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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: LOS ANGELES, CALIFORNIA Date: MAR 03 2009

MSC 02 236 64438

IN RE: [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]

NEW YORK, NY 10007

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

John F. Grissom, Acting 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 concluded that the applicant had not provided adequate evidence to support his claim that he had resided continuously in the United States in an unlawful status during the statutory period, a date prior to January 1, 1982 through May 4, 1988. Thus, the director denied the application.

On appeal, counsel asserted that the record did include sufficient evidence to establish that the applicant had resided continuously in the United States in an unlawful status throughout the entire statutory period. Counsel also submitted additional evidence of the applicant's continuous residence in the United States during the statutory period.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO's *de novo* review authority. *See,* e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

An applicant for permanent resident status under section 1104 of the LIFE Act must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date through May 4, 1988. *See* LIFE Act § 1104(c)(2)(B) and 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).

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).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See id.*

Documentary evidence may be in the format prescribed by U.S. Citizenship and Immigration Services (USCIS) regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. 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 petitioner or 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 petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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, to deny the application or petition.

On or near August 9, 1990, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On May 24, 2002, he filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

On February 13, 2004, the director issued a notice of intent to deny (NOID) in which she indicated that she intended to deny the application because the applicant had not established that he resided continuously in the United States during the statutory period. Specifically, the director indicated that she intended to deny the application because of discrepancies in the applicant's July 24, 2003 LIFE legalization interview testimony. She also intended to deny the application because she had contacted his affiants by telephone and they provided information that contradicted the information in their affidavits. However, the record does not include notes from the July 24, 2003 LIFE legalization interview. It includes only a brief summary of the applicant's testimony from that interview and much of the testimony to which the director referred in the NOID is not mentioned in this summary. The record also does not include any notes or other record of the director's telephone calls to the applicant's affiants. However, the record does include affidavits of affiants indicating that USCIS telephoned them.

In the rebuttal, the applicant stated through counsel that he did not make the inconsistent statements at the LIFE legalization interview to which the director referred in the NOID. He also indicated that his affiants did not provide information which was inconsistent with the information on their affidavits when contacted by the director. He also provided additional statements and affidavits to support his claim that he resided continuously in the United States throughout the statutory period.

On August 22, 2005, the director issued a notice of decision in which she denied the application based on the reasons set forth in the NOID.

On appeal, the applicant asserted that the evidence of record did establish that he had resided continuously in the United States in an unlawful status during the statutory period. He also submitted additional statements to support his claim of continuous residence in the United States throughout the statutory period.

At issue in this proceeding is whether the applicant is able to establish that he resided continuously in the United States from some date prior to January 1, 1982 through May 4, 1988. Also at issue is whether he is admissible to the United States.

On February 4, 2009, the AAO provided the applicant with a Notice of Intent to Dismiss which stated that the record includes the following adverse or inconsistent evidence regarding these points:

1. The affidavit of Ahmed Masood dated May 14, 2002 on which the affiant attested that the applicant lived with him at [redacted] Brooklyn, New York 11235 from July 1987 through February 1988.

2. The Form I-687, Application for Status as a Temporary Resident, which the applicant signed under penalty of perjury on August 9, 1990, on which he stated at item 33, where he was to list all his residences in the United States

since his first entry, that he resided at [redacted] Brooklyn, New York from January 1985 through February 1990.

3. The Form I-687, Application for Status as a Temporary Resident, which the applicant signed under penalty of perjury on September 26, 2005, on which he stated at page 3, item 30, where he was to list all his residences in the United States since his first entry, that he resided at [redacted] Brooklyn, New York from January 1985 through February 1990.

4. The statement of [redacted], which is not dated and which was submitted into the record on August 21, 2003, on which [redacted] indicated that the applicant lived with him at [redacted] Brooklyn, New York 11228 from January 1985 through 1990. Mr. [redacted] also indicated that he saw the applicant almost everyday during this period and that the applicant paid him rent for a furnished room and kitchen privileges.

5. The affidavit of [redacted] dated March 6, 2004 on which the affiant attested that the applicant lived with him from January 1985 through 1990.

6. The affidavit of dated September 12, 2005 on which the affiant attested that the applicant lived with him from January 1985 through 1990.

7. The affidavit of [redacted] dated August 13, 2003 on which the affiant indicated that the applicant lived with him at [redacted] Manhattan, New York from December 1980 through January 1985.

8. The Notice and Order of Expedited Removal dated June 4, 1999 executed at Dulles International Airport in metro-Washington D.C. which ordered the applicant removed from the United States on June 4, 1999 as an immigrant who at the time of application for admission was not in possession of a valid entry document.

9. The Form I-485 submitted May 24, 2002, less than three years after the applicant had been removed, in which he requested admission as a lawful permanent resident.

