U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

L1

FILE: [redacted] Office: CHICAGO Date: FEB 11 2008
MSC-02-171-61038

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. The file has been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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: The application for permanent resident status under section 1104 of the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, Chicago, on February 23, 2005. That decision was appealed to the Administrative Appeals Office (AAO) on March 24, 2005. The AAO dismissed the appeal on August 13, 2007 after concluding that the record contained inconsistencies and that the applicant did not establish by a preponderance of the evidence that he had resided in the United States for the requisite period. The applicant, through counsel, filed a "Sua Sponte Reopening Request" and accompanying Brief, dated September 15, 2007, claiming that the decision by the District Director was analyzed under a completely incorrect standard, and that the AAO erred in making adverse credibility findings and finding material inconsistencies for the first time on appeal. The AAO finds counsel's assertions to be meritorious. In response, the AAO has *sua sponte* reopened its prior decision.[1] The AAO's decision of August 13, 2007 will be withdrawn. The director's decision of February 23, 2005 will be withdrawn, and the matter will be remanded to the director for appropriate action consistent with this decision.

Along with his Brief in response to the findings of the AAO, the applicant submits his own detailed affidavit in an attempt to explain the inconsistencies noted by the AAO and additional affidavits from three of his acquaintances, with telephone numbers provided to facilitate verification, to overcome the AAO's finding that the evidence of residence previously submitted was insufficient to meet his burden of proof. The request to reopen is the applicant's first opportunity to address the basis of the denial of his application, as the director did not provide a reasoned decision that would have put the applicant on notice of the reasons for denying the application, and the AAO's decision on appeal raised new adverse findings of credibility and inconsistencies in the record.

As counsel points out, in the Seventh Circuit, where this case arises, the court has expressly held that it is not proper for an adjudicator to deny a claim based on allegations of inconsistencies without giving the applicant a chance to respond or explain the inconsistencies. *Tadesse v. Gonzales,* 492 F.3d 905, 911 (7th Cir. 2007) (remanding to Board of Immigration Appeals (BIA), holding that the Immigration Judge (IJ) "should have explored whether there was a good reason for the inconsistency, rather than bringing it up for the first time in the opinion, when it was too late to explain"); *Shtaro v. Gonzales,* 435 F. 3d 711, 716 (7th Cir. 2006) (remanding to the BIA, holding that "credibility determinations may not be based on minor discrepancies that are easily explained, and the IJ did not attempt to ascertain whether these omissions could be accounted for"); *Uwase v. Ashcroft,* 349 F.3d 1039, 1043 (7th Cir. 2003) (remanding for rehearing, holding that failure to explore "possible explanations" for an inconsistency "cast[s] doubt on [the IJ's] credibility determination"). Similarly, U.S. Citizenship and Immigration Services (CIS) regulations require that an applicant for permanent resident status under section 1104 of the LIFE Act be notified in writing of the decision of denial and of the reason(s) therefore; when an adverse decision is proposed, CIS "shall notify the applicant of its intent to deny the application and the basis for the proposed denial, and the applicant will be granted a period of 30 days . . . to respond . . . . All relevant material will be considered in making a final decision." 8 C.F.R. § 245a.20. In this case, a Notice of Intent to Deny (NOID) was issued on April 28, 2003. However, both the

[1] As noted by counsel, motions to reopen a proceeding or reconsider a decision on an application for permanent resident status under section 1104 of the LIFE Act are not permitted. 8 C.F.R. § 245a.20(c). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 245a and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b).

NOID and the final decision suffered from the same deficiencies, detailed below, in failing to notify the applicant of the basis for the proposed denial as required.

The record reflects that the director made several errors in his decision of February 23, 2005 that prejudiced the applicant. Notably, the director concluded that the applicant was ineligible to adjust status under the LIFE Act for the following reason:

> It has been determined that the evidence submitted by you to establish you have been illegally and physically present in the United States from January 1, 1982 through May 4, 1988, does not meet the criteria established to permit the Service to substantiate your claim of being physically present in the United States during the prescribed periods.

No other reason was stated. The conclusion incorrectly states the law, as the applicant is not required to establish that he was "physically present" from January 1, 1982 through May 4, 1988, but rather that he "resided continuously in the United States in an unlawful status." *See* sections 1104(c)(B) and (C) of the LIFE Act. "Continuous physical presence" is a separate requirement for the period from November 6, 1986 to May 4, 1988 (section 1104(c)(C) of the LIFE Act), and the analyses of the respective terms are different. 8 C.F.R. §§ 245a.15 and 16. Moreover, the conclusion refers to unknown and irrelevant criteria for the substantiation of a claim and gives no guidance regarding the basis for denial. Counsel's assertion that the case was denied "based on an incomprehensible legal position," is justified.

The director's decision also incorrectly cites to the evidentiary requirements of 8 C.F.R. § 103.2(b), rather than the requirements specific to applicants for adjustment of status under the LIFE Act, found at 8 C.F.R. §§ 245a.12(f), 15(b) and 245a.2(d)(3). In so doing, the director placed an incorrect burden on the applicant to submit "primary" or "secondary" evidence of residence to satisfy his burden of proof and failed to give proper weight to the evidence in the record.

The AAO may conduct a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility,[2] as was done in this case on appeal. However, after reviewing the record and taking into consideration counsel's assertions, the AAO finds that a full adjudication based on all relevant evidence, including new evidence submitted with the request to reopen, is appropriate. In this case, the director analyzed the evidence under an incorrect standard and the applicant was not provided a reasoned decision; as the applicant was unaware of any deficiency in the record, he could not have overcome the deficiency with relevant evidence. The record before the AAO on appeal was therefore lacking explanations or evidence an informed applicant would have been able to submit. Moreover, the AAO's decision raises new adverse findings without providing the applicant an opportunity to respond. The case should therefore be remanded to the director for a new adjudication. All new evidence must be taken into consideration; all relevant evidence must be reviewed and properly analyzed, including the applicant's own testimony; a reasoned decision must be issued; and the applicant must then be provided an opportunity to respond to any adverse findings.

---

[2] 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).

In summary, the record reflects that the director failed to analyze the applicant's evidence of residence under the correct standard and failed to provide a legitimate basis for denial to the applicant. On appeal, the AAO's *de novo* decision raised issues of credibility and other adverse information for the first time. As a result, the applicant has not been given proper notice and an opportunity to respond to the denial of his application.

For the reasons noted above, the director's decision of February 23, 2005 is withdrawn. The case is reopened *sua sponte*, and the AAO's decision of October 11, 2007 is withdrawn. The case is remanded to the director so that the applicant may be given the benefit of an adjudication based on correct legal standards, including a review of all evidence in the record and a reasoned decision on the merits of his application for permanent residence under section 1104 of the LIFE Act. In the event that the director denies the application, the decision shall be certified to the AAO.

ORDER: The case is reopened. The AAO's decision of August 13, 2007 is withdrawn and the director's decision of February 23, 2005 is withdrawn. The matter is remanded to the director for appropriate action consistent with this decision.