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[REDACTED]

FILE:

[REDACTED]

Office: LAS VEGAS

Date:

AUG 26 2008

MSC 02 057 66395

IN RE: Applicant:

[REDACTED]

APPLICATION:

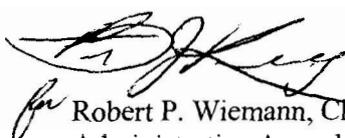
Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by LIFE Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

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.


for 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 District Director (director) in Las Vegas, Nevada. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the ground that the applicant failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988.

On appeal counsel asserts that the applicant has submitted sufficient evidence to establish his eligibility for adjustment under the LIFE Act.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

“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.” (Emphases added.)

“Continuous physical presence” is described in section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and 8 C.F.R. § 245a.16(b), in the following terms: “An alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of *brief, casual, and innocent absences* from the United States.” (Emphasis added.) The regulation further explains that “[b]rief, casual, and innocent absence(s) as used in this paragraph means *temporary, occasional trips abroad* as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States.” (Emphasis added.) 8 C.F.R. § 245a.16(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 its amenability to verification. *See* 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 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 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.

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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

The applicant, a native of Peru who claims to have lived in the United States since January 1980, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on November 26, 2001. As evidence of his residence in the United States during the years 1980-1988 the applicant submitted the following documents, some of which had originally been filed in 1989. They included the following:

- An affidavit from [REDACTED] a resident of Las Vegas, Nevada, dated October 20, 1989, stating that he has first-hand knowledge of the applicant’s continuous residence in the United States since 1981, that he would stay with the applicant sometimes when he visited New York and that the applicant would sometimes visit him in Las Vegas.
- An affidavit from [REDACTED], a resident of Las Vegas, Nevada, dated November 2, 1989, stating that he has first-hand knowledge of the applicant’s continuous residence in the United States since 1981, that he met the applicant through some friends, that he and the applicant became friends and would visit each other.

- An affidavit from [REDACTED] dated November 2, 1989, stating that the applicant is her brother, that she has first-hand knowledge of the applicant's continuous residence in the United States since 1981 and that they have spent a lot of time together since being in the United States.

A letter from the owner of Orlando Travel in Jackson Heights, New York, dated December 19, 2003, stating that the applicant was employed for five months starting in February 1982, and was paid \$150.00 per week.

- A letter from the office manager of Nabeta Travel Inc. in Passaic, New Jersey, dated December 20, 2003, stating that the applicant performed cleaning services in their office from February 1983 through May 1983, and was paid \$90.00 per week.

An affidavit from [REDACTED], a resident of Corona, New York, dated November 16, 1989, stating that he had known the applicant since 1980 and that the applicant used to be his "helper driver" from 1980 to 1989, at which time the applicant moved to Las Vegas.

- Affidavits from [REDACTED], residents of Far Rockaway, New York, dated November 17-18, 1989, stating that they had known the applicant since 1980, and knew that the applicant had resided in the United States continuously since 1980.

An affidavit from [REDACTED] a resident of Brooklyn New York, dated December 9, 1989, stating that he had known the applicant since 1980, and that they had been roommates at [REDACTED], Brooklyn, New York, since the applicant first came to the United States in 1980.

In a Notice of Intent to Deny (NOID), dated February 14, 2006, the director, indicated that the applicant failed to provide sufficient credible evidence to establish that he resided continuously in the United States from before January 1, 1982, through May 4, 1988, and that he had been continuously physically present in the United States from November 6, 1985 through May 4, 1988. The director also noted that the applicant twice failed the basic citizenship skills test administered on November 13, 2003 and June 15, 2004. The applicant was granted 30 days to submit additional evidence.

In response, counsel submitted additional documentation, which included the following:

- Another affidavit from [REDACTED], dated June 20, 2006, stating that he first met the applicant in 1980 at Flushing Meadows Park where the applicant was helping some people sell soda, that they became friends from 1980 to 1988, that he saw the applicant at the park around once or twice a week, that sometime in 1988, he

introduced the applicant to his employer - ACME Produce - and that the company offered the applicant employment sometime in 1988. Mr. [REDACTED] further affirms that the applicant worked for ACME Produce Company for two years, that they worked together and that he offered the applicant a room at his [REDACTED]

Brooklyn, New York apartment from 1988 until the applicant moved from New York.