The applicant stated on both the Forms I-687 in the record that he resided at [redacted] Brooklyn, NY 11228 from January 1985 through February 1990. [redacted] wrote a statement on his behalf received August 21, 2003 which indicates that the applicant lived with him at this [redacted] address from January 1985 through 1990, that the applicant paid him rent for a furnished room with kitchen privileges and that he saw the applicant almost everyday during this period. [redacted] submitted two statements subsequent to 2003 which also indicate that the applicant lived

with him for the entire period of January 1985 through 1990. However, the applicant also submitted into the record the affidavit of [redacted] dated May 14, 2002 on which [redacted] attested that the applicant lived with him at [redacted], Brooklyn, NY from July 1987 through February 1988.

In the Notice of Intent to Dismiss, the AAO stated that these discrepancies cast doubt on the authenticity of all the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

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, 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).

Thus, the AAO stated in the Notice of Intent to Dismiss that the applicant could only overcome the inconsistencies in the record by providing independent, objective evidence of his claim that he resided continuously in the United States during the statutory period. The AAO also stated that, as the record stood, the applicant had failed to provide contemporaneous evidence that might be considered independent, objective evidence of his having resided in the United States throughout the statutory period.

In addition, this office stated that the various statements and affidavits then in the record which attempt to substantiate the applicant's residence in the United States throughout the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding his claim that he maintained continuous residence in the United States from a date prior to January 1, 1982 through May 4, 1988, and that they are not probative.

In the response to the Notice of Intent to Dismiss, the applicant submitted affidavits, a Form I-690 and a brief.

For example, the applicant resubmitted the affidavit of [redacted] dated April 14, 2005. In this affidavit, the affiant attested that he has personal knowledge that the applicant resided at [redacted] in Manhattan during April 1983 because he visited the applicant there. On the Form I-687, which the applicant signed under penalty of perjury on August 9, 1990, the applicant stated that he lived at [redacted] Manhattan, New York from December 1980 through January 1985. With his response to the Notice of Intent to Dismiss, the applicant also resubmitted the affidavit of [redacted] dated August 13, 2003. In this affidavit, the affiant indicated that he had lived at [redacted], Manhattan, New York and that the applicant lived with him there from December 1980 through January 1985. The applicant also submitted an additional affidavit written by [redacted] dated February 14, 2009 on which the affiant attested that the applicant lived with him at [redacted], Brooklyn, New York from July 1987 through February 1988. The affiant attested that, apart from July 1987

through February 1988, during 1985 through 1990 the applicant lived at [redacted], Brooklyn, New York with [redacted]. The affiant indicated that [redacted] asked the applicant to move in with the affiant for seven months because [redacted] needed space for his relatives who had just arrived in the United States and had not yet found a permanent home. The affiant attested that the applicant never considered [redacted] to be his permanent home and he never received mail or bills at this address. In the brief provided in response to the Notice of Intent to Dismiss, the applicant through counsel provided a similar explanation for the contradictions in the evidence of record regarding the applicant's place of residence during July 1987 through February 1988.

The applicant failed to provide independent, objective evidence that might overcome the contradictions in the evidence of record relating to his claim of continuous residence in the United States throughout the statutory period. He submitted only additional statements which attempted to explain the inconsistencies in the record. However, the AAO notified the applicant in the Notice of Intent to Dismiss that any attempts to explain or reconcile contradictions in the record, absent competent objective evidence pointing to where the truth lies would not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The applicant has failed to establish continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and through May 4, 1988. Thus, he is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act. The appeal is dismissed on this basis.

Further, as stated in the Notice of Intent to Dismiss, the applicant was placed in Expedited Removal proceedings and removed from the United States on June 4, 1999. He filed the Form I-485 during May 2002 requesting admission as a lawful permanent resident, less than five years after his removal. Thus the applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, and, consequently, not eligible to adjust to permanent resident status under LIFE legalization.[2]

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 is admissible to the United States. *See* 8 C.F.R.

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[2] The applicant submitted evidence that he has completed a request for a waiver of this ground of inadmissibility on the Form I-690, Application for Waiver of Grounds of Inadmissibility. With the applicant's response to the Notice of Intent to Dismiss is the Form I-690 which on February 19, 2009 was stamped received by the U.S.I.N.S. New York District Bond Office and was annotated to indicate that the fee for the application has been received. The Form I-690 has not yet been adjudicated. In the brief submitted in response to the Notice of Intent to Dismiss, the applicant indicated through counsel that this office should adjudicate the Form I-690. However, this is not within our authority. The AAO is only authorized to review applications and petitions that have been denied in the field and then properly appealed to this office, and those completed decisions on applications and petitions which offices in the field have certified to the AAO for review.

§ 245a.12(e). The applicant might only overcome this ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The appeal is also dismissed because the applicant is inadmissible to the United States.

The applicant is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act for the reasons stated above, with each considered as an independent and alternative basis for denial.

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