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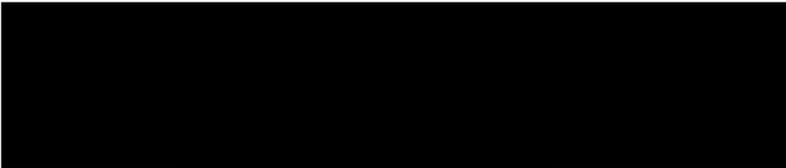
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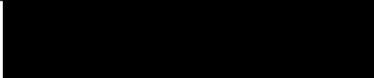
U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEW YORK

Date:

FEB 27 2008

MSC 02 249 64459

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:

Self-represented

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.

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, New York City. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director denied the application on the grounds that the applicant failed to establish that she had resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, and was continuously physically present in the United States from November 6, 1986 through May 4, 1988.

On appeal, the applicant submits a letter and requests that her case be reconsidered.

To be eligible for adjustment to permanent resident status under the LIFE Act an applicants must establish his or her continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, and 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 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 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 her application for permanent resident status under the LIFE Act (Form I-485) on June 6, 2002. In a Notice of Intent to Deny (NOID), dated March 9, 2005, the director reviewed six affidavits in the record – five from residents of Brooklyn, New York, dating from 2004 and one from a resident of Baldwin, New York, dating from 1990 – all of which assert that the applicant has been in the United States since August 1981. The director noted that none of the affiants provided personal identification, a contact phone number, proof that they were present in the United States during the statutory period of the 1980s, or proof of direct personal knowledge of the events being attested. Given these omissions, the director stated, the affidavits failed to overcome the lack of primary or secondary evidence in the record. The director also cited evidence that the applicant had been absent from the United States from June 29 to August 15, 1987 – a 47-day period – which exceeded the 45-day maximum prescribed in 8 C.F.R. § 245a.15(c)(1) and called into question the applicant’s claim of continuous residence in the United States from January 1, 1982 through May 4, 1988, as well as her continuous physical presence in the United States from November 6, 1986 through May 4, 1988. The applicant was granted thirty days to submit additional evidence.

The applicant responded with a letter in which she confirmed three short-term visits to her native Trinidad from 1982 to 1986 and explained that a fourth visit in the summer of 1987 (the 47-day stay referenced in the NOID) was for the purpose of giving birth to her son, with whom she returned to the United States. The applicant also submitted the current addresses and telephone numbers of the five affiants who had prepared affidavits in 2004.

On May 27, 2005 the director denied the application, determining that the additional documentation and information furnished by the applicant was insufficient to overcome the grounds for denial discussed in the NOID. While acknowledging that the addresses and phone numbers of the affiants improved the credibility of their affidavits, the director stated that they still did not provide any proof that the affiants had direct personal knowledge of the events and circumstances of the applicant’s residence in the United States. The applicant’s trip to Trinidad during the summer of 1987 exceeded 45 days, the director declared, and therefore broke her continuous residence in the United States. The director also determined that the trip to Trinidad broke the applicant’s continuous physical presence in the United States during the requisite period of November 6, 1986 to May 4, 1988 because its excessive length – over 45 days – and

the applicant's return to the United States with her new son in violation of U.S. immigration law did not make it a "brief, casual, and innocent" absence from the United States.

On appeal, the applicant submits a letter explaining that she had medical complications in her pregnancy and a difficult delivery, which delayed her return from Trinidad but did not interrupt her continuous residence in the United States. The applicant has provided no medical records or other documentation in support of this claim. Accordingly, the record does not support a finding that "emergent reasons," as contemplated in the definition of "continuous unlawful residence" at 8 C.F.R. § 245a.15(c)(1),¹ accounted for the applicant's extended stay in Trinidad during the summer of 1987, which might permit an exception to the 45-day limit for a single absence from the United States. The applicant refers to her previously submitted affidavits from acquaintances, but has provided no further information from the affiants of the types discussed in the NOID and the denial decision to enhance their credibility. The AAO notes that the five affidavits from 2004 are virtually identical fill-in-the-blank formats with very little original writing by the affiants or personal information from them about their relationships to the applicant. The other affidavit, from 1990, is from an individual who claims to have employed the applicant as domestic help from August 1981 to January 1984. The affiant has provided no employment records, however, and no details as to the location of the work, the applicant's address at the time, and whether she maintained any contact with the applicant after January 1984. Nor has the applicant submitted any earnings statements, tax returns, or other corroborating documentation relating to the employment.

