given the absence of contemporaneous documentation and the reliance on affidavits which do not meet basic standards of probative value, it is concluded that the applicant has failed to establish, by a preponderance of evidence, that he continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

The second issue on appeal is whether the applicant has maintained continuous physical presence in the United States during the period from November 6, 1986 through May 4, 1988.
In the notice of intent to deny the application, the director noted that the applicant claimed one twenty-day absence from the United States from September 6, 1987 until September 26, 1987. The director further noted that the applicant's third daughter was born in Mexico on October 29, 1988, approximately thirteen months after the applicant's return to the United States. The applicant was

afforded the opportunity to explain this inconsistency in the record; however, no evidence or acknowledgement of this issue was raised in the response submitted on November 3, 2003.

On appeal, counsel for the applicant submits for the first time an affidavit from [redacted] dated March 5, 2004, which claims that she accompanied her husband back to the United States on September 26, 1987 and remained in the United States until May 25, 1998. She further contends that at the time of departure, she was four months pregnant with the applicant's daughter, born on October 29, 1988.

Upon review, the record prior to adjudication contained no evidence clarifying the reason that the applicant's daughter was born thirteen months after his last visit to his family in Mexico. The director, therefore, correctly concluded that the applicant had most likely failed to disclose subsequent departures from the United States. Despite being afforded the opportunity to rebut this finding prior to adjudication, the applicant failed and/or refused to do so. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Where, as here, an applicant has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the applicant had wanted the submitted evidence to be considered, he should have submitted the affidavit in response to the notice of intent to deny. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. For this additional reason, the appeal will be dismissed.

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