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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SACRAMENTO Date: SEP 08 2008

MSC 02 309 60260

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.

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 District Director (director) in Sacramento, California. 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, resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, and was continuously physically present in the United States from November 6, 1986 through May 4, 1988.

On appeal counsel asserts that the applicant was continuously resident and physically present in the United States during the requisite time periods for LIFE legalization, and that he has submitted all available evidence.

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).

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 Mexico who has provided conflicting information as to when he first entered the United States, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on August 5, 2002. As evidence of his continuous residence and physical presence in the United States during the requisite time periods in the 1980s, the applicant submitted the following documentation:

- An affidavit by [redacted], the manager of [redacted]s in Escalon, California, dated May 21, 2002, stating that the applicant was employed on a part-time basis in 1982 (when he was also known as [redacted]) and in 1983 (when he was also known as [redacted]) performing "miscellaneous agricultural labor." Mr. [redacted] stated that the foregoing information is contained in the company's employment records, and that any further inquiries should be directed to a specific telephone number at the farm.

A receipt, dated May 18, 1986, for a $20 payment by the applicant on an unidentified account.

- Two pay statements issued to the applicant by the Wagner Turkey Ranch in Madera, California, for pay periods ending on February 15 and March 15, 1987.

  A receipt for registered mail from the applicant, with an address in Fresno, California, to a recipient in Mexico, postmarked July 22, 1987.

- A Form W-2, Wage and Tax Statement, for 1987, issued to the applicant at an address in Fresno, California.

On December 8, 2003, the applicant was interviewed for LIFE legalization in Sacramento. In response to the question of when he first arrived in the United States, the applicant answered "January 15, 1983." The applicant acknowledged that he had previously claimed to have lived in the United States since 1981, but indicated that 1983 was the correct year.

On February, 24, 2004, the director issued a Notice of Decision denying the application. The director cited a Form I-687 (application for temporary resident status) which the applicant had filed on January 2, 1990, [1] in which the applicant listed his first agricultural job in California as having started in January 1981 and stated that his last entry into the United States was on October 20, 1981, but noted that this information conflicted with the applicant's sworn statement at his LIFE legalization interview that he did not enter the United States until January 15, 1983. The director also indicated that the applicant was unable to provide any credible evidence of his presence in the United States before January 1, 1982. The director concluded therefore, that the applicant had failed to establish that he entered the United States before January 1, 1982, resided continuously in the United States in an unlawful status from that date through May 4, 1988, and was continuously physically present in the United States from November 6, 1986 through May 4, 1988, as required for legalization under the LIFE Act.

On appeal counsel asserts that the applicant's sworn statement that he entered the United States on January 15, 1983 was incorrect because he was confused and nervous at his interview for LIFE legalization. Counsel states that the applicant's "entry date is truly reflected in his application," without specifying to which application he referred. The Form I-485 at issue in this proceeding does not ask for the initial date of entry into the United States, though it does ask for the "date of last arrival," to which the applicant answered "October 1982." Counsel indicated that no more evidence is available, and that previously submitted evidence should be deemed sufficient to grant the applicant permanent resident status.

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[1] The Form I-687 was accompanied by a "Questionnaire to Determine Class Membership in Zambrano v. INS," a legalization class action lawsuit against the Immigration and Naturalization Service.

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 decisive issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided 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 employer letter from the manager of in Escalon, California, does not comport with the regulatory requirements of 8 C.F.R. § 245a.2(d)(3)(i) because it did not provide the applicant's address at the time of employment, did not identify the exact period of employment, and did not show periods of layoff. The letter merely confirmed that the applicant had been employed on a part-time basis sometime in 1982 and sometime in 1983. This vague information suggests that the applicant had seasonal labor in those years, from which he may have returned to Mexico and later come back to the United States for more seasonal work. Part-time farm labor in 1982 and 1983 does not establish that the applicant was continually resident in the United States during those years, much less that his continuous residence began before January 1, 1982, as required for LIFE legalization.

The only other evidence of the applicant's residence in the United States during the requisite period for LIFE legalization are the aforementioned documents dated in 1986 and 1987. Even if they are genuine, these documents provide no evidence that the applicant was continuously resident in the United States before 1986.

Based on the foregoing analysis, the AAO concludes 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). Therefore, the applicant is ineligible for permanent resident status under the LIFE Act.

The appeal will be dismissed, and the application denied. [2]

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

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[2] The AAO notes that a report from the Federal Bureau of Investigation (FBI) identifies the applicant as having been arrested in Fresno, California, on May 22, 1987, and charged with two counts of driving under the influence of alcohol, resulting in bodily injury. In any future proceedings before U.S. Citizenship and Immigration Services the applicant must submit a certified court record of the final disposition of that case.