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

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[redacted]

FILE: [redacted] Office: DALLAS Date: FEB 19 2008

MSC 02 249 64837

IN RE: Applicant: [redacted]

PETITION: 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 PETITIONER:

[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. Any further inquiry must be made to that office.

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, Dallas, and a subsequent appeal to the Administrative Appeals Office (AAO) was rejected as untimely filed. The matter is now before the AAO on a motion to reopen and/or reconsider. The motion will be granted. The appeal will be dismissed.

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 applicant submitted insufficient evidence to credibly document her continuous residence in an unlawful status since before January 1, 1982 to May 4, 1988 and her continuous physical presence in the United States from November 6, 1986 to May 4, 1988. Specifically, the district director found that the applicant's sworn statements provided in various documents, where she claimed to visit Mexico from December 20, 1986 to January 5, 1987, contradicted documentation showing that she gave birth to her daughter in Mexico on February 17, 1987. Consequently, the district director issued a Notice of Intent to Deny (NOID) the application on September 21, 2005, and afforded the applicant 30 days in which to submit credible evidence to show that she had continuously resided in the United States since before January 1, 1982 and May 4, 1988. The applicant was specifically asked to submit documentation clarifying the discrepancies between the dates she claimed to have visited Mexico and the date of birth of her daughter. The applicant failed to respond to the NOID, and the application was denied by the director on December 15, 2006.

The record indicates that counsel for the applicant sent a timely appeal to the Dallas District Office on January 9, 2007, with an incorrect filing fee of $110. The appeal was re-filed with the correct filing fee of $385 on January 20, 2007, 36 days after the notice of decision was mailed. The AAO rejected the appeal as untimely filed pursuant to 8 C.F.R. § 245a.20(b)(1).

On motion, counsel contends that the timely appeal, filed with the incorrect fee of $110, was pursuant to the instructions of the director in the notice of decision dated December 15, 2006. As a result, counsel requests that the original appeal and subsequently-filed brief be afforded consideration in this matter since the error was the result of the director's incorrect instructions. It is noted that, pursuant to 8 C.F.R. § 210.2(g), the AAO may *sua sponte* reopen any adverse decision conducted under its jurisdiction and reconsider any decision rendered in such proceeding. The motion to reopen and/or reconsider is granted.

On appeal, counsel for the applicant states on Form I-290B that the correct dates for the applicant's trip to Mexico were January 5, 1987 to February 20, 1987. No documentation or additional evidence in support of this contention is provided.

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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).

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 or 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.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to establish her continuous unlawful residence and continuous physical presence in the United States for the requisite periods. Here, the submitted evidence consists of the applicant's statements on the following documents:

1. Form I-687, Applicant for Status as a Temporary Resident, signed under penalty of perjury on July 31, 1990. On this form, the applicant claimed that she departed the United States for Mexico to visit family on December 20, 1986 and returned on January 5, 1987.

2. Affidavit for Class Membership, signed under penalty of perjury on August 7, 1990. On this form, the applicant claimed that she departed the United States for Mexico from December 1986 to January 1987.

3. Form for Determination of Class Membership, signed under penalty of perjury on August 7, 1990. On this form, the applicant claimed that she departed the United States for Mexico to visit family from December 20, 1986 to January 5, 1987.

4. Attachment to interview notes at the Dallas District Office, dated May 12, 1994, on which the applicant claims that she departed the United States for Mexico from December 20, 1986 to January 5, 1987. It is noted that the applicant was placed under oath during the interview.

However, the record contains evidence that the applicant gave birth to a daughter in Mexico on February 17, 1987. Specifically, the applicant provides a birth certificate evidencing the birth of her daughter, [redacted], on February 17, 1987 in Mexico. She also corroborates this information in Part 3,

Section B, on Form I-485, Application to Register Permanent Resident or Adjust Status, filed on June 6, 2002.

The applicant has made no attempt to explain the inconsistencies in the record; namely, that she returned to the United States on January 5, 1987 and has remained in the country since that time. The director afforded the applicant the opportunity to clarify this inconsistency in the NOID issued on September 21, 2005, but the applicant failed to respond. The director therefore concluded that the applicant must have been absent from the United States from December 20, 1986 to at least February 17, 1986, which at a minimum totaled 59 days. On appeal, counsel provides the following statement on Form I-290B:

The Respondent left the United States on January 5, 1987 [redacted] and returned to the United States on February 20, 1987 (four (4) days after giving birth). [redacted]s traveled to Mexico for 45 days. The dates specified in the December 15, 2005 decision are erroneous.

Despite filing a separate brief, where favorable consideration is requested, counsel submits no additional documentation in support of this contention.

The applicant provides four consistent statements under oath claiming that she went to Mexico from December 20, 1986 to January 5, 1987. However, she makes no effort to produce travel documents to either prove or disprove the exact dates of her trip, the destination, or the length of her departure. She likewise claims that she departed and reentered the United States 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 her departure and return. The record contains credible evidence that she gave birth to a daughter in Mexico on February 17, 1987. It appears more probably than not that the applicant departed the United States on December 20, 1987 as claimed and stayed in Mexico until the birth of her child, which would amount to a minimum of 59 days. The applicant's statements under oath, coupled by conflicting documents which place her in Mexico at a different time and a lack of contemporaneous documentation to actually prove her continued presence in the United States during the period in question, render it virtually impossible to conclude that the applicant did not interrupt her continuous residency. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

According to the regulation at 8 C.F.R. § 245a.15(c)(1), no single absence from the United States can exceed forty-five days without interrupting continuous residency. Despite the applicant's claim that she returned to the Untied States in January 1987, it is clear that the applicant gave birth in Mexico on February 17, 1987. Therefore, it appears more likely than not that the applicant was absent from the United States for at least 59 days, thereby easily exceeding the 45 day limit for a single absence. Since there is insufficient evidence to disprove the applicant's claim in the interview, and no documentary evidence to corroborate the claim on Form I-687, the AAO must conclude that continuous residency during the requisite period has not been established.

It is further noted that the statements provided by counsel on appeal cannot be afforded weight in these proceedings. Without documentary evidence to support the claim, the assertions of counsel will not satisfy

the applicant'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).

Given the absence of contemporaneous documentation and unresolved inconsistencies in the record, it is concluded that the applicant has failed to establish, by a preponderance of evidence, that she 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.

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