

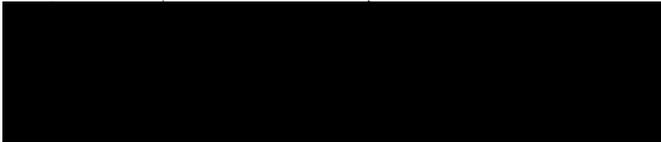
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services



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FILE:



Office: Phoenix

Date: JAN 06 2005

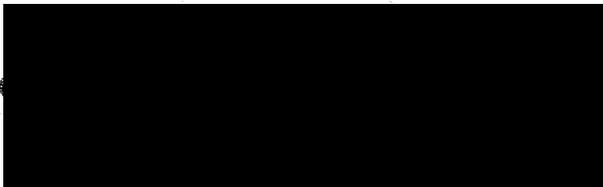
IN RE:

Applicant:



PETITION: 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, Phoenix, Arizona, and is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director determined that the applicant had not established that he resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. This decision was based on the district director's conclusion that the applicant had exceeded the forty-five (45) day limit for a single absence, as well as the aggregate limit of one hundred and eighty (180) days for total absences, from the United States during this period, as set forth in 8 C.F.R. § 245a.15(c)(1)(i).

On appeal, counsel submits documentation in an attempt to establish that an emergent reason had delayed the applicant's return to this country on each of the two occasions that she was absent from the United States.

An applicant for permanent resident status 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 and through May 4, 1988. 8 C.F.R. § 245a.11(b).

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if 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 depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E-- M--*, 20 I. & N. Dec. 77 (Comm. 1989).

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. 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The applicant is a class member in a legalization class-action lawsuit and as such, was permitted to previously file a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the INA on November 7, 1989. At part #35 of the Form I-687 application where applicants were asked to list all absences from the United States beginning from January 1, 1982, the applicant listed only one absence from this country when he traveled to Mexico for 25 days in April 1988.

The record shows that the applicant subsequently filed his Form I-485 LIFE Act application on March 12, 2002. The record further shows that the applicant subsequently appeared for the requisite interview relating to his LIFE Act application at the Phoenix District Office of the Immigration and Naturalization Service, or the Service (now Citizenship and Immigration Services, or CIS) on October 1, 2003. During the course of this interview, the applicant testified that he had been absent from the United States on two separate occasions in the period from January 1, 1982 to May 4, 1988. Specifically, the applicant testified that he returned to Mexico from October 1982 to December 1982 to visit his parents and fiancée, and that he returned to Mexico

from January 1983 to September 1983 to be married, attend the birth of his first child, and obtain his military card. However, the applicant's testimony regarding the number and length of his absences from this country at his interview directly contradicted his prior testimony at part #35 of the Form I-687 application where he listed only one absence when he traveled to Mexico in April 1988. The record contains no indication that the applicant attempted to provide an explanation for the contradiction between his testimony at his interview and the information listed on the Form I-687 application relating to the number, dates, and duration of his absences from this country.

On October 7, 2003, the district director issued a notice to the applicant informing him of the Service's intent to deny his LIFE Act application because the testimony he provided at his interview established that he had been absent from the United States for over 45 days for each of his two separate absences, and that he had exceeded the limit of 180 days for total absences as provided in 8 C.F.R. § 245a.15(c)(1).

In response to this notice, counsel submitted two letters written in Spanish and signed by [REDACTED] and Dr. [REDACTED] respectively, as well as two affidavits signed by [REDACTED] testifying to the accuracy and truth of the content of these letters. Counsel also provided certified English translations of the letters and affidavits. However, it must be noted that these letters relate only to the applicant's absence from this country for the period from January 1983 to September 1983, and provided no information regarding his initial absence from October 1982 to December 1982. Neither the applicant nor counsel made any attempt to address this initial absence in their response to this notice.

In his letter, [REDACTED] Secretary for the Municipal Council for Recruitment of Choix, Mexico, indicated that the applicant had completed his military service with the national class of 1983, and that he marched in January of that year until August of the same year and that he suffered an accident due to which he could not complete and conclude such service. However, in his letter, Dr. [REDACTED] stated that the applicant was attended to for a wound of 16 centimeters in length to the cranium, with a cerebral contusion, in this clinic by Dr. [REDACTED] on February 5, 1983, and that his convalescence lasted from this date until July of 1983. The information provided by Dr. [REDACTED] regarding the date the applicant was treated for his injury conflicts with the testimony provided by [REDACTED] who indicated that the applicant continued with his military service until August 1983 when he suffered an accident. Neither counsel nor the applicant has provided an explanation that would resolve the discrepancy regarding the specific date the applicant was injured in the year 1983. Nor did they explain why the accident wasn't mentioned at the time of his interview when he indicated that during this period he was married and stayed with his wife for the birth of their first child. As the applicant's supporting evidence regarding this absence and the reason for its extended length is contradictory in nature, it must be considered to be of questionable probative value.

The district director determined that the applicant's two absences from October 1982 to December 1982 and again from January 1983 to September 1983, exceeded the 45 day period allowable for a single absence, as well as the 180 day aggregate total for all absences. Therefore, the director concluded that the applicant had failed to credibly establish that he continuously resided in the United States from prior to January 1, 1982 to May 4, 1988, and denied the application.

On appeal, the applicant submits a statement in which he claims that he had not been absent from October 1982 to December 1982 as he had testified at his interview, but instead departed the United States on October 30, 1982 and subsequently returned on November 20, 1982. The applicant states that he was extremely nervous at his interview and may have made a mistake in providing the dates for his first absence. The applicant submits four affidavits in support of his claim to have been absent from October 30, 1982 to November 20, 1982. However, the applicant failed to provide any explanation as to why he neither addressed nor provided evidence relating this initial absence in his response to the notice of intent to deny. The district director specifically cited both of the applicant's absences in the notice, yet the applicant only provided evidence relating to his second absence from January 1983 to September 1983. While the applicant claims

that he was nervous at his interview, such explanation cannot be viewed as compelling enough to ignore his prior testimony that he was absent from October 1982 to December 1982.

In the absence of additional credible evidence from the applicant, it is determined that his two absences from October 1982 to December 1982 and again from January 1983 to September 1983, exceeded the 45 day period allowable for a single absence, as well as the 180 day aggregate total for all absences. While not dealt with in the district director's decision, there must, nevertheless, be a further determination as to whether the applicant's second and prolonged absence from the United States from January 1983 to August 1983 was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) holds that *emergent* means "coming unexpectedly into being."

As discussed above, the testimony of Dr. [REDACTED] indicates that the applicant was treated for head wound on February 5, 1983, and that his convalescence lasted from this date until July of 1983. However, this testimony is directly contradicted by that of [REDACTED] who indicated that the applicant had completed his military service beginning in January of 1983 until August of that same year when he suffered an accident. Given the fact that the underlying testimony regarding the date the applicant suffered his injury is conflicting in nature, it cannot be concluded that the applicant has established that an emergent reason delayed the applicant in returning to this country during the course of his absence from January 1983 to August 1983.

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).

Given the fact that the applicant has failed to establish that an emergent reason delayed his return to this country after being absent from October 1982 to December 1982 and again from January 1983 to August 1983, that these absences exceeded the 45 day period allowable for a single absence, as well as the 180 day aggregate total for all absences, and the conflicting testimony contained in the record regarding the number and length of her absences, the applicant has failed to establish having resided in continuous 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.

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