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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW YORK Date: OCT 29 2008

MSC 02 028 62209

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.

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

The director denied the application because the applicant had not demonstrated that she had continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988.

On appeal, the applicant asserts that she has submitted sufficient documentation to establish her continuous residence in the United States from prior to January 1, 1982 through May 4, 1988.

The alien must establish that the alien entered the United States before January 1, 1982, and that he or she has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. Section 1104(c)(2)(B)(i) of the LIFE Act; 8 C.F.R. § 245a.11(b).

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 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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that she continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

In an attempt to establish continuous unlawful residence since before January 1, 1982, through May 4, 1988, the applicant provided the following evidence:

- A statement dated August 29, 1991, from [redacted] of Jamaica, New York, who indicated that the applicant has been a patient for several years while residing at [redacted], Jamaica, New York.
- A notarized affidavit from [redacted] of Carteret, New Jersey, who attested to the applicant's departure from the United States on December 4, 1987.
  Affidavits notarized September 1, 1991, from [redacted] and [redacted], who indicated that they have known the applicant for seven years and attested to the applicant's moral character.
- A notarized affidavit from [redacted] of Richmond Hill, New York, who indicated that she has known the applicant since June 30, 1983.
- A notarized affidavit from [redacted] of Brooklyn, New York, who indicated that he had known the applicant "for a long time" and attested to the applicant's moral character.
- A notarized affidavit from [redacted] of Richmond Hill, New York, who attested to the applicant's residence from December 1981 to December 1990 at [redacted], Jamaica, New York. The affiant asserted that he has known the applicant since 1981 and had dated the applicant for six months.
- A notarized affidavit from [redacted] of Woodside, New York, who attested to the applicant's residence from December 1981 to December 1990 at [redacted], Jamaica, New York. The affiant asserted that he has known the applicant since 1981 and that the applicant has been a customer at the business where he is employed.
- A notarized affidavit from [redacted] of Brooklyn, New York, who attested to the applicant's residence from December 1981 to December 1990 at [redacted] Jamaica, New York. The affiant asserted that he has known the applicant since 1981 and has seen the applicant in church on most Sundays.
- A notarized affidavit from [redacted] of [redacted] Men's Wear in Flushing, New York, who indicated that the applicant was in his employ as an operator from September 1985 to November 1990.
- A notarized affidavit from [redacted] of Great Location 8th Avenue, Inc., in New York, New York, who indicated that the applicant was in his employ as an operator from December 1981 to June 1985.
- Notarized affidavits from [redacted] and [redacted] of Jamaica, New York, and [redacted] of Elmhurst, New York, who attested to the applicant's residence from December 1981 to December 1990 at [redacted] Jamaica, New York. The affiants also attested to the applicant's absence from December 4, 1987 to January 10, 1988 to Ecuador.
  Nine envelopes addressed to the applicant at [redacted] Jamaica, New York.
- A receipt from Bravo Video dated May 7, 1982 for the rental of a DVD named "La Hija De Nadie."

The applicant also submitted additional affidavits and receipts; however, they will not be considered as they serve to attest to the applicant's physical presence and residence in the United States subsequent to the requisite period.

On May 15, 2007, the director issued a Notice of Intent to Deny, which advised the applicant the affidavits submitted appeared to be neither credible nor amenable to verification and that no evidence was submitted demonstrating that the affiants had direct personal knowledge of the events testified in their respective affidavits. The applicant was advised that eight of the nine envelopes presented were postmarked in 1991. The applicant was also advised that the receipt from Bravo Video was fraudulent as it listed a telephone number with the area code of "718" and this area code did not come into existence until September 1, 1984. In addition, the DVD, La Hija De Nadie, was not released until March 20, 1996.

The director, in issuing her Notice of Intent to Deny, also informed the applicant that her absence of 37 days from December 4, 1987 to January 10, 1988 "appears to be more than brief, casual and innocent and therefore violates the continuous physical presence required by the statute."

The director, however, erred in applying a thirty (30) day limit for a single absence in the period from November 6, 1986, to May 4, 1988, as set forth in 8 C.F.R. § 245a.16(b). This regulation has been amended and the previous reference to a "thirty (30) day limit" on absences has been removed. The current, amended regulation reads as follows:

> For purposes of this section, 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. 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.

The term "casual" is not defined in the statute, though its parameters can be gleaned in the regulatory guideline that "temporary, occasional trips abroad" are not inconsistent with an alien's "continuous physical presence" in the United States. *See* 8 C.F.R. § 245a.16(b). Nor is the term "innocent" defined in the statute. It seems logical, however, that an absence would be "innocent" if it does not involve illegal activities or other conduct in conflict with United States national interests and is "consistent with the policies reflected in the immigration laws of the United States," as the regulation requires.

Without the actual questions asked by the interviewing officer or a signed statement executed by the applicant, the AAO cannot conclude that there was no intention on the applicant's behalf to return to the United States. It is noted that the applicant indicated on her Form I-687 application and Form to Determination of Class Membership, that the purpose of her trip was due to her father's illness. Accordingly, the director's finding in this matter will be withdrawn.

