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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
MSC 02 246 64591

Office: NEW YORK

Date: FEB 12 2006

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. The file has been returned to the National Benefits Center. 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The district director denied the application because the applicant failed to demonstrate credibly that he was continuously physically present in the United States since November 6, 1986.

On appeal, counsel asserted that the director denied the application solely due to the applicant's alleged failure to respond to a Notice of Intent to Deny (NOID). Counsel asserted that the applicant had, in fact, responded to two such notices issued in this matter. Counsel further stated, "The [applicant] meets all of the requirements to be granted permanent residence pursuant to Section 1104 of the LIFE ACT and his application should be decided on the merits," but did not otherwise address the substantive basis for the decision of denial.

An applicant for temporary resident status pursuant to the LIFE Act must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from that date until May 4, 1988. 8 C.F.R. § 245a.11(b). The regulation at 8 C.F.R. § 245a.15(c)(1) provides that an applicant shall be regarded as having resided continuously if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days.

The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been continuously physically present in the United States from November 6, 1986 until May 4, 1988. 8 C.F.R. § 245a.11(c). As to continuous physical presence since November 6, 1986, 8 U.S.C. § 1255a(a)(3) states, "[a]n 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." *See also* 8 C.F.R. § 245a.16(b).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, has been physically present in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The sufficiency of all evidence provided by the applicant will be judged according to its value and credibility. 8 C.F.R. § 245a.12(f). To meet his or her burden of proof, however, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.2(d)(6).

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 filed the following documents to support his claim that he resided continuously in the United States from prior to January 1, 1982 through the date of filing:

- Four form affidavits from acquaintances of the applicant and attesting to his presence in the United States since February, March, June, and October of 1981.

A letter dated August 20, 1981 from a medical doctor in New York stating that he treated the applicant there from August 1, 1981 to August 20, 1981.

- A form letter dated March 1, 1992 purporting to be from a New York religious organization and to be signed by its president. The body of that letter reads, in its entirety,

This is to certify that Mr/Mrs _____ now residing at _____ is well[-]known to me. He/She is a member of this council (MADINA MASJID*).

Mr/Mrs _____ comes to this council (MADINA MASJID*) for a long time to offer his/her prayers and other religious activities.

The name and address of the applicant were written into the blank spaces on that letter.

- A membership application, also dated March 1, 1992 indicating that the applicant applied, on that date, to join the religious organization that provided the form letter described above.¹
- A letter notarized on March 10, 1992 that purports to be from the president of a New York restaurant and states that the applicant worked at that restaurant since July 1981, as a part-time employee two years, and later full-time. That letter is not on letterhead, and does not state the applicant's duties, declare whether or not the information was taken from company records, and identify the location of such company records, or state whether such records are accessible or in the alternative state the reason why such records are unavailable, as required by 8 C.F.R. § 245a.2(d)(3)(i).
- An affidavit notarized on June 22, 1992 stating that the applicant was absent from the United States from November 10, 1987 to December 20, 1987. The affiant states that the reason for the absence was, "[to] seek a better life in Canada." The affidavit states that the affiant knows the applicant personally but does not otherwise describe their relationship. The affidavit does not state the basis for the affiant's asserted knowledge of the applicant's movements and motive, except to say that it is from personal knowledge.
- A letter dated July 16, 1992² stating that the applicant had lived with the writer since February 1981 and continued to live with the writer on the date of the letter. The writer's address and phone number are not provided on that letter. The letter was not accompanied by any evidence that the writer actually lived in the United States during the salient period.
- A declaration, notarized on July 21, 1992, stating that the applicant visited the affiant in Canada and was absent from the United States from November 10, 1987 to December 20, 1987. The declaration states that the affiant is a restaurateur and knows the applicant personally but does not otherwise describe their relationship.
- The May 1993 statement pertinent to the applicant's checking account
- An undated Form for Determination of Class Membership in *CSS v. Thornburg* (Meese) indicating that, in answer to Item 8, the applicant indicated that he departed the United States for Canada on November 10, 1987 and returned on December 20, 1987. In answer to Item 9(d) the applicant stated that he went to Canada, "[t]o seek a better life for [himself] and to

¹ This office looks askance at a form letter attesting to long-time attendance of religious services by an applicant prior to a given date, submitted contemporaneously with an application indicating that the applicant applied for membership in the organization on that same date. The application was not denied based on the credibility and reliability of the evidence submitted, however, and this office need not further address that issue.

