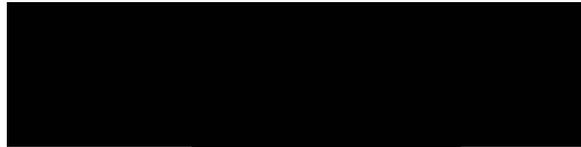




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Office: CHARLOTTE, NORTH CAROLINA

Date: JUN 24 2008

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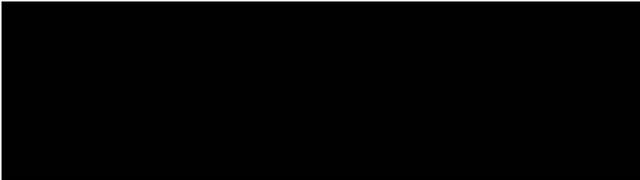
Applicant:



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. If your appeal was dismissed or rejected, all documents have been forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

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), Charlotte, North Carolina, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director concluded that the applicant had not provided any evidence to support his claim that he had resided continuously in the United States in an unlawful status during the statutory period, a date prior to January 1, 1982 through May 4, 1988. The director also indicated that the applicant had failed to respond to the April 22, 2004 Notice of Intent to Deny (NOID) and to the request for additional evidence included in the NOID. Thus, the director denied the application.

On appeal, counsel asserted that the record did include evidence that established that the applicant had resided continuously in the United States in an unlawful status during the statutory period. He also asserted that previous counsel had provided a timely reply to the NOID. Counsel provided evidence of a submission which he claimed was a reply to the NOID and its receipt by Citizenship and Immigration Services (CIS). Finally, counsel submitted evidence intended to establish the applicant's continuous residence in the United States during the statutory period.

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

An applicant for permanent resident status under section 1104 of 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 since such date through May 4, 1988. *See* LIFE Act § 1104(c)(2)(B) and 8 C.F.R. § 245a.11(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).

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).

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).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See Id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See Id.*

Documentary evidence may be in the format prescribed by CIS regulations. *See Matter of E-M-*, 20 I&N Dec. 77 at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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.* at 80. 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 or 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 petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (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, to deny the application or petition.

On June 5, 1991, 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 August 19, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

On April 22, 2004, the director, Charlotte, North Carolina, issued a notice of intent to deny (NOID) in which she indicated that she intended to deny the application because the applicant had not provided any evidence of having resided in the United States during the statutory period.

However, at the time that the director issued the NOID, the record did contain evidence relating to the applicant's residence in the United States during the statutory period. This evidence and the evidence submitted after the issuance of the NOID is summarized later in this analysis.

The record is not clear regarding the response to the NOID. That is, in response to the NOID previous counsel did submit: a cover letter dated May 20, 2004; copies of documents which were already included in the record; and documents which appear to relate to the applicant's presence in the United States outside the statutory period. However, these rebuttal documents were stamped received by the Missouri Service Center, and not by the Charlotte District Office, the CIS office which issued the April 22, 2004 NOID. Also, the Missouri Service Center did not stamp the rebuttal received until June 16, 2004. Finally, this office notes that the rebuttal was apparently not incorporated into the record of proceedings until after the May 20, 2005 filing of the Form I-290B, Notice of Appeal to the Administrative Appeals Unit.²

Yet, on appeal, previous counsel provided a customer copy of a U.S. Postal Service Express Mail receipt as proof that a timely rebuttal had been filed. The U.S. Postal Service had stamped this document as received on May 20, 2004. A printout from the U.S. Postal Service website, which tracked the delivery of the corresponding Express Mail packet was also submitted on appeal. This printout indicates that previous counsel's firm did submit an "additional evidence response" to the CIS District Office, Charlotte, North Carolina that was received by that office on May 21, 2004. However, there is nothing on either the customer copy of the Express Mail receipt or the printout from the U.S. Postal Service website which connects these documents to the instant matter.³ Moreover, counsel indicated on appeal that this U.S. Postal Service receipt relates to the rebuttal cover letter dated May 20, 2004 referred to in the previous paragraph. Yet, as was pointed out in the last paragraph, the record indicates that that cover letter and its attachments were received by the *Missouri Service Center*, not the Charlotte District Office, and that these documents were not received until June 16, 2004.⁴

On May 13, 2005, the director issued a Decision on Application for Status as Permanent Resident in which she denied the application based on a finding that the applicant had provided no evidence of continuous residence in the United States during the statutory period and that the applicant had failed to respond to the NOID.

