



U.S. Citizenship
and Immigration
Services

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FILE:

MSC 02 081 61845

Office: HOUSTON, TEXAS

Date: **JAN 22 2008**

IN RE:

Applicant:

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. 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

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

The district 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. Specifically, the director found that the applicant provided inconsistent testimony regarding the manner in which he supported himself after entering the United States and regarding whether he had ever obtained a visa to enter the United States. The director also found that certain evidence in the record was inconsistent with the applicant's testimony regarding when he, his wife and child entered the United States and when he last spent time with his wife before entering the United States. The director concluded that the preponderance of the evidence indicated that the applicant had not entered the United States until after January 1, 1982.

On appeal, counsel asserted that the applicant did maintain continuous unlawful residence in the United States during the statutory period. Counsel also asserted that in the rebuttal the applicant overcame all the apparent inconsistencies in the record as laid out in the director's Notice of Intent to Deny (NOID). Counsel indicated that the director did not address what was insufficient in the rebuttal in his notice of denial. Counsel asserted that the director denied the applicant due process by merely stating in his denial that the application was denied based on the reasons set forth in the NOID.

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).

The regulation at 8 C.F.R. § 245a.15(c) provides in relevant part that an alien shall be regarded as having resided continuously in the United States if:

(1) 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.

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).

Here, the submitted evidence is not relevant, probative and credible.

The record indicates that on or near May 23, 1996, 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 December 20, 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 the following evidence relating 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:

- A. Notes from the May 17, 2004 sworn testimony taken during the applicant's LIFE late legalization interview, which indicate that the applicant testified that about one month after his April 1981 entry into the United States he arrived in Houston, Texas, where he supported himself by cleaning offices. He continued doing this work for 10 years. He could not give the name of who employed him during this period. After this, beginning in 1992, he worked at a flea market.
- B. The statement of [REDACTED] dated October 19, 2001 which indicates that the applicant worked with [REDACTED] for six months during 1982 at the Meineke Discount Muffler Shop located at the intersection of Kirkwood and Bellaire in Houston, Texas.
- C. The Form I-687, Application for Status as a Temporary Resident, signed by the applicant under penalty of perjury on December 3, 1995. At item #36 of this form the applicant stated that from April 1981 through December 1984 he was employed as a janitor by BPA

Contract Janitorial Services of 5800 Corporate Drive. The applicant failed to list the city in which BPA Contract Janitorial Services was located, but elsewhere on this form he stated that he lived in Houston, Texas during this period of employment. The applicant also stated at item #36 that from December 1984 through May 1991 he was self-employed. He indicated that his occupation during this period was that of "grocery store", apparently meaning that he was a self-employed grocer. In addition, the applicant indicated at item #36 that from June 1991 through October 1994 he owned and operated a business named "Young Lady Fashion."

- D. The director's NOID dated December 7, 2004. The NOID points out to the applicant that he testified during his LIFE late legalization interview to having worked for ten years, 1981 through 1991, cleaning offices, after which he worked at a flea market. However, the Form I-687 indicates that it was from April 1981 through December 1984 that he worked for a janitorial service, that from December 1984 through May 1991, he worked for himself, and that from June 1991 through October 1994, he worked at Young Lady Fashion.
- E. The rebuttal to the NOID which includes the applicant's affidavit dated January 4, 2005 in which the applicant attested that he did do janitorial work for ten years after arriving in the United States but that he could not provide an employer's name because he would pick-up various janitorial jobs from others on the street, in stores, etc. and he cannot recall the names of those for whom he worked, and that after this he found his jobs on his own and was self-employed as a janitor.
- F. Notes from the May 17, 2004 sworn testimony taken during the applicant's LIFE late legalization interview, which indicate that the applicant testified that he first entered the United States during April 1981 and that his wife and son first entered the United States during 1987. The applicant also testified that he first exited the United States during 1987.
- G. The statement of [REDACTED] of Houston, Texas dated March 6, 1992 which indicates that the applicant and his wife began living at [REDACTED]'s home in April 1981 just after they arrived in the United States and that they continued to live there for the three months that followed.
- H. The statements of six other individuals who indicate in their statements that they have knowledge of the applicant and his wife being present in the United States during 1981.
- I. The section of the NOID which indicates that statements and affidavits in the record contradict the applicant's LIFE late legalization interview testimony in that they indicate that the applicant and his wife have lived in the United States since 1981 but he testified that his wife and son did not enter the United States until 1987.
- J. The rebuttal to the NOID which includes the applicant's affidavit dated January 4, 2005 in which the applicant attested that the contradiction between his testimony regarding his wife entering in 1987 and the affiants attesting to his wife being present in the United States beginning in 1981 can be explained by the fact that so much time passed between when the applicant and his wife arrived, in 1981 and 1987, respectively, and when the affiants wrote