An affidavit from [REDACTED] a resident of Las Vegas, Nevada, dated June 19, 2006, stating that he first met the applicant in June or July 1984 at Flushing Meadows Park, that he resided in New York at that time and used to play soccer with his friends at the park, that he would regularly buy sodas and chips from the applicant, that he would regularly see the applicant at the park whenever he played soccer there, that he continued to see the applicant until November 1987, when he moved to Texas, and that he has personal knowledge of the applicant's physical presence in the United States from 1984 to 1987.

- An affidavit from [REDACTED], a resident of Las Vegas, Nevada, dated June 19, 2006, stating that he first met the applicant in 1987 when the applicant was helping some people sell snacks and beverages at Flushing Meadows Park, that he used to play soccer at the park and would buy beverages from the applicant, that he saw the applicant twice a week from 1987 to 1990, when the applicant moved to Las Vegas, and that he has personal knowledge of the applicant's presence in the United States during that period.

An affidavit from [REDACTED] a resident of Las Vegas, Nevada, dated June 20, 2006, stating that she used to live in Elmhurst, New York, that she met the applicant in 1985 at her apartment complex in Elmhurst when he was helping the building superintendent shovel snow, that she would see the applicant every morning helping the superintendent until the spring of 1986 when the superintendent told her that the applicant moved to White Plains, New York, and that she has personal knowledge of the applicant's presence in the United States from November 1985 until April or May 1987.

Another affidavit from [REDACTED] and [REDACTED], dated June 20, 2006, stating that they first met the applicant in March 1980 at a party at their friend's house in Queens, New York, that two months later the applicant began to help them sell sodas at Flushing Meadows Park every weekend until sometime in 1990, when the applicant moved to Las Vegas, that they paid the applicant in cash, and that they know the applicant was present in the United States from 1980 until he moved to Nevada in 1990.

On October 4, 2006, the director issued a Notice of Decision denying the application. The director found that the applicant's rebuttal and the documentation submitted in response to the

NOID were insufficient to overcome the grounds for denial. The director cited the affidavits submitted by the applicant as unverifiable and contradictory. The director concluded that the affidavits undermined the credibility of the applicant's claim that he entered the United States before January 1, 1982 and resided continuously in the country through May 4, 1988.

On appeal, counsel offered some explanation for the inconsistencies noted by the director in his decision. In counsel's opinion, the evidence submitted by the applicant is sufficient to establish that he has been residing in the United States since before January 1, 1982. The applicant submitted no additional documentation with the appeal.

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).

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The AAO determines that he has not.

The letters from [redacted] of Orlando Travel, dated December 19, 2003, and from [redacted] of Nabeta Travel Inc, dated December 20, 2003, do not comport with the regulatory requirements of 8 C.F.R. § 245a.2(d)(3)(i) because they do not provide the applicant's address at the time of employment, do not indicate whether the information was taken from company records, and do not indicate whether such records are available for review. The AAO also notes that the applicant made no mention of these employers on the Form I-687 he filed in 1990. The letters were not supplemented by any earnings statements, pay stubs, or tax records demonstrating that the applicant actually had the jobs during any of the periods claimed.

For the reasons discussed above, the AAO determines that the employment letters have limited probative value. They are not persuasive evidence of the applicant's continuous residence in the United States during the years 1981 through 1988.

The affidavits from [redacted] dated October 20, 1989, from [redacted] dated November 2, 1989, from [redacted] dated November 2, 1989, from [redacted] dated December 9, 1989, from [redacted] dated December 9, 1989 and June 20, 2006, from [redacted] and [redacted], dated November 17 and 18, 1989 and June 20, 2006, from [redacted] dated June 19, 2006, from [redacted] dated June 19, 2006, and from [redacted] dated June 20, 2006, all stating that the affiants have known the applicant since the 1980s, provide limited information about the applicant's life in the United States and his interactions with the affiants over the years. The affidavits were not accompanied by any documentary

evidence from the affiants – such as photographs, letters, and the like – of their personal relationship with the applicant in the United States during the 1980s.

