U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: GARDEN CITY, NY Date: SEP 09 2009

MSC 02 033 62353

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 forwarded to the U.S. 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, Garden City, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director found that the applicant failed to demonstrate residence in the United States from a date prior to January 1, 1982 through May 4, 1988. Therefore, the director denied the application.

On appeal, the applicant asserted through counsel that the record did establish that he had resided continuously in the United States in an unlawful status throughout the statutory period, and that he was otherwise eligible to adjust under the LIFE Act.

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).

The regulation at 8 C.F.R. § 245a.15(c) provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

> (1) 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.

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

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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).

depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

> (b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:
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> . . .
>
> (9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.
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> (10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

> Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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 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 October 2, 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 November 2, 2001, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

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 throughout the statutory period.

The director stated that the record indicated that the applicant had visited Brazil during May/June 1986; that he departed the United States on May 2, 1986 and returned on June 25, 1986; and that USCIS records confirm that he entered the United States on June 25, 1986 as a B2, visitor for pleasure. The director indicated that any absence such as this one, which is more than 45 days in

one single absence, represents a break in continuous residence. As such, the applicant failed to demonstrate continuous residence in the United States throughout the statutory period. The director also indicated that the record did not support the finding that the applicant failed to return to the United States within 45 days due to emergent reasons.

In the rebuttal, the applicant asserted through counsel that he was not able to return to the United States in 1986 within 45 days of having departed, but instead returned after 54 days, because his mother was hospitalized at that time and needed his assistance. In support of this assertion, the applicant submitted a detailed letter from his mother's cardiologist on letterhead stationery with the cardiologist's personal stamp near her signature, as well as, a letter from the applicant's mother and his aunt. All of these letters indicate that the applicant had intended to return to the United States on June 1, 1986; however, the applicant had to remain in Brazil until June 25, 1986 due to his mother's unstable health condition. The letters from the applicant's mother and his aunt also indicate that the applicant resided in the United States continuously throughout the statutory period.

In the notice of decision, the director indicated that the statements provided in the rebuttal were not sufficiently reliable in that the applicant had failed to provide copies of actual hospital records which support the assertion that he remained in Brazil beyond 45 days because of his mother's unstable condition, and because his mother and his aunt failed to provide a copy of their identification documents or evidence of having resided in the United States during all or part of the statutory period.

The AAO issued a notice of intent to dismiss on June 25, 2009 which noted that the applicant had provided copies of several of his mother's identification documents and an affidavit from [redacted], the individual who employed his mother in the United States from 1980 through 1983, which supports his mother's claim that she was residing in the United States during the relevant period.

On appeal, the applicant asserted through counsel that he had provided for the record all the evidence that was available to him to establish that he needed to remain in Brazil for over 45 days in 1986 due to his mother's unstable health. The applicant stated that he was unable to obtain hospital records but that he had submitted a letter from his mother's cardiologist written after the cardiologist reviewed his mother's hospital records. The applicant indicated that the director had erred in suggesting that he should provide evidence beyond this. The applicant also indicated that he had submitted many affidavits, statements and other evidence that confirm that he had resided in the United States throughout the statutory period. The applicant asserted through counsel that USCIS should take into account the passage of time since the statutory period and judge the evidence in the record to be sufficient to support the finding that he resided continuously in the United States throughout the statutory period. The applicant also indicated through counsel that if USCIS had wanted additional, specific details and evidence to be included in affidavits or attached to affidavits and statements submitted in support of legalization and LIFE legalization applications then USCIS should have made available what affidavit format it would find acceptable when these applications and affidavits were being

compiled, as it is currently too difficult for applicants to obtain such affidavits. Counsel indicated that too much time has passed and it is no longer possible for applicants to locate affiants and request additional statements with additional details and additional evidence from the statutory period.

According to the director's notice of decision, the issue in this proceeding is whether the applicant is able to establish that his absence from the United States during May/June 1986 was longer than 45 days due to emergent reasons, or whether this absence represents a break in his continuous residence in the United States during the relevant period.

