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[REDACTED]

FILE:

[REDACTED]

Office: NEW YORK Date: **AUG 04 2008**

MSC 02 211 64419

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 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the late legalization provisions of the Legal Immigration Family Equity (LIFE) Act was denied by the District Director (director), New York, New York, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The 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. The director also indicated that the applicant failed to provide sufficient, credible evidence that he was continuously present in the United States during the statutory period beginning on November 6, 1986 and ending on May 4, 1988.

On appeal, counsel asserted that the applicant did maintain continuous unlawful residence and physical presence in the United States during the statutory periods.

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his or her continuous, unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 1104(c)(2)(B) of the LIFE Act states in relevant part:

(i) In General – The alien must establish that he or she entered the United States before January 1, 1982, and has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

See also 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 states 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 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 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 CIS 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 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

At issue in this proceeding is whether the applicant has submitted credible evidence to meet his burden of establishing continuous unlawful residence in the United States during the requisite period. Here, the applicant has failed to meet this burden.

The record indicates that on or near July 9, 1991, 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 September 7, 2001, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The record contains documents that relate to the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988, including:

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).

1. A statement written on what purports to be D-W Pharmacy Corporation, Jamaica, New York letterhead stationery. The statement is not dated and is signed by [REDACTED], President of D-W Pharmacy. Mr. [REDACTED] indicated that the applicant worked at this pharmacy from December 1983 through February 1990. Mr. [REDACTED] used stationery that indicated that the telephone number for D-W Pharmacy was (212) 529- 1474.
2. The Notice of Intent to Deny (NOID) dated September 13, 2006 on which the director pointed out that the area code for D-W Pharmacy and its surrounding businesses had changed to 7-1-8 in 1984. The director indicated that this called into question the authenticity of the statement signed by Mr. [REDACTED] and summarized at #1 above.
3. On appeal, the applicant indicated through counsel that Mr. [REDACTED] had used outdated D & W Pharmacy² letterhead stationery, and that is why the telephone number on the stationery which he used when writing the employment verification letter for the applicant, listed an area code that had been obsolete for more than six years. He also submitted the statement of his friend, [REDACTED], which is not dated. Mr. [REDACTED] stated that he knew the applicant worked at D.W. Pharmacy from 1983 through 1990. He also explained that Mr. [REDACTED], the owner of the pharmacy, is absent-minded and that is why he used outdated letterhead stationery when preparing the employment verification letter for the applicant. The applicant also submitted a blank prescription receipt which listed D-W Pharmacy at the top along with a telephone number that used the updated 7-1-8 area code. The applicant asserted through counsel that this blank receipt is evidence that Mr. [REDACTED] did eventually update his stationery and prescription receipt notepad with the correct area code.
4. The statement of [REDACTED], Dance Director, dated December 10, 1990. This statement indicates that [REDACTED] shared an apartment with the applicant at [REDACTED] from December 1981 through December 1988. This statement purports to be the statement of [REDACTED], subscribed and sworn to before notary public, [REDACTED] on December 10, 1990; however, it is not signed by [REDACTED]. The statement is signed by [REDACTED].
5. The affidavit of [REDACTED], Dancer, dated November 13, 1990. This affidavit attests that [REDACTED] shared an apartment at [REDACTED] New York, New York, with the applicant from December 1981 through December 1988.
6. The Form I-485 which the applicant signed under penalty of perjury on September 7, 2001 which indicates at Part 3, item B, that the applicant has no children.
7. The Form I-485 which the applicant submitted prior to filing the instant application and which he signed under penalty of perjury on May 7, 1991. At Part 3, item B, the applicant

² The documents in the record which purport to be letterhead stationery and prescription receipt notepad paper from this pharmacy list the name of the pharmacy as D-W Pharmacy. The brief submitted on appeal refers to the pharmacy as D & W Pharmacy. Mr. [REDACTED] referred to the pharmacy as D.W. Pharmacy in his statement.

stated on this form that his son, [REDACTED], was born in Bangladesh on October 22, 1982.

8. The Form I-687 which the applicant signed under penalty of perjury on July 26, 1994 which indicates at item 32 that the applicant's son, [REDACTED], was born in Bangladesh on October 22, 1982.

On September 13, 2006, the director issued a NOID which indicated that the applicant had failed to demonstrate continuous residence in the United States during the statutory period.

At the outset, the AAO notes that in the NOID the director indicated that she intended to deny the application because the applicant did not list the alien number [REDACTED] on the Form I-485. This point in the NOID is withdrawn. The record indicates that the applicant listed [REDACTED] on the Form I-485 and during the LIFE interview, [REDACTED] was added as an additional A-number for the applicant.

In the NOID, the director also suggested that the application might be denied based on the January 18, 2002 finding by the Vermont Service Center Director that the applicant had not established continuous residence in the United States during the statutory period in connection with a separate application filed with that office. This point in the NOID is also withdrawn. Each application is a separate proceeding. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the director must base the decision on all the evidence of record, including the evidence submitted in connection with the current filing, rather than relying exclusively on previous findings related to continuous residence.