The information on the affidavit from [REDACTED] dated December 9, 1989, is inconsistent with the information on his affidavit dated December 20, 2006. While the affiant claimed on December 9, 1989, that he and the applicant were roommates from 1980 to 1989 at [REDACTED], Brooklyn New York, he attests on the June 20, 2006 affidavit that he and the applicant became roommates in July 1988. The contradictory information on the affidavits is also inconsistent with the information provided by the applicant on his previously filed Form I-589 dated March 26, 1997, Form EOIR-42B, filed on March 26, 1997, and Form G-325A, dated March 6, 1997. On these forms the applicant listed his residence as [REDACTED] Woodside, New York, from January 1980 to May 1989.

The inconsistencies noted above cast doubt to the veracity and reliability of the affidavits as credible evidence of the applicant's residence in the United States during the periods stated. 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 without competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

In view of the substantive shortcomings discussed above, the AAO finds that the affidavits have little probative value. They are not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988.

Based on the foregoing analysis of the evidence, the AAO concurs with the director's decision that the applicant has failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A).

Beyond the decision of the director, an applicant for permanent resident status must demonstrate under section 1104(c)(2)(E)(i) of the LIFE Act regarding basic citizenship skills, 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 [Secretary of Homeland Security]) 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 Secretary of Homeland Security may waive all or part of the above requirements for aliens who are at least 65 years of age or who are developmentally disabled. *See also* 8 C.F.R. § 245a.17(c).

An applicant may establish that he or she has met the requirements of section 312(a) of the Immigration and Nationality Act (Act) by demonstrating an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language, and by demonstrating a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States. *See* 8 C.F.R. § 245a.17(a)(1) and 8 C.F.R. §§ 312.1 – 312.3.

An applicant may also establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by providing a high school diploma or general educational development diploma (GED) from a school in the United States. *See* 8 C.F.R. § 245a.17(a)(2). The high school or GED diploma may be submitted either at the time of filing the Form I-485 LIFE Act application, subsequent to filing the application but prior to the interview, or at the time of the interview. *Id.*

Finally, an applicant may establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by establishing that:

He or she has attended, or is attending, a state recognized, accredited learning institution in the United States, and that institution certifies such attendance. The course of study at such learning institution must be for a period of one academic year (or the equivalent thereof according to the standards of the learning institution) and the curriculum must include at least 40 hours of instruction in English and United States history and government. The applicant may submit certification on letterhead stationery from a state recognized, accredited learning institution either at the time of filing Form I-485, subsequent to filing the application but prior to the interview, or at the time of the interview (the applicant's name and A-number must appear on any such evidence submitted).

8 C.F.R. § 245a.17(a)(3).

An applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the initial LIFE interview shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the required tests or to submit the evidence described above. *See* 8 C.F.R. § 245a.17(b).

On November 13, 2003 the applicant was interviewed for LIFE legalization. He passed the test of ordinary English language but failed the test of basic knowledge of U.S. history and government during the examination portion of the interview.

At his second interview for LIFE legalization, on June 15, 2004, the applicant again failed the test of basic knowledge of United States history and government for the second and final time.

In the NOID dated February 14, 2006, the director notified the applicant that he failed to meet the citizenship skills requirement of a basic understanding of the history and government of the United States for the second and final time. The applicant was granted 30 days to submit additional evidence. The applicant did not provide a response on this issue in his rebuttal. In his October 4, 2006, Notice of Decision, however, the director failed to determine whether the applicant has met the basic citizenship skills requirement under the LIFE Act.

The applicant has not satisfied the basic citizenship skills for LIFE legalization under any of the three options set forth in the regulations. On two separate occasions he failed to pass examinations of his knowledge of U.S. history and government, as required under 8 C.F.R. § 245a.17(a)(1). He did not provide a high school diploma or GED from a school in the United States, as required under 8 C.F.R. § 245a.17(a)(2). Nor did the applicant show at the time of his second interview on June 15, 2004, that he had attended, or was attending, a state recognized, accredited learning institution in the United States, following a course of study which spans one academic year and that includes 40 hours of instruction in United States history and government, as required under 8 C.F.R. § 245a.17(a)(3).

The applicant is not 65 years old or older and there is no evidence in the record that he is developmentally disabled. Thus, the applicant does not qualify for either of the exceptions listed in section 1104(c)(2)(E)(ii) of the LIFE Act.

The applicant has failed to demonstrate that he has met the basic citizenship skills requirement as described at 1104(c)(2)(E) of the LIFE Act. On this ground as well, therefore, the applicant has failed to establish his eligibility for legalization under the LIFE Act.

The appeal will be dismissed, and the application denied.

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