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FILE:

MSC 02 247 63578

Office: SALT LAKE CITY

Date: **MAY 14 2008**

IN RE:

Applicant:

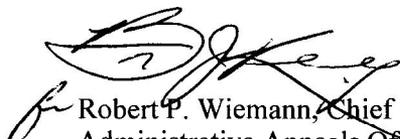
APPLICATION:

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. 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.


for 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, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant had not demonstrated that he had continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988.

On appeal, counsel asserts that the applicant had provided numerous documents to substantiate his claim. Counsel argues that the director is asking the applicant to submit certain documents contrary to the statute and regulations.

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. Section 1104(c)(2)(B)(i) of the LIFE Act; 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).

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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he continuously resided in the United States in an unlawful status during the requisite period. Here, the applicant has failed to meet this burden.

In an attempt to establish continuous unlawful residence since before January 1, 1982, through May 4, 1988, the applicant provided the following evidence:

- A school transcript from Technical Career Institutes in New York, New York for the fall of 1987.
- Two earnings statements for the periods ending January 24 and 31, 1988.
- A passport issued on August 31, 1987, in Bangladesh. The passport reflects that the applicant was issued a F-1 student visa on September 14, 1987, by the United States consulate in Dhaka, Bangladesh to attend Snow College in Ephraim, Utah. The applicant lawfully entered the United States on September 23, 1987.
- An affidavit from [REDACTED], manager of Bit of Bengal Restaurant in Elmhurst, New York, who indicated that the applicant was employed from September 1981 to August 1987.
- Affidavits from an uncle, [REDACTED] of Jamaica, New York, who indicated that the applicant resided with him at [REDACTED] Jamaica, New York from September 6, 1981, to August 19, 1987, and December 18, 1987, to June 6, 1990, and provided a copy of his lease agreement entered on January 7, 1981, and terminated on February 29, 1984. The affiant attested to the applicant's residence in Ephraim, Utah from September 1987 to December 1987.
- Several envelopes postmarked during the requisite period.
- An affidavit from [REDACTED] of Westbury, New York, who attested to have known the applicant since 1982 and attested to the applicant's character.
- An affidavit from [REDACTED] of Jamaica, New York, who attested to have known the applicant since 1984 and attested to the applicant's character.

At the time of his interview, the applicant indicated that he entered the United States as a stowaway on the boat his father was employed.

On June 15, 2004, the director issued a Form I-72, which requested the applicant to submit evidence that his place of employment, Bit of Bengal Restaurant, was in operation from 1981 to 1987. The applicant was also requested to submit evidence of his residence in the United States as well as evidence of the mariner's card of his father or proof of his father's employment from the ship's company.

In response, former counsel asserted that the applicant's father had passed away in 1987, and his mother was attempting to obtain her husband's mariner's card. However, there has been some delay in getting a copy of the card as counsel asserted that the applicant was unable to contact anyone in Bangladesh for approximately a month as the telephone service was cut off due to seasonal monsoonal flooding. Former counsel requested an extension of time, and subsequently submitted:

- An affidavit from the applicant's mother in Dhaka, Bangladesh, who attested to her husband's employment with Atlas Shipping Company, and that he took the applicant as his companion on his journey to the United States in 1981. The affiant attested to the applicant's residence in the United States since that time and since September 1987, she has spoken with the applicant every three to four months. The affiant asserted that she remains in contact with the applicant's uncle, [REDACTED]
- An additional affidavit from [REDACTED] who reaffirmed the applicant's residence in his home from 1981 to 1987 and from December 1987 to June 1990 at [REDACTED] [REDACTED], Embassy Building, Jamaica, New York. The affiant asserted that it was his understanding that the applicant's father had smuggled him on the ship where he was a crewman and the applicant traveled from Florida by train to New York.
- A sworn statement from the applicant, who described his travels from his village of Dhaka to the port where his father was a crewman on a ship named Atlas. The applicant asserted when the

ship docked in the Bahamas, he and his father left the ship and boarded a smaller boat to Miami, Florida. The applicant asserted that his father purchased a train ticket to New York City for him and gave him instructions on locating his uncle, [REDACTED]. The applicant attested to his residence at his uncle's residence during the requisite period and to being employed at Bit of Bengal Restaurant. The applicant indicated that in 1985, he worked on Tuesdays and Thursdays for [REDACTED] who owns a pharmacy in Manhattan and received \$20.00 for a full day of work. The applicant indicated that he also worked for his uncle [REDACTED] in exchange for room and board.