The director also noted that the ninth postmarked envelope presented by the applicant was smudged and altered and appeared to have been addressed to the applicant in "March 1981." However, a review of the envelope indicates that the date stamp on this envelope is "Mar. 9, 1991." It is noted that the Ecuador stamp (50 anos union nacional de periodistas) on the envelope indicates that it was issued in 1991. Accordingly, the director's finding in this matter will also be withdrawn.

The record, however, does contain three envelopes postmarked August 8, 1981, November 13, 1984, and January 10, 1987 from Ecuador. The Ecuador stamp (Avianca) on the envelope postmarked in 1981 indicates that it was issued in 1988. This fact coupled with the applicant's claim to have entered the United States four months after the envelope was postmarked on August 8, 1981 raises questions as to its

authenticity.[1] The remaining two envelopes appear to have been altered. The applicant's address appears to have been written over an address in Richmond Hill, New York.

The director, in denying the application on May 15, 2007, noted that no additional evidence had been submitted in support of the application.

On appeal, the applicant states, "[a]s I alleged in my prior statement on rebuttal...." A thorough review of the record, however, does not reflect that a response to the Notice of Intent to Deny was received by Citizenship and Immigration Services (CIS). As such, CIS cannot consider documentation that has not been submitted.

On appeal, the applicant asserts that she does not have any additional documentation to submit as it has been over 20 years and it would be undue hardship to make her locate witnesses who provided affidavits many years ago. The applicant asserts, "[t]he sole witness who I can locate is my own sister, [redacted] (nee: ..." The applicant, however, did not present an affidavit from this affiant.

Regarding the postmarked envelopes, the applicant asserts, in pertinent part:

> I do not recall anything about some alleged irregularities on envelopes submitted many years ago, because it has elapsed so many years, about more than 16 years, and I do not keep record of them. I informed to the Immigration Service that – at that time – I hired a Preparer who was not a lawyer. If there was actually something wrong about what he did, I lack of knowledge about it.

CIS has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E-- M--, supra.* In ascertaining the evidentiary weight of such affidavits, CIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--, supra*, the affidavits 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. The statements issued by the applicant have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988, as she has presented contradictory and inconsistent documents, which undermines her credibility. Specifically:

1. The employment affidavits from [redacted] and [redacted] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulations, the affiants also failed to 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.

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[1] The applicant claimed on her Form I-687 application to have entered the United States on December 5, 1981.

2. [redacted] indicated that the applicant was a patient several years; however, no evidence such as appointment notices or billing statements were provided to corroborate the affiant's assertion.
3. [redacted] and [redacted] all attest to the applicant's residence in Jamaica, New York during the requisite period, but none of the affiants provide any details regarding the nature of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence. The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of her claim.

4. The remaining affiants all attest to having known the applicant, but the affidavits lack probative value as the affiants failed to state the applicant's place of residence, provide details regarding the nature or origin of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence.

5. The applicant's assertion that she "hired a Preparer" to prepare her application has no merit. The applicant presented two Form I-687 applications dated in April 1991 and February 24, 1994 and neither application indicates that anyone other than the applicant completed the application. No information is listed in items 48 and 50 of the Form I-687; items 48 and 50 request the name, address and signature of the person preparing the form.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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. *Matter of Ho*, 19 I. & N. Dec. 582 (BIA 1988).

The regulation at 8 C.F.R. § 245a.12(e) provides that "[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods." Preponderance of the evidence is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). *See Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991). Given the credibility issues arising from the documentation provided by the applicant, it is determined that the applicant has not met her burden of proof. The applicant has not established, by a preponderance of the evidence, that she entered the United States before January 1, 1982 and resided in this country in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). Given this, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

Finally, it is noted for the record that the applicant indicates that in October/November 1996 and March 1997, she attempted to reenter the United States and was detained by the legacy Immigration and Naturalization Services (now Citizenship and Immigration Services) in Miami and New York City, respectively. The applicant indicated that on each occasion she was sent back to her native country, Ecuador.

The record reflects that on November 1, 1996, the applicant arrived from Ecuador seeking admission as a returning resident alien by presenting her passport which contained a counterfeit adit stamp number,

At the time of her sworn testimony, the applicant refused to state how much money she paid for the counterfeit stamp or from whom she obtained the counterfeit stamp. On November 5, 1996, a hearing was held and the alien was ordered excluded and deported from the United States. The applicant has filed a Form I-690, Application for Waiver of Grounds of Excludability.

The record also reflects that on March 24, 1997, the applicant attempted to re-enter the United States under the alias [redacted]. On August 7, 1997, the immigration judge administratively closed the case.

It is also noted that the record contains an FBI report dated February 10, 2004, which reflects that the applicant was arrested by the New York Police Department for possession of a forged instrument on September 9, 2002. The applicant was subsequently charged with attempted possession of a forged instrument in the 3rd degree. The applicant pled guilty to the charge and was sentenced to serve ten days in jail or pay a fine of $100.00.

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