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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 02 152 60637

Office: DALLAS

Date:

SEP 12 2006

IN RE:

Applicant:



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:



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. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The 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, counsel states that the applicant's absence from the United States beginning in 1987 and extending through May 4, 1988 was due to emergent reasons.

The director issued her decision on May 3, 2003. However, the director failed to issue a Notice of Intent to Deny (NOID) in accordance with 8 C.F.R. § 245a.20(a)(2). The applicant appealed this decision on June 5, 2003. On September 12, 2003, the director issued an "Amended Notice" in which she notified the applicant that "[u]pon consideration, the Service has decided to afford [him] one last opportunity to submit evidence in support" of his application. The director then notified the applicant that Citizenship and Immigration Services (CIS) intended to deny the application based on the applicant's failure to establish his continuous presence in the United States from June 1986 to May 1988. The director did not withdraw her previous decision and was without jurisdiction to issue the "Amended Notice."

On May 8, 2004, the director issued a NOID in which she notified the applicant that CIS intended to deny his application because he failed to establish that he satisfied the "basic citizenship skills" requirements of section 1104(c)(2)(E) of the LIFE Act. The director incorporated by reference the September 12, 2003 "Intent to Deny." The director issued another decision on November 10, 2004 in which she denied the application based on the applicant's failure to demonstrate that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988 and failure to demonstrate a minimal understanding of English and U.S. history and government.

As noted, the director did not withdraw her initial decision and the applicant timely appealed that decision. Accordingly, the director did not have jurisdiction to issue any of the subsequent decisions or notices of intent to deny. Considering the director's procedural irregularities, the AAO will consider all of the evidence of record in rendering its decision. Further, we find that the director's subsequent actions, together with the AAO's consideration of all of the evidence of record, cures the director's failure to issue a NOID prior to rendering her decision of May 3, 2003.

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. Section 1104(2)(c)(B) of the LIFE Act; 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).

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 quantity 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 petitioner 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.

Although CIS 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)(v)(L).

The applicant stated that he initially entered the United States without inspection in 1980. On his Form I-687, Application for Status as a Temporary Resident, which he signed under penalty of perjury on July 3, 1990, the applicant stated that he left the United States in June 1986 for “family problems” and returned in April 1990.

In an attempt to establish continuous unlawful residence since before January 1, 1982 through May 4, 1988, the applicant provided the following evidence:

1. An undated letter from ██████████ president of ██████████ Construction Company, Inc., in which he stated that the applicant worked for the company from October 1980 through January 1986. Mr. ██████████ did not indicate the records that he relied upon in providing the information regarding the applicant’s employment and did not indicate the address at which the applicant lived during his employment. *See* 8 C.F.R. § 245a.2(d)(3)(i). Furthermore, in contradiction of this statement, Mr. ██████████ provided a September 18, 2001 letter, in which he stated that the applicant worked for the company from October 1980 through May 1988. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).
2. A February 3, 2003 letter from ██████████ vice president of ██████████ Construction, Co., Inc., in which he stated that the applicant worked for the company from 1980 “through late January or early February of 1987.” Mr. ██████████ further stated, “The relevant employment records showing the exact days he worked back then are in deep storage or destroyed because they are over 15 years old and would be very difficult to locate. [The applicant] returned to work in 1989.” However, these statements conflict with the statements of ██████████ who stated that the applicant worked for the company until January 1986 or May 1988. They also conflict with the applicant’s statements on his Form I-687 application, where he stated that he departed the United States in June 1986 and returned in April 1990. The record also contains an undated and unsigned letter on ██████████ letterhead that indicates that the applicant had been employed by the company since 1980 and does not indicate any break in employment.

3. Envelopes bearing canceled postmarks in November 1982, July 1985, September 1986, and January 1987. The envelopes show the applicant as the sender with an address in Kilgore, Texas.

The record also contains a copy of a document that appears to be an envelope showing the applicant as the sender; however the canceled postmark is illegible. The record contains an August 25, 1985 pay stub from [REDACTED] Construction Company; however, the stub does not indicate the name of the recipient. The applicant submitted no other documentation to establish his continued presence and residency in the United States during the qualifying period.

