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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: DALLAS Date: JUL 03 2008

MSC 03 245 61904

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director determined that the applicant had not established that he resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. This decision was based on the district director's conclusion that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States during this period, as set forth in 8 C.F.R. § 245a.15(c)(1)(i).

The applicant submitted insufficient evidence to credibly document his continuous residence in an unlawful status since before January 1, 1982 to May 4, 1988 and his continuous physical presence in the United States from November 6, 1986 to May 4, 1988. Specifically, the director found that the applicant stated, on his Application for Status as a Temporary Resident, Form I-687, that he was outside of the country during the relevant period from June 20, 1987 to September 1987. The director also noted that the applicant married on September 1, 1986 in Mexico, and had two children born in Mexico, one born on May 11, 1987, and the other born in December 1988. Consequently, the director issued a Notice of Intent to Deny (NOID) the application on December 22, 2005, and afforded the applicant 30 days in which to submit credible evidence to show that he had continuously resided in the United States since before January 1, 1982 to May 4, 1988.

The applicant's response failed to overcome the director's findings, and consequently the application was denied on March 14, 2006.

On appeal, counsel for the applicant alleges that the director erred by concluding that the applicant's visit outside of the United States interrupted his continuous residence. Counsel resubmits documentary evidence in the form of affidavits from the applicant and individuals to support the applicant's claim that he had continuously resided in the United States during the requisite period.

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).

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 his continuous unlawful residence and continuous physical presence in the United States for the requisite periods. Here, the submitted evidence includes the applicant's statement on Form I-687, Application for Status as a Temporary Resident, which he signed under penalty of perjury on July 11, 1990. On this form, the applicant claimed that he departed the United States for Mexico on one occasion since his arrival in March 1981, from June 20, 1987 to September 1987. The applicant also claimed in a sworn statement on the Form for Determination of Class Membership in *CSS V. MEESE or LULAC*, sworn to on July 15, 1990, that he departed the United States from June 20, 1987 and returned in September 1987.

During the applicant's interview on May 7, 2004, the applicant was questioned regarding his absences from the United States during the requisite period. The applicant advised the officer that he had departed the United States once since arriving without inspection in 1981. He claimed that this departure was in 1986, and that he stayed in Mexico for three months. No specific dates in 1986 were provided.

The director issued a NOID on December 22, 2005, and afforded the applicant thirty days to explain these inconsistencies and provide additional evidence in support of his eligibility. The applicant failed to overcome the basis for the director's denial, and the application was denied on March 14, 2006.

On appeal, counsel for the applicant alleges that the director failed to properly define "Preponderance of the evidence;" failed to "Conduct an examination of each piece of relevant evidence;" and failed to "challenge the credibility of the applicant or the authenticity of the documents" with specific reasons.

Upon review, the AAO concurs with the director's findings.

The regulation at 8 C.F.R. § 245a.15(c)(1) provides that an alien shall be regarded as having resided continuously in the United States if 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.

According to the applicant's statement in the May 7, 2004, interview, he was absent for three months in 1986. Therefore, if the applicant's statements in his interview are in fact true, he would have been absent from the United States for close to 90 days, not including the additional absence from June

1987 to September 1987 as claimed on the Form I-687 application. Since the evidence submitted on appeal fails to overcome the conclusions of the director, the AAO must conclude that continuous residency during the requisite period has not been established.

Counsel addresses the applicant's absences, on appeal, by submitting an affidavit from the applicant stating: 1) that the preparer of his Form I-687 made a mistake on his application regarding his departure; 2) that he departed the United States to Mexico in August 1986 to get married, and returned from Mexico in September 1986; 3) that his wife visited him in the United States in March 1988 for three weeks and she returned to Mexico; and 4) that he was unable to be in Mexico for the birth of either of his children. Counsel asserts that the director failed to consider the evidence and drew her own conclusion that the applicant was absent from the United States for over 45 days.

On appeal, counsel alleges ineffective assistance of the applicant's prior representative. Counsel alleges the applicant's prior representative erred in completing the applicant's application by inserting that the applicant departed the United States in June 1987 and returned in September 1987, to the applicant's detriment. However, counsel does not submit any of the required documentation to support an appeal based on ineffective assistance of counsel.

Any appeal based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that the representative whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Furthermore, CIS is not responsible for inaction of the applicant's representative.

Counsel's assertion that the director failed to consider the evidence and drew her own conclusion that the applicant was absent from the United States for over 45 days is not persuasive for two reasons. First, counsel completely ignores the fact that the applicant stated under oath that when he departed the United States for Mexico in 1986, he remained there for *three* months. Therefore, contrary to counsel's assertions, the director was not drawing her own conclusions but basing them on the applicant's own sworn testimony. Second, merely submitting an affidavit from the applicant is insufficient to support his allegations that the applicant was not outside the United States for over 45 days. It is noted that in his affidavit, the applicant does not specify the dates he left the United States in August 1986 or the day he returned from Mexico in September 1986. In addition, although counsel resubmitted numerous affidavits from individuals attesting to knowing the applicant in the United States at various periods, starting in 1981, none of the affiants states whether the applicant departed the United States in August 1986 and returned in September 1986 as he claimed. In addition, it is noted that contrary to the counsel's assertions that the director had failed to consider the evidence, one of the affiants, Mario Nava, submitted an affidavit, dated July 15, 1990, stating that the applicant was his roommate from May 1984 to March 1987, and that he saw the applicant "every day" during that period. 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). The applicant's affidavit, which contradicts the evidence of record, including his own prior sworn statements, does not establish the dates of the applicant's arrivals and departures from the United States.

Furthermore, it is also noted that at the applicant's interview on May 7, 2004, he claimed his first departure from the United States did not take place in August 1986 and that he did not remain absent until September 1986. As noted above, of the several affidavits submitted by the applicant and by counsel on his behalf, one of the affiants, [redacted], stated that the applicant was his roommate from May 1984 to March 1987, and that he saw the applicant "every day" during that period. However, the applicant stated that he was outside the United States from August 1986 to September 1986 which is during the same period. Based on this statement, the AAO is forced to question the validity of the remaining documentary evidence upon which the application is based. These discrepancies, coupled with the conflicting statements provided on the Form I-687 and on his sworn statement on the Form for Determination of Class Membership in *CSS V. MEESE or LULAC*, on July 15, 1990, wherein he stated that he departed the United States on June 20, 1987 and returned in September 1987, seriously challenge the credibility of the application as a whole.

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. 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). *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, and the aggregate of all absences cannot exceed one hundred and eighty (180) days between January 1, 1982, and May 4, 1988 without interrupting continuous residency. Therefore, if the applicant's statement in his May 7, 2004 interview is in fact true, he would have been absent from the United States for approximately three months from an unspecified date in 1986 thereby exceeding the 45 day limit for a single absence. Since there is insufficient evidence to support the applicant's claim in the interview, conflicting evidence regarding the date of first departure on the Form I-687 and on his sworn statement on the Form for Determination of Class Membership in *CSS V. MEESE or LULAC*, sworn to on July 15, 1990, and no documentary evidence to corroborate his changed testimony, the AAO must conclude the applicant has not established continuous residence during the requisite period.

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 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.

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