The AAO stated in the notice of intent to dismiss that the cardiologist's letter in the record dated August 30, 2007: is detailed; is handwritten on hospital letterhead stationery; includes the doctor's personal stamp; and states that the cardiologist requested that the applicant remain in Brazil beyond June 1, 1986 because of his mother's unstable health. This credible evidence viewed together with other evidence in the record, such as, the applicant's mother's 2004 statement, which was submitted several years earlier in response to a request for evidence of the applicant's initial entry into the United States, which states that the applicant returned to Brazil with his mother in May 1986 because of her serious health problems, led the AAO to find that the preponderance of the evidence indicates that the applicant did remain outside of the United States for more than 45 days due to emergent reasons related to his mother's hospitalization and her unstable health condition. Thus, the applicant had overcome the grounds for denial set forth by the director.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In the notice of intent to dismiss, the AAO stated that, beyond the decision of the director, the AAO found that certain adverse evidence in the record indicates that the applicant is not eligible for permanent resident status under the late legalization provisions of the LIFE Act because he did not reside continuously in the United States and because he is inadmissible under section 212(a)(6)(C)(i) of the Act.

According to USCIS records the applicant departed the United States again on August 4, 1986. Yet, according to the Form I-687, his only absence from the United States during the statutory period occurred during May/June 1986.

Also, the applicant submitted the Forms W-2 for 1987 and 1988, Wage and Tax Statement, and the Internal Revenue Service Letter 1722(ICP) which indicate that he filed taxes for tax years

1987, 1988 and 1989. Yet, the record issued by the Social Security Administration, which the applicant provided, indicates that he began paying into Social Security during 1990.[2]

These discrepancies cast doubt on the authenticity of 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).

The notice of intent to dismiss stated that such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States throughout the statutory period. The applicant did provide, for example, the 1987 and 1988 Forms W-2 which indicate that he was employed in New Jersey during 1987 and 1988, as well as a copy of his 1988 State of New Jersey tax refund receipt. He provided a letter on Union City Adult Education, Union City, New Jersey letterhead stationery which indicates that he attended that school during 1981. He provided the original letter from his pastor at Holy Rosary Church, Jersey City, New Jersey on letterhead stationery, with an attached, preprinted Holy Rosary envelope, which confirms that the applicant attended this church from 1981 through 1986, as well as a letter on letterhead stationery from [redacted] of Ralph's Tire Shop which indicates that the applicant was employed at this tire shop from 1981 through 1986.

However, the record does not include evidence that might be considered independent, objective evidence of the applicant having returned to the United States in 45 days or less subsequent to his August 4, 1986 departure, or of having been unable, due to emergent reasons, to return to the United States within 45 days, at that time.

Thus, the AAO pointed out in the notice of intent to dismiss that unless the applicant provides such evidence he will have failed to establish continuous residence throughout the statutory period.

Also, the notice of intent to dismiss stated that, according to the record, on June 26, 1986, when the applicant presented himself for entry into the United States, he misrepresented himself as a

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[2] The forms in the record indicate that the applicant provided one Social Security number to employers prior to 1990 and a different Social Security number for 1990 and following. If the Social Security Administration restricted its search to records using the Social Security number which the applicant used in 1990 and following, rather than to any Social Security numbers under his name and date of birth, the applicant may submit an affidavit which indicates that.

B2, nonimmigrant, visitor for pleasure. According to the claims that the applicant made in this proceeding, his actual intent upon returning was to continue residing unlawfully in the United States. Thus, in June 1986, he procured entry into the United States by willfully misrepresenting a material fact. As such, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

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. § 245a.12(e). The applicant may 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 applicant has submitted the Form I-690, Application for Waiver of Grounds of Inadmissibility. This is the form he must file to request a waiver of the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. However, the notice of intent to dismiss pointed out that the applicant failed to state on that form why his request should be granted. The applicant also failed to provide any documentation with that form to support his request. As the director had not yet adjudicated that form, the AAO provided the applicant with the opportunity to submit any additional information and documentation needed to complete the request.

The applicant did not respond to the notice of intent to dismiss within the time period provided.

Thus, the AAO finds that the applicant has failed to establish that he resided continuously in an unlawful status in the United States from some date prior to January 1, 1982 and through May 4, 1988. The applicant has also failed to demonstrate that he is admissible to the United States and he has failed to complete his request for a waiver of the ground of inadmissibility to which he is subject.

The applicant is not eligible to adjust 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.