² Actually, although the typed letter is dated July 16, 1992, the signature is dated July 19, 1992. The significance of that discrepancy is unknown to this office.

help my family in Bangladesh.” Item 9(h) indicates that the applicant stated that he re-entered the United States because, “[He] was not satisfied with life in Canada.”

The record contains no other evidence pertinent to the applicant’s presence in the United States during the salient period.

In a NOID, dated September 13, 2005,³ the director noted that in an interview the applicant indicated that he left the United States and entered Canada on November 10, 1987, that he remained there until December 20, 1987, and that he went to Canada at that time “to seek a better life for [himself] and to help [his] family in Bangladesh.” The director found that seeking employment in Canada indicates that the applicant intended to reside in Canada, that the applicant’s absence was not, therefore, casual within the meaning of 8 U.S.C. § 1255a(a)(3), that the applicant was therefore not continuously physically present in the United States from November 6, 1986 to the date he filed his application as required by Section 245A(a)(3) of the Act and the regulation at 8 C.F.R. § 245a.2(b)(1), and that the applicant was therefore ineligible for temporary resident status pursuant to Section 245A of the Act. The applicant was accorded 30 days to respond to that notice.

In response, counsel submitted a letter dated September 27, 2005, in which he argued that, because the applicant’s absence from the United States did not exceed 45 days, it was insufficient to break his continuous residence. Counsel asserted that the evidence in the record demonstrates the applicant’s eligibility.

In the Notice of Decision, dated July 22, 2005, the director denied the application based on the reasons stated in the NOID. The director also incorrectly stated that the applicant had not responded to the NOID. On appeal, counsel’s only substantive assertion was that the applicant is eligible for the benefit sought.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he was continuously present in the United States from November 6, 1986 until May 4, 1988.

The evidence provided in support of the application indicates that, in general, the applicant lived in the United States during the salient period, and, notwithstanding certain discrepancies and shortcomings, the director did not call that evidence into question. Because the credibility of the evidence was not called into question in the NOID or the decision of denial, this office will not base today’s decision on the flaws in that evidence, but will accept it as reliable.

For the purpose of today’s decision, then, the evidence submitted is accepted as showing that the applicant first entered the United States during February of 1981, that he sought treatment of a medical condition in New York during August of 1981, that he worshipped at a New York religious organization for a long time prior to March 1, 1992 and applied for membership on that date, that he worked at a New York restaurant beginning during July of 1981 and continuing until at least March

³ The director issued a duplicate NOID on April 4, 2006, possibly as the result of a clerical error.

10, 1992, that he left the United States on November 10, 1987 to seek a better life in Canada, and that he returned to the United States on December 20, 1987 because he was dissatisfied with life in Canada.

Because the evidence indicates that the applicant has been present in the United States with the exception of the time he spent in Canada, whether the instant application may be approved hinges upon whether the applicant's departure to Canada on November 10, 1987 interrupted his continuous residence.

The only assertion counsel has made pertinent to the basis for the decision of denial is that contained in his September 27, 2005 response to the NOID, that the applicant's absence from November 10, 1987 to December 20, 1987 does not affect his eligibility for temporary resident status because it was less than 45 days.

As was noted above, the applicant is required to demonstrate continuous residence in the United States from January 1, 1982 through May 4, 1988. 8 C.F.R. § 245a.11(b). Pursuant to 8 C.F.R. § 245a.15(c)(1) an applicant's continuous residence shall not be deemed to have been interrupted if no single absence during the salient period was longer than 45 days and the aggregate of all absences does not exceed 180 days. That is not the issue in this case.

The applicant is also required, by section 245A(a)(3) of the Act and 8 C.F.R. § 245a.11(c) to show that he was continuously physically present in the United States from November 6, 1986 until May 4, 1988, except that 8 U.S.C. § 1255a(a)(3) provides that continuous physical presence in the United States shall not be deemed to have been interrupted by virtue of brief, casual, and innocent absences. Whether the applicant's absence from the United States constitutes a brief, casual, and innocent absence is the issue in this case.

The applicant indicated that he went to Canada to seek a better life and to help his family, and that he returned to the United States because he was not satisfied with his life in Canada. Other evidence in the record confirms the applicant's assertion. The applicant's statement does, as the director noted, imply that he was seeking employment in Canada and sought to live there. This was not, therefore, a casual visit. The application was correctly denied on this basis, which has not been overcome on appeal.

The applicant failed to sustain his burden of proof and to establish continual physical presence in the United States since November 6, 1986 as required under Section 245A(a)(3) of the Act. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act. The appeal will be dismissed.

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