² It seems that the rebuttal was not sent to the correct CIS office and thus it had to be transferred to the office which housed the record of proceedings, which took a lengthy period of time.

³ Handwritten vertically in the margin of the customer copy of the Express Mail receipt is the name: "[REDACTED]". Yet, the handwriting of this name is much darker and bolder than the rest of the handwriting on the receipt. Thus, it appears that the applicant's name was written on the copy of this Express Mail receipt at some point after it was stamped received by the U.S. Postal Service. Thus, the AAO finds that this annotation is not sufficient on its own to demonstrate that the receipt relates to the instant matter.

⁴ The heading of the May 20, 2004 cover letter does list as its addressee the Charlotte District office. Yet, again, the record indicates that this cover letter and the attached documents of the rebuttal were in fact sent to the Missouri Service Center and stamped received by that office. That is, the record indicates that previous counsel did not send the rebuttal to the correct address and did not send it timely.

On May 20, 2005, the Form I-290B in this matter was received by the District Office, Charlotte, North Carolina. On appeal, counsel asserted that the record did include evidence which established that the applicant had resided continuously in the United States in an unlawful status during the statutory period. He also asserted that previous counsel had submitted a timely reply to the NOID. Counsel provided documents which previous counsel suggested were evidence of that submission and its receipt by CIS. Counsel also submitted evidence intended to establish the applicant's continuous residence in the United States during the statutory period.

This office finds that it is not necessary to determine whether the applicant submitted a timely response to the NOID to the appropriate CIS office in adjudicating this appeal, as the NOID and the Decision on Application for Status as Permanent Resident did not take into account the evidence of record. Thus, instead, this office will analyze that evidence. The record includes the following.

1. An original pay stub issued to the applicant and generated by FTW Contracting Corporation, Smithtown, New York. The pay stub covers the period of February 20, 1988 through February 26, 1988.
2. The affidavit of [REDACTED], the applicant's brother-in-law, dated October 12, 1990 and signed on October 17, 1990 in which the affiant attested that from January 1980 through November 1985 he and the applicant shared an apartment at [REDACTED], Brooklyn, New York. The affidavit includes the affiant's telephone number, and as such appears amenable to verification.
3. The affidavit of [REDACTED] dated October 17, 1990 in which the affiant attested that the applicant resided continuously in the United States from 1980 through the date that affidavit was signed. The affidavit includes the affiant's address, and as such appears amenable to verification.
4. The statement of [REDACTED] dated May 5, 2004 in which [REDACTED] indicated that he first met the applicant in 1985 when the applicant was living on 4 [REDACTED]t. This statement bears the same signature as the two affidavits of [REDACTED] summarized above. This statement also includes [REDACTED] address and telephone number and as such appears amenable to verification.
5. The statement of [REDACTED] dated May 2, 2004 in which [REDACTED] indicated that she has personal knowledge that during 1980 the applicant lived at her apartment on [REDACTED] during his first few months in New York. The statement includes [REDACTED] address and telephone number, and as such appears amenable to verification.
6. The Form I-687 signed by the applicant on February 28, 1995 on which he stated at item 33 that his first address in the United States was [REDACTED] Brooklyn, New York, and that he lived at this address from January 1980 through November 1985.