In the NOID, the director pointed out discrepancies in the record relating to the applicant's claim that he resided continuously in the United States from some date prior to January 1, 1982 through May 4, 1988. For example, the director stated that the applicant had provided an employment verification letter that did not appear to be authentic in that, while it was written subsequent to 1990, the document included a telephone number with an area code that had been obsolete for the region since 1984. The director indicated that the applicant had a child born in Bangladesh in October 1982, and that the record indicated that the applicant's wife, this child's mother, had not been in the United States during the statutory period. The director then indicated that the applicant must have been residing in Bangladesh during, at least, the initial portion of the statutory period. The director also asserted that Nirvana Restaurant, New York, New York, where the applicant claimed to have worked during January 1982 through November 1983, did not have a telephone listing until August 1983. The director suggested that this was evidence that the restaurant was not in operation before August 1983.

The director stated that because of these and other contradictions in the record, he had concluded that the applicant had failed to establish continuous residence in the United States throughout the statutory period. For these reasons, the director intended to deny the application.

On rebuttal, counsel requested a 30 day extension beyond the original thirty days which the director had allowed for response to the NOID.

On October 18, 2006, the director denied the request for an extension and denied the application based on the reasons set forth in the NOID. The director pointed out that counsel had not provided any specific basis for allowing the applicant additional time to reply to the NOID.

On appeal, counsel provided evidence in the form of an article obtained using the Internet which establishes that a Nirvana Restaurant was in operation in New York City throughout the statutory period. This office finds that the applicant has established that this restaurant was in operation throughout the statutory period.

Counsel also asserted that the applicant had established that he had resided continuously in the United States throughout the statutory period. First, he suggested that [REDACTED], the owner of D & W Pharmacy, accidentally used outdated letterhead stationery when writing the employment verification letter for the applicant. Counsel indicated that the statement from [REDACTED] and the blank prescription receipt from the pharmacy which displays the telephone number with an updated area code establishes that [REDACTED]'s employment verification letter is authentic.

The applicant also asserted through counsel that his son was born on October 22, 1981, not October 22, 1982. He indicated that wherever the evidence in the record suggests otherwise, that is the fault of typographical errors. The applicant also indicated through counsel that his wife has obtained a divorce since the applicant arrived in the United States and has refused even to accept money from him on behalf of their son. The applicant explained through counsel that is why he stated that he had no spouse or children on the Form I-485 submitted under the LIFE Act. The applicant also submitted a document which purports to be an Extract from the Register of Birth (Rule-21), Chandpur, Bangladesh that lists his son's date of birth as October 22, 1981. On the reverse side of this extract, August 1, 2006, is listed as the date on which this birth was registered.

The applicant concluded through counsel that the record establishes that he resided continuously in the United States throughout the statutory period.

The applicant submitted what he purported to be an employment verification letter from D-W Pharmacy, a New York City business, that covered the period of 1983 through 1990 and which listed a telephone number with an area code of 2-1-2, which, for over six years, had been obsolete in the area where the pharmacy was located. In the NOID dated September 13, 2006, the director pointed out that the employment verification letter appeared inauthentic because the area code for D-W Pharmacy and its surrounding businesses had changed from 2-1-2 to 7-1-8 during 1984. On appeal, the applicant indicated through counsel that outdated letterhead stationery had been used by the pharmacy's owner by accident. The applicant also submitted the statement of [REDACTED]. Mr. [REDACTED] indicated that he was the applicant's friend and that he knew the applicant worked at D.W. Pharmacy from 1983 through 1990. Mr. [REDACTED] also explained that Mr. [REDACTED] the owner of the pharmacy, is absent-minded and that is why he used outdated letterhead stationery when preparing the employment verification letter for the applicant.

The AAO finds that any assertion that the pharmacy owner simply used stationery with an outdated telephone number in the letterhead is not reasonable given how many years had passed between when the area code had changed and when the letter must have been written.

The applicant also submitted a blank prescription receipt which listed D-W Pharmacy in its heading along with a telephone number that used the updated 7-1-8 area code. The AAO finds that this evidence is neither probative, nor relevant.

In addition, the applicant listed his son's date of birth as October 22, 1982 on one of the Forms I-485 and one of the Forms I-687 in the record. On the Form I-485 submitted under the LIFE Act, the applicant stated that he had no children. The AAO finds that the document in the record which the applicant purports to be a record of the registration of his son's birth is neither reliable nor probative regarding the date of this birth because the document states on its face that it refers to a registration that occurred more than fourteen years after the birth.

These discrepancies in the record cast serious doubt on the authenticity of all the evidence submitted. This in turn casts doubt on 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).

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. It is not sufficient for the applicant to attempt to explain such contradictions as being the consequence of simple human error or his former wife's decision to cut off correspondence between the applicant and his son.

The applicant failed to provide credible, contemporaneous evidence that might be considered independent, objective proof of his having resided in the United States from a date prior to January 1, 1982 and throughout the statutory period. The various envelopes in the record which the applicant claimed were sent to him during the statutory period are postmarked with dates beginning in March 1982 and following. These envelopes, even if the postmarks with which they are stamped were found to be authentic, are not sufficient to establish that the applicant was in the United States *throughout* the statutory period.

The AAO also finds that the various statements in the record which purport to substantiate the applicant's continuous residence in the United States throughout the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States in an unlawful status from a date prior to January 1, 1982 through May 4, 1988, and that these documents do not have probative value in this matter.

The applicant has failed to establish continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and through May 4, 1988. Thus, the applicant is not eligible 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.