Additionally, the applicant has not demonstrated that his absence from the United States during the qualifying period did not exceed the forty-five (45) day limit for a single absence and the aggregate limit of one hundred and eighty (180) days for total absences. 8 C.F.R. § 245a.15(c)(1).

“Continuous unlawful residence” is defined in the regulations at 8 C.F.R. § 245a.15(c)(1), as follows:

Continuous residence. 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. [Emphasis added.]

Although the term “emergent” is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) holds that *emergent* means “coming unexpectedly into being.” In other words, the reason must be unexpected at the time of departure from the United States and of sufficient magnitude that it made the applicant’s return to the United States more than inconvenient, but virtually impossible.

In a February 19, 2002 statement, the applicant stated that he left for Mexico at the end of February 1987 for the purpose of receiving affordable medical treatment for varicose veins. The applicant alleged that his plans were to get treatment and return to his job within a month. The applicant stated:

I was able to contact a doctor who put me on treatment as soon as [I] arrived, but the doctor required me to have a number of follow-up visits that I had not thought would be necessary. He therefore did not finally release me until August 1989. After being on treatment for two years I was finally in good enough condition[] to return to work here in the U.S.

The applicant submitted a January 9, 2002 statement from [REDACTED] in which he stated that he treated the applicant in 1987 for varicose veins. The doctor stated that the applicant “got treatment then he immigrated to the United States of America. Occasionally he came for check ups and also occasionally medicine prescriptions were issued for his treatment.” [REDACTED] does not indicate in his statement that the applicant’s treatment necessitated that he remain in Mexico in excess of two years, and does not support the applicant’s assertion that he was not released from treatment until August 1989.

Additionally, the applicant's statements regarding the purpose of his extended stay in Mexico conflicts with the statement that he made on his Form I-687 application that he signed on July 3, 1990. The applicant stated on the Form I-687 application that he departed the United States in June 1986 and returned in April 1990, and that the reason for his absence was for "family problems." In an interview on October 28, 1994, the applicant stated that he first entered the United States in May 1989. The applicant submitted no independent objective evidence of his absence and return or reasons for his prolonged stay from the United States. Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa application. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Given the conflicting statements, minimal contemporaneous documentation, and the applicant's extended absence from the United States during the qualifying period, it is concluded that the applicant has failed to establish continuous residence in the U.S. for the required period.

The director determined that the applicant failed to establish that he satisfied the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act.

Under section 1104(c)(2)(E)(i) of the LIFE Act ("Basic Citizenship Skills"), an applicant for permanent resident status must demonstrate that he or she:

(I) meets the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. § 1423(a)) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

(II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Attorney General may waive all or part of the above requirements for aliens who are at least 65 years of age or developmentally disabled.

An applicant can demonstrate that he or she meets the requirements of section 312(a) of the Act by "[s]peaking and understanding English during the course of the interview for permanent resident status" and answering questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test . . . by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS)." 8 C.F.R. § 245a.3(b)(4)(iii)(A)(1) and (2).

The regulation at 8 C.F.R. § 245a.17(b) provides that an applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the interview, shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the tests or submit evidence as described in paragraphs (a)(2) or (a)(3) of this section.

The director stated that at the time of his first interview, the applicant presented a January 22, 2003 letter from the Kilgore College Adult Education Longview Center that purportedly satisfied the provisions of section 1104(c)(2)(E)(i)(II) of the Act. The record reflects that in a phone call on April 29, 2004, the ESL (English as a Second Language) director denied that an ESL program was administered at the Longview Center. In response to the director's NOID of May 8, 2004, counsel requested, pursuant to 8 C.F.R. § 103.2(b)(16)(i), that the district

office provide all derogatory information and provide the applicant with the opportunity to submit a rebuttal. The record does not reflect that the director responded to counsel's request. Further, the record does not reflect that the applicant was provided with the opportunity to take and pass an English literacy and/or United States history and government test.

Therefore, we withdraw this specific determination by the director. Nonetheless, as the applicant has failed to establish that he continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988, he is ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act.

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