7. The affidavit of [REDACTED] dated October 17, 1990 in which the affiant attested to having personal knowledge that the applicant resided continuously in Brooklyn, New York from January 1980 through the date that affidavit was signed. The affidavit includes the affiant's address, and as such appears amenable to verification.
8. The affidavit of [REDACTED] dated October 12, 1990 and signed October 13, 1990 in which the affiant attested that he shared an apartment with the applicant from August 1987 through July 1990. The address of this apartment is [REDACTED], Brooklyn, New York. The affidavit includes the affiant's address, and as such appears amenable to verification.
9. The affidavit of [REDACTED] dated August 13, 1991 in which the affiant attested that the applicant departed the United States for approximately twenty days during 1985, and that he departed the United States again in December 1987 and returned in January 1988. The affidavit includes the affiant's address, and as such appears amenable to verification.
10. The affidavit of [REDACTED] dated October 12, 1990 and signed on October 17, 1990 in which the affiant attested that he and the applicant worked for Laredo Roofing Corporation, Smithtown, New York, from approximately January 1988 through January 1989. The affidavit does not appear to be amenable to verification.
11. The statement of Fabiola Sosa dated May 5, 2004 in which [REDACTED] indicated that her brother rented the basement of his home on [REDACTED] to the applicant and his family during approximately 1984 through 1987, and that [REDACTED] met the applicant's wife while working with her at a factory in Brooklyn. The statement includes [REDACTED]'s telephone number and address, and as such appears amenable to verification.
12. The statement of [REDACTED] dated May 5, 2004 in which [REDACTED] indicated that he had worked at Star City Sportswear in Brooklyn, New York and that he recommended the applicant to the foreman for a position there. [REDACTED] indicated that the applicant worked at Star City Sportswear sweeping floors from approximately 1984 through 1986, and that the applicant used the name [REDACTED] while employed there.⁶ The statement includes [REDACTED]'s telephone number and address, and as such appears amenable to verification.

³ On this statement, [REDACTED] spelled his last name [REDACTED] in one place and [REDACTED] in another. When signing, he spelled his last name [REDACTED]. This office will treat [REDACTED] as the correct spelling on this name for purposes of this analysis.

⁶ The record also includes a pay stub issued to [REDACTED] by Star City Sportswear dated February 14, 1986. This pay stub was submitted into the record during the 1990s. This office notes that other than the

13. The affidavit of [REDACTED] dated May 19, 2004 in which the affiant attested to having personal knowledge that the applicant resided continuously in the United States from 1981 through the date that affidavit was signed. The affidavit includes the affiant's address and telephone number, and as such appears amenable to verification.
14. The affidavit of [REDACTED] dated May 19, 2004 in which the affiant attested to having personal knowledge that the applicant resided continuously in the United States from 1981 through the date that affidavit was signed. The affidavit includes the affiant's address and telephone number, and as such appears amenable to verification.
15. The affidavit of [REDACTED] the applicant's brother-in-law, dated May 19, 2004 in which the affiant attested to having known the applicant since 1981. The affiant is a Mexican citizen and he did not make clear in the affidavit whether he met the applicant in the United States or outside of the United States. The affidavit includes the affiant's address and telephone number, and as such appears amenable to verification.
16. The statement of [REDACTED] dated May 3, 2004 in which [REDACTED] indicated that he has personal knowledge that the applicant lived in Brooklyn, New York during 1983 through 1986 and that he and the applicant played on the same soccer team during that period. The statement includes [REDACTED]'s address and telephone number, and as such appears amenable to verification.
17. The statement of [REDACTED] dated May 4, 2004 in which [REDACTED] indicated that he has personal knowledge that the applicant lived in Brooklyn, New York on [REDACTED] during 1981 through 1995 at an address near where [REDACTED] lived at the time. The statement includes [REDACTED] address and telephone number, and as such appears amenable to verification.
18. An immunization record for the applicant's daughter, [REDACTED]. The record was completed at a health center in Brooklyn, New York. The record makes reference to vaccinations which [REDACTED] received during the statutory period. However, the record does not indicate whether those vaccinations were administered at this clinic in New York, or if the record of these vaccinations were transferred on to this record from an immunization card for [REDACTED] provided to this health center.

On May 13, 2008, the AAO issued a Notice of Intent to Dismiss which pointed out that during the early 1990s, the applicant submitted into the record a document in which [REDACTED], the applicant's brother-in-

applicant's written statements and this statement of [REDACTED], there is no evidence in the record to link this pay stub for [REDACTED] to the applicant, [REDACTED].

law, attested that from 1980 through 1985, he shared an apartment with the applicant at [REDACTED] Brooklyn, New York, and a document in which [REDACTED] indicated that he has personal knowledge that the applicant resided continuously in the United States from 1980 through 1990. During 2004, this same [REDACTED] signed a statement included in the record in which he indicated that he did not meet the applicant until 1985. The applicant also submitted the May 2, 2004 statement of [REDACTED] which indicates that in 1980 the applicant lived at [REDACTED] apartment on [REDACTED] during his first few months in New York. Yet, on the Form I-687 at item 33, the applicant stated that from January 1980 through November 1985, he resided at [REDACTED] Brooklyn, New York.

