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Services

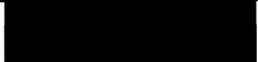
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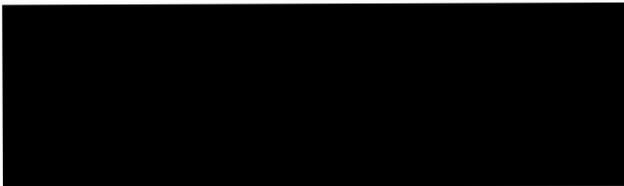
IN RE: Applicant:



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. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits 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 remanded for further action, 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, Dallas, and 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 1) to maintain unlawful status when he returned to the United States on a B-2 visa after his absence in 1987, and 2) to provide requested documentation for his arrest in 1989.

On appeal, counsel contends that when the applicant returned to unauthorized employment in 1987, he was in violation of his B-2 visa status and, therefore, in unlawful status. Counsel also contends that the applicant has provided all the information available on his 1989 arrest. Counsel asserts that no disposition exists regarding the applicant's arrest and the applicant cannot be required to produce information that does not exist.

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 (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

“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.

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 applicant has not submitted any evidence to establish that an emergent reason delayed her return to the United States.

8 C.F.R. § 103.2(b)(13) states, in pertinent part:

If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

In the Notice of Intent to Deny (NOID), dated on April 29, 2006, the director stated that the applicant legally returned to the United States from Guatemala on December 18, 1987, with a B-2 visa. The director also stated that the applicant failed to provide the court dispositions regarding his

arrest in 1989. Based on the above, the director intended to deny the application. The director granted the applicant thirty (30) days to submit any evidence to overcome the stated reasons for denial. **The record reflects that the applicant submitted evidence in rebuttal.** In the Notice of Decision, dated August 24, 2006, the director denied the instant applicant based on the reasons stated in the NOID.

The issues in this proceeding are whether the applicant established his continuous unlawful residence in the United States throughout the requisite period, and whether he established his admissibility as an immigrant. The subsidiary issues are whether the applicant's absence interrupted his continuous unlawful residence and whether he complied with the director's request for additional evidence relating to his arrest in 1989.

Continuous Unlawful Residence

The first issue in this proceeding is whether the applicant established his continuous unlawful residence for the duration of the statutory period. The applicant made a claim to class membership in a legalization class-action lawsuit and as such, was permitted to previously file a Form I-687, Application for Temporary Resident Status pursuant to Section 245A of the Immigration and Nationality Act on October 29, 1990. In his Form I-687, at Question #35, where asked to list absences from the United States, the applicant stated that he went to Guatemala from October 18, 1987, through December 18, 1987. The applicant stated that the purpose of his trip was to see his ill father, who he had not seen since January 1981.

The record also contains an Affidavit For Determination of Class Membership in *League of United Latin American Citizens v. INS* (LULAC), signed by the applicant on January 28, 1991. The applicant indicated that he was absent from the United States from October 18, 1987, through December 18, 1987. The applicant stated the he violated his status when he went back to work.

The record contains a copy of the applicant's passport with a U.S. visa issued to the applicant on November 17, 1987, in Guatemala. The passport also contains an INS admittance stamp dated on December 18, 1987. On appeal, counsel contends that when the applicant returned to unauthorized employment in December 1987, he was in violation of his status and, therefore, in unlawful status.

On his Form I-687, the applicant indicated that he was employed by [REDACTED] from November 1985 to January 1990, as a maintenance employee. The record includes an October 9, 1990, affidavit from [REDACTED], who confirmed that he has known the applicant since November 1985 to January 1990. The affiant also stated that the applicant was employed by his company as a maintenance man performing plumbing and electrical repairs. The affidavit contained a copy of the affiant's business card with his telephone number and business address.

Based on the above evidence, the AAO concludes that the applicant was employed by [REDACTED] prior to his absence from the United States in October 1987. The applicant returned to the United States on December 18, 1987, on a valid B-2 visa with the intention to resume

his unlawful employment. Since the applicant resumed his unlawful employment, the applicant violated his lawful B-2 visa status and, therefore, was in unlawful status.

However, beyond the decision of the director, the AAO finds that the applicant's 1987 absence interrupts his continuous unlawful residence during the requisite period. According to the applicant's own statements and evidence in the record, the applicant departed the United for Guatemala on October 18, 1987, and returned on December 18, 1987, a period of 61 days. This single absence is in excess of forty-five (45) days between January 1, 1982, and May 4, 1988, as permitted under 8 C.F.R. § 245a.15(c)(1).

