U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: NEW YORK CITY Date: OCT 01 2008

consolidated herein]
MSC 03 189 61208

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. 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.

John F. Vaughan
for
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 in New York City. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988.

On appeal the applicant asserts that he did not receive the Notice of Intent to Deny (NOID) issued by the director and was unable to respond to the NOID. The applicant requests that his case be reopened and the director's decision be reconsidered.[1] The applicant did not submit any additional documentation with the appeal.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.15(c)(1), as follows: "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." (Emphases added.)

"Continuous physical presence" is described in section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and 8 C.F.R. § 245a.16(b), in the following terms: "An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of *brief, casual, and innocent absences* from the United States." (Emphasis added.) The regulation further explains that "[b]rief, 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." (Emphasis added.) 8 C.F.R. § 245a.16(b).

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[1] The applicant claimed that he did not receive the director's NOID issued on April 16, 2007, and was unable to provide a response. However, the applicant acknowledged receipt of the Notice of Decision issued on June 23, 2007, which was mailed to the same address as the NOID. The record does not reflect that the NOID mailed to the applicant at his former address was returned as undeliverable. The record reflects that the NOID was also sent to the applicant's attorney at his address of record. The attorney should have notified the applicant and/or filed a response to the NOID, but failed to do so. Notwithstanding, the applicant received the Notice of Decision and had the opportunity to submit additional documentation with his appeal. The AAO will accept the record as complete and will render a decision based on the evidence in the record.

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 its amenability to verification. *See* 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 applicant, a native of Bangladesh who claims to have lived in the United States since July 1981, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on April 7, 2003.

In a Notice of Intent to Deny (NOID), dated April 16, 2007, the director indicated that the applicant had not provided sufficient credible evidence to establish that he resided continuously in the United States from before January 1, 1982, through May 4, 1988. The applicant was granted 30 days to submit additional evidence.

The applicant failed to respond to the NOID, and on June 23, 2007, the director issued a Notice of Decision denying the application based on the grounds as stated in the NOID. The applicant filed a timely appeal, accompanied by a personal affidavit stating that he did not receive the NOID issued by the director and requesting reconsideration of the director's decision. The applicant did not submit any additional documentation to support his claim.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The AAO determines that he has not.

The only evidence in the record of the applicant's residence in the United States during the years 1981-1988 consists of the following documents:

- An affidavit from [redacted], a resident of Astoria, Queens, dated May 4, 2004, stating that he had known the applicant since 1981, and that they used to be roommates at [redacted], Astoria, Queens, New York.

  Three photographs of the applicant at various locations with no authenticating notations on the photographs regarding their dates.

The affidavit by [redacted], dated May 4, 2004, provides very little information about the applicant's life in the United States and the affiant's interaction with him over the years. The affidavit is not accompanied by any documentary evidence from the affiant – such as photographs, letters, and the like – of his personal relationship with the applicant in the United States from January 1, 1982 to May 4, 1988. Furthermore, the address identified by [redacted] as one he shared with the applicant beginning in 1981, is not an address that was listed by the applicant on the Form I-687 (application for status as a temporary resident) he filed at the Vermont Service Center on October 28, 1991. On the Form I-687 the applicant listed his addresses in the United States during the 1980s as [redacted], Lake Worth, Florida, from July 1981 to December 1987, and [redacted], West Palm Beach, Florida, from January 1988 to the present (1991). Thus, it appears that the applicant resided at [redacted], Astoria, Queens, New York, sometime after 1991, which was outside the statutory period for legalization under the LIFE Act. In view of these substantive shortcomings, the AAO finds that the affidavit by [redacted] has no probative value in this proceeding. It is not

persuasive evidence of the applicant's residence in the United States from before January 1. 1982 through May 4, 1988.

As for the photographs – which the applicant asserts were taken in New York – they have no probative value as evidence of the applicant's residence in the United States during the statutory period. There are no notations on the photographs as to when they were taken, and even if they were taken during the 1980s they would not establish that the applicant resided in New York at that time.

Given the paucity of evidence in the record, the AAO finds that the applicant has failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A). Accordingly, the applicant is ineligible for permanent resident status under the LIFE Act.

The appeal will be dismissed, and the application denied.

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