U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

L2

[redacted]

FILE: [redacted] Office: NEW YORK Date: FEB 26 2010

MSC-02-045-61343

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.

Perry Rhew
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, Atlanta, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The district director denied the application because the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. On appeal, the applicant contends that the decision was arbitrary and constitutes an abuse of discretion in that the director did not consider new evidence submitted in response to the Notice of Intent to Deny (NOID). In support of these contentions, counsel submits further explanation regarding evidence previously submitted.

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 quality 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 or petitioner 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 or petition.

The *Matter of E-- M—*decision provides guidance in assessing evidence of residence, particularly affidavits. In that case, the applicant had established eligibility by submitting (1) the original copy of his Arrival Departure Record (Form I 94), dated August 27, 1981; (2) his passport; (3) affidavits from third party individuals; and (4) an affidavit explaining why additional original documentation is unavailable.

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite

period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1, 1982 and lived in an unlawful status during the requisite period consists of the following:

- Affidavits from [redacted] and [redacted] The letter from [redacted], signed by [redacted] indicates that the applicant was employed by the company from October 1981 until April 1987. The letter from [redacted] signed by [redacted], indicates that the applicant was employed for the "past four years." The letter is dated August 1991. Neither letter meets certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether CIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The letters described above do not include much of the required information and can be afforded minimal weight as evidence of the applicant's residence in the United States for the duration of the requisite period.

- Affidavits from [redacted], and [redacted] Although the affiants state that they met the applicant during the relevant period, their statements do not supply enough details to be considered probative. The affiants do not indicate how they date their initial meeting with the applicant, how frequently they had contact with the applicant, or how they had personal knowledge of the applicant's presence in the United States. Given these deficiencies, these affidavits have minimal probative value in supporting the applicant's claims that she entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

- Several affidavits from [redacted] In the first affidavit, dated March 24, 1992, the affiant indicates that the applicant was his cousin and lived at his house. The record also contains an undated affidavit, signed by '[redacted] in which he indicates that the applicant lived at his house since August 1991. The address listed is in Alexandria, Virginia. In a third affidavit, dated September 5, 2007, the affiant indicates that the applicant lived with him in Bronx, New York from 1981 "for a few years before moving to Alexandria, Virginia." On his Form I-687, the applicant indicates that he lived in Bronx from 1981 until 1986, then moved to Queens, New York from 1986 until 1991 when he moved to Alexandria, Virginia. The inconsistencies regarding the applicant's addresses were noted by the director. On appeal, the applicant fails to address these inconsistencies.

The remaining evidence in the record is comprised of the applicant's statements and application forms, in which he claims to have entered the United States in 1981. On appeal, the applicant has not submitted any additional evidence in support of his claim that he was physically present

or had continuous residence in the United States during the entire requisite period or that he entered the United States in 1981.

Pursuant to 8 C.F.R. § 245a.12(e), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. The applicant has failed to submit sufficient credible documentation to meet his burden of proof in establishing that he has resided in the United States since prior to January 1, 1982 to May 4, 1988 by a preponderance of the evidence as required under both 8 C.F.R. § 245a.12(e) and *Matter of E-- M--*, 20 I&N Dec. 77.

Given the applicant's reliance upon documents with minimal probative value and the contradictory nature of his own testimony, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988 as required under section 1104(c)(2)(B) of the LIFE Act. The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act on this basis.

Additionally, it is noted by AAO that the director noted that the applicant was absent from the United States for 34 days from June 23, 1987 until July 27, 1987. A LIFE legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* Section 1104(c)(2)(B) of the LIFE Act. A legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 245A(a)(3)(A) of the Act, 8 U.S.C. § 1255a(a)(3)(A). An absence during this period which is found to be brief, casual and innocent shall not break a legalization applicant's continuous physical presence. Section 245A(a)(3)(B) of the Act, 8 U.S.C. § 1255a(a)(3)(B). *See e.g. Espinoza-Gutierrez v. Smith, INS, et al.*, 94 F.3d 1270 (9th Cir. 1996). The *Espinoza-Gutierrez* court held that a legalization applicant's absence would not represent a break in continuous physical presence if it was found that the absence was brief, casual and innocent as defined by the court in *Rosenburg v. Fleuti*, 374 U.S. 449 (1963) *See also Assa'ad v. U.S. Attorney General, INS*, 332 F.3d 1321 (11th Cir. 2003)(which affirmed the portion of the holding in *Espinoza-Gutierrez* relied upon here, but disagreed with a different aspect of that holding). The AAO finds that the applicant's absence from the United States in this case was brief, casual and innocent in that the record indicates: that he was absent from the United States for the purpose of visiting friends in Canada. This portion of the director's decision will be withdrawn.

Additionally, as noted by the director, on November 20, 1995, the applicant was ordered excluded from the United States pursuant to Section 212(a)(6)(c)(i) and departed the United States on May 15, 1998. Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – 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.

The applicant has been found to have sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. He was ordered excluded and deported in absentia on November 20, 1993 for violating Section 212(a)(6)(C)(i) and Section 212(a)(7)(i)(I) of the Act. He is, therefore, inadmissible to the United States pursuant to Section 212(a)(6)(C) of the Act. The AAO notes that the applicant filed a Form I-690 Application for a Waiver of Excludability. He failed to submit any supporting documents with the application. This waiver, however, is moot since the application for permanent resident status has been denied and this appeal is dismissed.

The applicant is also inadmissible because he left the United States pursuant to an order of removal on January 10, 1998 and illegally reentered the United States on April 14, 1998, without prior permission. Section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(A)(ii).

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