While not dealt with in the director's decision, there must, nevertheless, be a further determination as to whether the applicant's prolonged absence from the United States was due to an "emergent reason." 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." In his Form I-687, the applicant specifically stated that the purpose of his trip abroad was to see his father who was ill and needed to see the applicant. As the applicant had knowledge of his father's illness before his departure, the AAO cannot conclude that his father's illness established an emergent reason which delayed his return to the United States. The applicant has not submitted any other evidence to establish that an emergent reason delayed his return to the United States. Therefore, the applicant has failed to demonstrate continuous unlawful residence in the United States for the duration of the requisite period.

Admissibility and Requested Documentation

The second issue in this proceeding concerns whether the applicant established his admissibility as an immigrant. A subsidiary issue is whether the applicant failed to provide the requested documentation for his arrest in 1989.

According to an FBI identification record dated March 15, 2002, the Dallas Sheriff's Office arrested the applicant under the name [REDACTED], on January 14, 1989, and charged him with *indecentcy with a child*, a violation of section 21.11 of the Texas Penal Code.

It is noted that the applicant indicated on his Form I-485 application and his Form I-687 application that he had no arrests. Nonetheless, the applicant submitted a letter dated from the Houston Chief of Police, stating that a search of the records on file in that department, by name only, had been conducted and that she was unable to locate any record of the applicant having been arrested by any member of the Houston Police Department on any charge. We note that the applicant was arrested by the Dallas Sheriff's Office, not the Houston Police Department.

On March 23, 2005, the director issued a request for additional evidence (RFE) indicating that applicant "must submit a certified copy of the Police Criminal/Incident Report (Arrest Case Report) and the Court Disposition for all [the applicant's] arrests . . ." (Emphasis in the original.)

The record contains a July 19, 2006, declaration from [REDACTED], District Clerk of Dallas County, Texas. Mr. [REDACTED] stated that the District Criminal Court indexes of Dallas County, Texas, have been searched and they are unable to locate any charges or convictions filed against the applicant. The record also contains an October 13, 2006, declaration from Lana McDaniel, Judge, 203rd District Court. Judge McDaniel stated that under her review of the records of the district clerk of Dallas County and the county clerk of Dallas County, the applicant has no record under his name or names or [REDACTED].

On appeal, counsel contends that the applicant has provided all the information available on his 1989 arrest. Counsel asserts that no disposition exists regarding the applicant's arrest and the applicant cannot be required to produce information that does not exist.

The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(ii). The applicant must not only show that the evidence is unavailable but also submit relevant secondary evidence of the arrest. If secondary evidence is unavailable, then the applicant must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances, such as the prosecuting attorney, defense attorney, etc. Here, the applicant has not provided secondary evidence or affidavits of the arrest. It is noted that the applicant should have requested his arrest record from the Dallas Sheriff's Office.

In addition, any letter that is submitted to show that a criminal record is unavailable must be: (1) an original, (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available. It is noted that the applicant has provided evidence to demonstrate that a thorough search of his records has been conducted by appropriate parties in Dallas County, Texas. However, the evidence does not indicate the reason the record does not exist or whether similar records for the time and place are available.

Furthermore, Section 1104(c)(2)(D) of the LIFE Act provides that the alien "must establish that he is (i) is admissible . . . and (ii) has not been convicted of any felony or 3 or more misdemeanors." Based on the record, the applicant has a criminal history and has been asked to provide evidence regarding his criminal arrest. A letter stating that the required evidence is unavailable, regardless of who wrote the letter or the reasons for unavailability, does not establish that the alien "has not been convicted" of the offense in question. As the applicant has merely submitted letters of unavailability, no secondary evidence and no affidavits, the applicant has not met the requirements of 8 C.F.R. § 103.2(b)(2)(i) and (ii). Accordingly, the applicant has not met his burden of proof.

Therefore, based on the above discussions, the applicant failed to establish continuous unlawful residence in the United States since before January 1, 1982, through May 4, 1988 as required under Section 1104(c)(2)(B) of the LIFE Act. The applicant has also failed to establish his admissibility as an immigrant and provide the requested documentation for his criminal arrest. 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.