



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: [Redacted] MSC 02 241 63488

Office: HOUSTON

Date: JAN 09 2008

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. 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

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, Houston, Texas, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to establish that he resided continuously in the United States in an unlawful status since January 1, 1982, through May 4, 1988. The director also determined that the applicant was convicted of a felony offense and therefore ineligible for adjustment.

On appeal, counsel asserts that the discrepancy regarding the applicant's absence during the statutory period was due to a translation error, and his prolonged absence due to emergent reasons. Counsel further states that the applicant is eligible for adjustment of status as the felony conviction was dismissed in State Court.

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she 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 (Act) that were most recently in effect before the date of the enactment of this Act shall apply.

The regulation at 8 C.F.R. § 245a.15(c)(1) defines “continuous unlawful residence” 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. (Emphasis added.)

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 or 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).

In the Notice of Intent to Deny (NOID), dated December 1, 2004, the director stated that the applicant failed to establish continuous unlawful residence in the United States from before January 1, 1982, through May 4, 1988, as well as maintain continuous physical presence in the United States from November 6, 1986, through May 4, 1988. The director also stated that the applicant failed to establish his exit was for an emergent reason. The director granted the applicant thirty (30) days to rebut and/or submit evidence to overcome the denial. It is noted that the director applied an incorrect standard. The applicant must establish that his *return* to the United States was delayed due to an emergent reason, not his *exit* from the United States. The AAO considers this a harmless error as the AAO reviews appeals de novo basis.

On December 28, 2004, counsel responded to the NOID and stated the discrepancy in the applicant's claim was due to translation error. Counsel asserted that the applicant had established continuous unlawful residence due to emergent reasons.

In a January 24, 2005, Superseding Notice of Intent to Deny, the director reiterated the reasons for denial as noted in the December 1, 2004, NOID. The director also determined that the applicant was ineligible for adjustment of status due to a felony criminal conviction. The director granted the applicant thirty (30) days to rebut and/or submit evidence to overcome the denial. The record reflects that no rebuttal or evidence was received. The director denied the instant application in the Notice of Decision dated April 19, 2005.

The issues in this proceeding are whether the applicant has established continuous unlawful residence during the requisite period and that his prolonged absence was due to emergent reasons; and whether the applicant is ineligible for adjustment of status due to his criminal conviction.

Continuous Unlawful Residence

The first issue in this proceeding is whether the applicant has established continuous unlawful residence during the requisite period and that his prolonged absence was due to emergent reasons.

In an October 8, 2004, interview, the applicant stated that he departed the United States to Mexico for two to three weeks in June 1987. In his Form I-687, Application of Status as a Temporary Resident, the applicant stated that he was absent from the United States on June 30, 1987, through September 2, 1987, to visit his wife who was expecting a baby. The applicant reiterated this statement on his Affidavit for Determination of Class Membership and at an interview on December 29, 1993. The director determined that the applicant's subsequent statements were in direct contradiction to his original statement.

On appeal, counsel contends that the applicant intended to say two to three months, instead of two to three weeks, in his original statement. Counsel asserts that the discrepancy is merely a mistake in the applicant's translation. The applicant submitted his own affidavit in an attempt to explain the discrepancy. To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). Although it is a probable explanation, 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). The applicant submitted a December 28, 2004, letter by his wife, [REDACTED]. She stated that her son was born on July 29, 1987, and the applicant was with her for approximately two to three months because she was in the hospital after the birth of son for two months due to excessive bleeding post-partum. The applicant also submitted a birth certificate for his son born on July 29, 1987, in Mexico. [REDACTED]'s statement serves two purposes. She simultaneously reconciles the applicant's inconsistent statements and also provides an emergent reason for his prolonged absence from the United States.

It is noted that the applicant also submitted a December 16, 2004, letter by [REDACTED] M.D. of Fannett Medical Center in Beaumont, Texas. [REDACTED] stated that he had been treating the applicant's wife for multiple medical problems since 1996. [REDACTED] stated that the applicant's wife had been confined in a hospital in Mexico for two months in 1987 due to bleeding when her son was born. He further stated that the applicant's wife had a cesarean section due to bleeding in 1993, and a hysterectomy in 1998 because of her medical difficulties during her previous pregnancies. While the affiant does not attest to having first-hand knowledge of [REDACTED] medical condition in 1987, the affiant does serve to corroborate her history of medical problems related to the 1987 pregnancy.

In the Notice of Decision, the director incorrectly stated that the applicant failed to establish his exit was for an emergent reason. The applicant must establish that his return was delayed due to emergent reasons. 8 C.F.R. § 245a.15(c)(1) On appeal, counsel asserts that the applicant did not return to the United States within forty-five days because of his wife's medical complications due to child birth. Although this term is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808

(Comm. 1988) holds that *emergent* means “coming unexpectedly into being.” The AAO finds that the above reason meets the definition of emergent as the applicant could not return to the United States due to the unexpected post-partum medical condition of his wife. Thus, the applicant has established continuous unlawful residence during the requisite period and the director’s decision regarding this issue will be withdrawn.

Ineligibility

The second issue in this proceeding is whether the applicant is ineligible for adjustment of status due to his felony offense in 1991. An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is ineligible for adjustment to legal permanent resident status under 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a).

The record reflects that on October 19, 1990, the applicant was charged with *accident involving personal injury or death* in violation of section 550.021 of the Vernon’s Texas Code Annotated, Transportation Code (formerly *failure to stop and render aid* of article 6701d, section 38 of the Vernon’s Annotated Civil Statute¹). On December 13, 1990, the applicant was indicted for *accident involving personal injury or death* in violation of section 550.021, a felony, in the 252nd District Court of Jefferson County (Cause # [REDACTED]). On July 29, 1991, the applicant entered a plea of guilty to the District Court of Jefferson County. The Court found beyond a reasonable doubt that the evidence supported a finding of guilt. In a Deferred Adjudication Order, the Court deferred an adjudication of guilt and placed the applicant on probation for a period of five years. On January 30, 1995, the case was dismissed due to the fact that the applicant had satisfactorily served more than one third of the sentence.

On appeal, counsel asserts that the applicant’s deferred adjudication for *accident involving personal injury or death* was not a conviction for immigration purposes. Counsel contends that the applicant’s deferred adjudication for *accident involving personal injury or death* was not a “conviction” because the proceedings against the applicant were ultimately dismissed and the applicant was discharged on January 30, 1995, because he had satisfactorily served more than one third of his sentence.

According to section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101 (a)(48)(A),

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

¹ Acts 1995, 74th Leg. Ch. 165, § 1, eff. Sept. 1, 1995. Amended by Acts 2007, 80th Leg., ch. 97, § 2, eff. Sept. 1, 2007.

- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

On July 29, 1991, the applicant pled guilty to a felony offense, and the Texas Judge accepted the plea, heard evidence, found that it substantiated the applicant's guilt, fined him \$500.00 and placed him on five years probation under community supervision, but withheld "adjudication of guilt."

The applicant's deferred adjudication constitutes a conviction under section 101(a)(48)(A) of the Act, and does so notwithstanding the 1995 dismissal of the proceedings. *See Madriz-Alvarado v. Ashcroft*, 383 F.3d 321 (5th Cir. 2004).

Based on the above, the applicant has established continuous unlawful residence in the United States from before January 1, 1982, through the duration of the requisite period. However, the applicant remains ineligible for adjustment of status under 8 C.F.R. § 245a.11(d)(1) and 8 C.F.R. § 245a.18(a). Given this, he is ineligible for permanent resident status under Section 1104 of the LIFE Act.

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