the affidavits. Also, the applicant indicated that it was natural for the affiants to think of the applicant and his wife as being here together because they are a married couple. In addition, the applicant indicated that his wife is very friendly and people feel that they have known her for a long time after just meeting her.

- K. The applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, Part 3B which indicates that the applicant's wife gave birth to his son in South Korea on March 1, 1982.
- L. The section of the NOID which points out for the applicant the inconsistency in the record in that he testified to having entered the United States in April 1981 and to his wife giving birth to his son in South Korea on March 1, 1982, more than nine months after the last time that he had seen his wife.
- M. The rebuttal to the NOID which includes the applicant's affidavit dated January 4, 2005 in which the applicant attested that he recalls that his wife delivered their son late and that he could not recall exactly when he entered the United States. He attested that if he entered the United States in late April 1981, then his son was born 10 months later. He indicated that he also might have entered the United States during May 1981 or June 1981.
- N. Notes from the May 17, 2004 sworn testimony taken during the applicant's LIFE late legalization interview, which indicate that the applicant testified that he had never obtained a visa to enter the United States. However, when it was explained to the applicant that Citizenship and Immigration Services (CIS) records indicate that he entered the United States on June 19, 1991 using a B2 visitor visa, he modified his testimony. The applicant explained that he paid a broker to obtain a visa for him.
- O. The section of the NOID which points out for the applicant the inconsistency in the record in that he first testified to never having obtained a visa. Then, he testified to having paid a broker to obtain a visa. In addition, the NOID explains that the applicant failed to acknowledge his June 19, 1991 entry on the Form I-687.
- P. The rebuttal to the NOID which includes the applicant's affidavit dated January 4, 2005 in which the applicant attested that the reason he testified that he had never obtained a visa was because he had never properly obtained a visa. He had only paid a broker for a visa and a Form I-94 (Arrival-Departure Record). He attested further that the reason he did not list a June 19, 1991 entry on the Form I-687 was because he did not actually enter on June 19, 1991. He attested that he was informed that he had to have proof of having exited and reentered an additional time in order to qualify for amnesty, and that is why he paid to have this visa put in his passport. There was no actual entry on June 19, 1991 which corresponded to this visa and Form I-94.
- Q. A printout of a CIS electronic record which indicates that the applicant, his wife and his son entered the United States at Los Angeles, California on Korean Air Lines flight number 0018 on June 19, 1991 at which time each presented a B2 visitor visa and each was then granted a period of authorized stay that expired on December 18, 1991.