In the Notice of Intent to Dismiss, the AAO stated that these discrepancies cast serious doubt on the authenticity of [REDACTED]'s statements and [REDACTED]'s statement and on the authenticity of the rest of the evidence of record, and that this in turn casts doubt on the applicant's claim that he resided continuously in the United States throughout the statutory period.

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).

In keeping with this, the AAO emphasized in the Notice of Intent to Dismiss that the applicant could only overcome the inconsistencies in the record by providing independent, objective evidence of his claim that he resided continuously in the United States during the statutory period. The AAO also stated that, as the record stood, the applicant had failed to provide contemporaneous evidence that might be considered independent, objective evidence of his having resided in the United States throughout the statutory period. The applicant did provide an original pay stub generated by FTW Contracting Corporation, Smithtown, New York which indicates that the applicant worked for FTW from February 20, 1988 through February 26, 1988. This is independent, contemporaneous evidence, but it is not sufficient to overcome the discrepancies in the evidence of record and to substantiate the applicant's claim that he was in the United States throughout the entire statutory period.

In his response to the May 13, 2008 Notice of Intent to Dismiss, counsel did not submit any additional independent, objective evidence in support of the applicant's claim that he resided continuously in the United States during the statutory period. Rather, counsel submitted additional statements and affidavits, as well as a brief and copies of photographs which were purportedly taken during the statutory period. In his brief, counsel asserted that the AAO may not rely on *Matter of Ho* to justify dismissing all affidavits and statements in the record because there are inconsistencies in some of the affidavits and statements of record. Counsel's assertions are not persuasive. The reasoning set forth by the Board in *Matter of Ho* is controlling in this matter. Namely, once the applicant has undermined his own claims of eligibility by submitting evidence that is intended to support those claims, but which is contradictory, the only means by which he or she might then resolve the inconsistencies in the record is by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

As stated in the Notice of Intent to Dismiss, affidavits and statements which purport to substantiate the applicant's residence in the United States during the statutory period are not objective, independent evidence and as such are not sufficient to overcome the inconsistencies in the record regarding the claim that the applicant maintained continuous residence in the United States during the statutory period. The AAO finds that these documents do not have probative value in this matter.

In response to the Notice of Intent to Dismiss, counsel also suggested that no inconsistencies exist between statements in the record such as [REDACTED]'s statement that he roomed with the applicant during January 1980 through November 1985 and [REDACTED]'s statement which indicates that he has only known the applicant since 1985. According to counsel, during 1980 through 1985, the applicant and [REDACTED] shared an apartment occupied by a total of 17 individuals and during that time, the applicant and [REDACTED] had very different work schedules. Counsel indicated that because of these factors, the applicant and [REDACTED] did not truly get to know each other while they were roommates. However, in 1985, after the applicant began dating [REDACTED]'s sister, the woman who later became the applicant's wife, the applicant and [REDACTED] did get to know each other as friends. Counsel suggested that when [REDACTED] indicated in one of his written statements that he had known the applicant since 1985, he meant that he had known the applicant as a friend since then, not that he first met him in 1985. Also, added to the record in response to the Notice of Intent to Dismiss was a copy of the affidavit of [REDACTED] dated June 11, 2008 and the applicant's affidavit dated June 11, 2008 which make assertions similar to counsel's assertions regarding what [REDACTED] actually meant when he stated that he had known the applicant since 1985. None of these assertions in the various statements are persuasive. The AAO finds that [REDACTED]'s statement that he roomed with the applicant from January 1980 through November 1985 contradicts the statement which he made at a later date which indicates that he has only known the applicant since 1985. Only independent, objective evidence is sufficient to resolve these inconsistencies. Explanations put forth by counsel, the applicant and [REDACTED] will not suffice.

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.