Thus, the evidence of record is insufficient to establish that the applicant 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). The director's denial application on this ground will therefore be affirmed.

With regard to the other ground for denial, the director's determination that the applicant's trip to Trinidad in the summer of 1987 was not "brief, casual, and innocent" and therefore interrupted her continuous physical presence in the United States from November 6, 1986 through May 4, 1988, was only partially correct. It was incorrect insofar as the director concluded that an absence of more than 45 days was no longer "brief" within the meaning of the statute, section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and the regulation, 8 C.F.R. § 245a.16(b). The 45-day maximum absence from the United States appears in the regulatory definition of "continuous residence," but does not appear anywhere in the definition of "continuous physical presence." In fact, a federal district court specifically found in the case of *Fernandez v. McElroy*, 920 F.Supp. 428, 448 (S.D.N.Y. 1996) ("*Fernandez*"), that a three-month absence from the United States caring for a dying family member in India did not break an illegal alien's continuous physical presence in the United States for the purpose of maintaining his eligibility for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"), the forerunner of the LIFE Act. Though *Fernandez* is not binding precedent for district offices or the AAO, the court's ruling is persuasive that in determining whether the duration of an alien's absence from the United States qualifies as "brief," we should be guided by the circumstances of each individual case. In light of *Fernandez* and the lack of any numerical definition of "brief" in the pertinent statute or regulation, the AAO concludes that the director erred in declaring that an absence of more than 45 days *ipso facto* broke the applicant's continuous physical presence in the United States for the purposes of LIFE legalization. However, the AAO agrees with the director that the applicant's return to the United

¹ Although the term "emergent reasons" is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that *emergent* means "coming unexpectedly into being."

States with a newborn child – who was a citizen of Trinidad without legal status in the United States – did not comport with an “innocent” absence from the country and represented a break in her continuous physical presence in the United States for the purposes of LIFE legalization.

The meaning of the term “brief, casual, and innocent absence” is fully discussed in the *Fernandez* case. The district court discussed the historic meaning of the phrase dating from a Supreme Court decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963). In that earlier case the Supreme Court construed a section of immigration law defining “entry” into the United States and determined that an afternoon trip to Mexico by a permanent resident alien was “innocent, casual, and brief,” not an “intent to depart” the United States that could “be regarded as meaningfully interruptive of the alien’s permanent residence,” triggering entry requirements upon return. *Rosenberg v. Fleuti*, 374 U.S. at 461-62. Factors relevant in determining whether an absence is “meaningfully interruptive” of permanent residence, the Court explained, included (1) the duration of the absence, (2) the purpose of the absence and whether it was intended to accomplish some object contrary to a policy of U.S. immigration law, and (3) the need for documentation to make the trip. See *Fernandez, id.*, at 445. Over the years the so-called “Fleuti” factors have been applied more broadly to include determinations of whether absences from the United States by illegal aliens are meaningfully interruptive of their continuous physical presence in the country. See *id.* at 445-46.

In the case at issue, the applicant states that she was absent from the United States for 47 days in the summer of 1987 to give birth to a child in Trinidad, and that when she returned to the United States illegally she also brought her new child into the country. While the duration of the applicant’s absence was not so long as to necessarily interrupt her continuous physical presence in the United States, one purpose of her absence was to bring another alien back with her into the United States illegally, which was “contrary to a policy of U.S. immigration law” (“Fleuti” factor no. 2). A first time entry into the United States by a newborn infant would ordinarily require proper documentation (“Fleuti” factor no. 3). The AAO concurs with the director, therefore, that the applicant’s trip to Trinidad in the summer of 1987 was not an “innocent” absence from the United States within the meaning of 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), and that it interrupted the applicant’s continuous physical presence in the United States during the requisite time period of November 6, 1986 to May 4, 1988. Accordingly, the director’s denial of the application on this ground will also be affirmed.

For the reasons discussed above, the applicant has failed to establish her eligibility for permanent resident status under the LIFE Act. The director’s decision will be affirmed.

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