- R. The affidavit of [REDACTED] of Houston, Texas which was notarized on May 23, 1996. The affiant attested that he has known the applicant since 1985. The affiant did not indicate where he met the applicant, whether he had personal knowledge of the applicant's address or whether he had personal knowledge that the applicant resided continuously in the United States during the statutory period.
- S. The statement of [REDACTED] of Houston, Texas which indicates that [REDACTED] has known the applicant since 1985. [REDACTED] did not indicate where he met the applicant, whether he had personal knowledge of the applicant's address or whether he had personal knowledge that the applicant resided continuously in the United States during the statutory period.
- T. The statement of [REDACTED] of Houston, Texas which indicates that [REDACTED] has known the applicant since 1985. [REDACTED] did not indicate where he met the applicant, whether he had personal knowledge of the applicant's address or whether he had personal knowledge that the applicant resided continuously in the United States during the statutory period. [REDACTED] did state that he, the applicant and fellow church members made a trip to a church in Mexico together. They were in Matamoros, Texas from June 15, 1987 through June 22, 1987.

There is no other evidence in the record relevant to the applicant's claim that he resided continuously in the United States during the statutory period.

On December 7, 2004, the director issued the Notice of Intent to Deny (NOID). In the NOID, the director summarized for the applicant the notes from his sworn testimony dated May 17, 2004. For instance, the director pointed out that the applicant testified to having worked cleaning offices for ten years, and then he began working at a flea market. Yet, the Form I-687 indicated that the applicant only did janitorial work from April 1981 through December 1984, that after that from December 1984 through May 1991, he was self-employed, and that from June 1991 through October 1994, he worked at Young Lady Fashion. The director also stated that the applicant initially testified that he had never obtained a visa to enter the United States. Later, the applicant acknowledged that he had paid a broker to obtain a B2 visitor visa. In addition, the applicant failed to list his June 19, 1991 entry into the United States on the Form I-687. The NOID also explained that it is inconsistent for the applicant to represent all of the following: that he entered the United States in April 1981, that he did not exit until 1987, that his wife did not enter the United States until 1987, and that his wife gave birth to his son was born in South Korea on March 1, 1982. The director also underscored the fact that many of the applicant's affiants attested to having personal knowledge that the applicant's wife was in the United States in 1981, but the applicant testified that she first entered the United States in 1987. Finally, the director pointed out to the applicant that he was not able to provide any contemporaneous evidence of having been in the United States during the statutory period. The director found that the preponderance of the evidence did not support the applicant's claim that he resided continuously in the United States during the statutory period.

In the rebuttal to the NOID dated January 4, 2005 the applicant again failed to provide any contemporaneous evidence to support his claim that he had continuously resided in the United States during the statutory period. He provided an affidavit dated January 4, 2005 in which he attested that when doing janitorial work he would pick up jobs on the street and in stores. Consequently, he could not recall the names of his various employers

from this period. After this, he began finding his own janitorial jobs and was self-employed. He also attested that he could not recall when he first entered the United States, and that he might have entered at the end of April 1981, that he might have entered in May 1981 or that he might have entered in June 1981. He indicated that he was certain that his wife delivered his son later than her due date. He attested that his affiants had mistakenly listed his wife as already being in the United States in 1981 because so many years had passed by the time that they wrote these affidavits and when they first met his wife. He indicated that he had not acknowledged a 1991 entry into the United States or having obtained a B2 visitor visa for this entry because he had not properly obtained the visa and had not made an actual entry. He attested that he bought this visa and Form I-94 because he was informed that he had to demonstrate that he had made an additional entry in order to qualify for amnesty.

On January 24, 2005, the director denied the application based on the reasons set out in the NOID.

On appeal, the applicant still did not provide any contemporaneous evidence of having resided in the United States during the statutory period. He did not provide any additional evidence. The applicant did assert through counsel that he had thoroughly addressed the director's concerns as laid out in the NOID in the rebuttal and that for the director to deny the application based on the reasons in the NOID without indicating what was deficient in his rebuttal to the NOID amounted to a denial of due process.

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

First, any assertion that due process requires that the director specify what is deficient in an applicant's rebuttal rather than providing a summary statement that the rebuttal did not overcome the bases of denial as set out in the NOID is not persuasive. The director provided a NOID which specified several major inconsistencies in the record. When the director informed the applicant in the Notice to Deny that the applicant's rebuttal failed to provide sufficient evidence to overcome these inconsistencies and that the application was being denied for the reasons set out in the NOID, the applicant was put on notice that, on appeal, he needed to provide stronger evidence of having resided continuously in the United States during the statutory period before this application might be approved. *See* 8 C.F.R. § 245a.20.

