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

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[redacted]

FILE: [redacted] Office: PORTLAND Date: SEP 26 2008
MSC 02 248 64952

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: On February 7, 2006, the District Director, Portland, Oregon, denied the application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

In an October 9, 2005, Notice of Intent to Deny (NOID), the director found that that the applicant failed to meet the requirements of 8 C.F.R. § 245a.15(c), because his absence from the United States from December 1986, through February 23, 1987, created a break in his required continuous residence. **The director also found that the applicant failed to establish his** continuous physical presence under 8 C.F.R. § 245a.16. In response to the NOID, the applicant submitted a statement, explaining that he returned to Mexico on December 28, 1986, to get married and intended to return to the United States at the end of January 1987. He stated that he intended to remain in Mexico long enough to marry his fiancé on January 23, 1987, and return to his job in California as soon as possible afterward. He stated that one week before the wedding, his wife, who was two months pregnant at the time, almost had a miscarriage. He asserted that his fiancé's doctor advised her to rest for two weeks before she proceed with the wedding. He asserted that he returned to the United States one week after the wedding. The director determined that the applicant failed to meet his burden of proof. The director also concluded that that 8 C.F.R. § 245a.15(c) makes no exceptions for emergent or unexpected circumstances.

On appeal, the applicant asserts that his absence from the United States was brief and that his residence in the United States has been constant, consistent, and uninterrupted. On appeal, he submits additional documentation including a letter from his wife and a letter from her doctor.

The AAO has reviewed all of the evidence and has made a de novo decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[1]

Section 1104(c)(2)(B) of the LIFE Act states:

> (i) In General – 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. In** determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

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[1] 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 director is incorrect in asserting that the applicant must also establish that his departure was brief, casual, and innocent pursuant to 8 C.F.R. § 245a.16(b). An analysis under this regulation is performed only if the applicant's departure occurred after May 1987. The departure in question occurred from December 1986 to February 1987.

The director is also incorrect that that 8 C.F.R. § 245a.15(c) makes no exceptions for emergent or unexpected circumstances. In fact, according to 8 C.F.R. § 245a.15(c)(1), an applicant for adjustment of status under the LIFE Act shall be regarded as having resided continuously in the United States if, at the time of filing of the application, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days between January 1, 1982, through the date the application is filed, *unless the applicant can establish that due to emergent reasons*, his or her return to the United States could not be accomplished within the time period allowed. (Emphasis added.)

A LIFE Legalization applicant must also provide evidence establishing that, before October 1, 2000, he or she was a class member applicant in a legalization class-action lawsuit. *See* 8 C.F.R. § 245a.14. In this case, the record reflects that the applicant applied for such class membership by submitting a "Form for Determination of Class Membership in CSS v. Meese [CSS lawsuit]," accompanied by a Form I-687 "Application for Status as a Temporary Resident (Under Section 245A of the Immigration and Nationality Act)," dated June 26, 1991. On question number 35 of the Form I-687, where the applicant was asked to list any absences from the United States since entry, the applicant, among others, a trip to Mexico to get married, from December 1986, to February 1987.

On June 5, 2002, the applicant submitted a Form I-485, Application to Register Permanent Residence or Adjust Status. On May 18, 2005, the applicant appeared for an interview based on his application.

On appeal, the applicant submits a letter from his wife and a letter from her doctor. In her letter, the applicant's wife states that she met the applicant in 1986 when she lived in Los Angeles. She states that they were engaged from July 1986 to December 1986. She returned to Mexico on December 18, 1986. She states that the applicant went to Mexico at the end of December 1986 to ask her parents for her hand in marriage. She states that she had problems with her pregnancy and had to postpone the wedding at the recommendation of her doctor. She states that after the wedding, the applicant returned to the United States and she stayed at his parents' house.

The letter from the doctor of the applicant's wife can be given little evidentiary weight as it does not sufficiently corroborate the applicant's assertion that his wife almost suffered a miscarriage and was advised to rest for two weeks. The letter, dated January 18, 1987, simply states that the applicant's fiancé was sick due to a fever.

The regulation at 8 C.F.R. § 245a.15(c)(1) provides an exception to the continuous residence requirement, if a single absence exceeded 45 days, and the aggregate of all absences did not

exceed 180 days between January 1, 1982, through the date the application is filed, if the applicant can establish that due to emergent reasons, his return to the United States could not be accomplished within the time period allowed. The relevant issue under the regulation is not the fact that the applicant's stay was lengthened by complications, but rather whether the applicant, when leaving the United States, reasonably expected to return within the 45-day time limit, *Ruginsky v. INS*, 942 F.2d 13 (1st Cir. 1991).

Here, given the distance from California to Mexico, the fact that the applicant had a job to return to, the fact that it coincided with the Christmas and New Year's holidays, and the fact, that his main purpose was simply to get married, it is reasonable that the applicant expected to return to the United States within the 45-day time limit.

The applicant admitted that his absence exceeded 45 days. He has explained that the reason for the delay in his returning to the United States was that his fiancé almost had a miscarriage and that their wedding had to be postponed by several weeks. His assertion is sufficiently corroborated by the letter from his wife. His wife's letter also addresses the director's conclusion that the applicant must have been in Mexico longer than initially stated because of how far along his wife was when she hemorrhaged. In her letter, the applicant wife explains that she was in the United States until December 1986. Although she does not explicitly state this, a reasonable inference can be drawn that this is when she became pregnant. The date of birth of the applicant's child, [redacted], is consistent with her becoming pregnant in December 1987. *See* Form I-687, Application for Status as Temporary Resident. Several documents in the record, dated 1983 through 1989, including a state-issued California identification card, two employment letters, and various tax records, also corroborate the applicant's assertion, as they indicate the applicant resided continuously at [redacted] California, during that time. Finally, the applicant's marriage certificate, which indicates he married on February 13, 1987, in Guerrero, Mexico, is consistent with his testimony and written statement.

The applicant has established that his return to the United States was delayed by an unforeseen event - because his fiancé at the time almost had a miscarriage. As a result, the applicant is found to have resided continuously in the United States throughout the requisite period. Accordingly, the director's decision to deny the application on this ground will be withdrawn. The applicant has satisfied all other grounds of eligibility.[2]

Based on the above, the applicant has established entry into the United States prior to January 1, 1982, and continuous unlawful residence through May 4, 1988, as required under Section

[2] The AAO notes that on May 18, 2005, the director requested that the applicant submit court-certified final dispositions for all arrests and/or convictions. In response, the applicant submitted a court-certified disposition and sentencing order from the Superior Court of Los Angeles, indicating that on April 4, 2004, he was convicted of driving with a blood alcohol content of .08% or more, pursuant to § 23152(b) of the California Vehicle Code. This conviction is classified as a misdemeanor. The sentencing order also indicates that on May 5, 2005, the applicant surrendered himself for "commitment" to file proof that he enrolled in and completed an alcohol program. The conviction does not render the applicant ineligible for adjustment of status.

1104(c)(2)(B) of the LIFE Act. Given this, he is eligible for permanent resident status under Section 1104 of the LIFE Act.

ORDER: The appeal is sustained. This decision constitutes a final notice of eligibility.