At the May 17, 2004 LIFE legalization interview, in order to support his claim that he had resided continuously in the United States during the statutory period, the applicant testified that he supported himself his first ten years in the United States by cleaning offices and that after that in 1992 he began working at a flea market. He testified that he was not able to give the name of his employer during the period that he cleaned offices. It was pointed out to the applicant in the NOID that this testimony contradicts the information that he provided on the Form I-687 where he stated that from April 1981 through December 1984

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).

he did janitorial work, that from December 1984 through May 1991 he was self-employed, and that from June 1991 through October 1994, he worked at Young Lady Fashion. The applicant's explanation that he picked up many different jobs from various employers during April 1981 through December 1984 and that subsequent to that he found his own janitorial jobs does not resolve the discrepancies in the record. That is, the Form I-687 contradicts this explanation in that it does provide a single name and address of the applicant's employer during 1981 through 1984: BPA Contract Janitorial Service, 5800 Corporate Drive. Thus, the Form I-687 indicates that the applicant was not regularly changing the employer from whom he obtained janitorial jobs during this period. Also, the Form I-687 indicates that the applicant was a self-employed grocer subsequent to his employment with BPA Contract Janitorial, not a self-employed janitor working various jobs that he found for himself. Moreover, the applicant made no attempt to explain the following inconsistency: that he testified that he worked at a flea market beginning in 1992 after leaving the work of cleaning offices, and that the Form I-687 stated that in June 1991 and the years that followed, he was the owner of a business named Young Lady Fashion. The AAO would also underscore that the applicant submitted a statement from [REDACTED] that further contradicts all information in the record relating to the applicant's employment during the statutory period analyzed thus far. The statement of [REDACTED] dated October 19, 2001 indicates that the applicant supported himself by working at a Meineke Discount Muffler shop in Houston for six months during 1982.

At the May 17, 2004 LIFE late legalization interview, the applicant also testified that he first entered the United States during April 1981. He stated on the Form I-687 that he first entered the United States during April 1981. The applicant submitted the statement of [REDACTED] into the record that specifies that the applicant and his wife lived at [REDACTED]'s home in Houston during April 1981 and the months that followed. In the NOID, the director explained that this entry date was not consistent with the applicant's claim that his wife gave birth to his son in South Korea on March 1, 1982. In the rebuttal the applicant attempted to resolve this discrepancy by attesting that he entered the United States in late April 1982 and that his wife delivered their son well past her due date. Specifically, the applicant suggested that his wife may have carried their son for just over ten months. Moreover, the applicant attempted to modify his testimony and all the statements that he had submitted into the record previously regarding his entry date, as well as contradicting the statement of [REDACTED] by indicating that he did not know if he entered the United States during April 1981. He attested that he might have entered in May 1981 or June 1981. The applicant did not offer any explanation as to why he had consistently specified that he first entered the United States during April 1981 in all the documents which he submitted into the record over the course of nearly ten years, but now was asserting that he did not know which month he had entered this country.

These inconsistencies in the record cast 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).

The applicant failed to provide any contemporaneous evidence that might be considered independent, objective evidence of his having resided in the United States from a date prior to January 1, 1982 and throughout the statutory period.

This office also finds that the various affidavits and statements in the record which purport to substantiate the applicant's residence in the United States just before and during 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 a continuous unlawful residence in the United States from a date prior to January 1, 1982 through May 4, 1988, and that these affidavits and statements do not have probative value in this matter.

There is no other evidence in the record to support the applicant's claim that he entered the United States prior to January 1, 1982 and that he maintained continuous residence in this country in unlawful status throughout the statutory period.

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.