On September 30, 2005, the director issued a Notice of Intent to Deny, which advised the applicant that his employment at Bit of Bengal Restaurant in Elmhurst, New York has been called into question as it was established through a record check that the company was never located at the address claimed on the employment letter and that the business terminated its operation on September 30, 1981. The director noted the address listed on the employment documents pertained to an apartment complex. The applicant was further advised that he had failed to provide evidence of his father's employment as a crewman on any ship that had entered the United States, and that based on the lack of evidence to substantiate the affidavits and his testimony, it must be assumed that he entered the United States after January 1, 1982.

In response, former counsel asserted that he attended the interview and was fully aware of what was stated by the interviewing officer and the applicant. Counsel argued that the notice contains mistakes and misstatements of fact that are not supported by the record and the numerous documents contained therein or the applicant's sworn testimony given at the time of his interview. Counsel argued that the statement in the notice, "it is assumed that you did not enter the U.S. until after January 1, 1982," completely disregards not only the applicant's sworn testimony, but also the evidence he had submitted in support of his application. Regarding the evidence submitted for Bit of Bengal Restaurant, counsel argued that the statement in the notice contradicted what the interviewing officer stated at time of the interview. Counsel claimed:

He led my client and I to believe that he had obtained evidence that the Bit of Bengal Restaurant "did not exist" and was fictitious". The information contained in the Notice suggests that the restaurant existed, but never did business at the address listed and ceased doing business after September 30, 1981. This information is contradictory. We question whether your office actually possesses any credible evidence.

Counsel argued that because he only had the statement in the Notice stating, "the address listed on the employment document pertains to an apartment complex and that of a business address" he was unable to determine the validity of the claim.

Regarding the failure to provide evidence of his father's employment as a crewman, counsel argued that this statement questions whether the interviewing officer reviewed the documents submitted in response to the Form I-72. Counsel asserted that he was concerned that the documentation provided was overlooked or completely disregarded.

Counsel asserted that in the event additional evidence is required, the applicant shall be given the opportunity to submit that evidence. Counsel requested that the director review all of the evidence submitted in support of the application including the evidence submitted in response to the Form I-72, and approved the application.

Counsel provided copies of the documents that were submitted in response to the Form I-72 along with an affidavit from [REDACTED] of Jamaica, New York. [REDACTED] indicated he resided at [REDACTED]

Embassy Building, Jamaica, New York with his parents from December 1980 to February 2000. The affiant asserted that he first met the applicant in May 1986 "when he [the applicant] moved to the Embassy Building to live with his uncle, [REDACTED] and attested to the applicant's residence in Jamaica, New York from 1986 to 1993.

The director, in denying the application, determined the affidavits from his mother and uncle appeared to be self-serving, were not supported by any other evidence and lacked credibility as the applicant failed to respond to the allegations outlined in the Notice of Intent to Deny. The director determined that the applicant had failed to present any credible evidence to comply with the residency requirements.

On appeal, counsel argued that the director's requirement of a particular set of documents as evidence of residence during the requisite period is contrary to congressional language and Department of Homeland Security's own regulations and interpretive memoranda. Counsel argues that the evidence submitted corroborates the applicant's testimony that he first entered the United States in September 1981 as a stowaway on a ship that employed his father and resided continuously since that time until the present. Counsel requests that the affidavit submitted be accorded appropriate weight as required by the LIFE Act regulations. Counsel provides copies of documents that were previously submitted.

Citizenship and Immigration Services (CIS) has determined that affidavits from third party individuals may be considered as evidence of continuous residence. *See Matter of E-- M--*, *supra*. In ascertaining the evidentiary weight of such affidavits, CIS must determine the basis for the affiant's knowledge of the information to which he is attesting; and whether the statement is plausible, credible, and consistent both internally and with the other evidence of record. *Id.*

Following the dicta set forth in *Matter of E-- M--*, *supra*, the affidavits would not necessarily be fatal to the applicant's claim, if the affidavits upon which the claim relies are consistent both internally and with the other evidence of record, plausible, credible, and if the affiant sets forth the basis of his knowledge for the testimony provided

The statements of counsel on appeal regarding the amount and sufficiency of the applicant's evidence of residence, and the applicant's inability to produce additional evidence of residence for the period in question due to the passage of time have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant continuously resided in the United States during the requisite period as he has presented contradictory and inconsistent documents, which undermines his credibility.

In his affidavits, [REDACTED] attested to the applicant's residence in his home, [REDACTED] Embassy Building, Jamaica, New York, from 1981 to 1987 and from December 1987 to June 1990. However, [REDACTED] in his affidavit, indicated that the applicant resided with Mr. [REDACTED] commencing in May 1986. As conflicting statements have been provided, it is reasonable to expect an explanation from the affiants in order to resolve the contradictions. However, no statement from either affiant has been submitted to resolve the contradicting affidavits.

As the applicant's mother has never resided in the United States she cannot attest to the applicant's presence or residence in the United States. Furthermore, the affidavits from the applicant's mother and uncle must be viewed as having a self-evident interest in the outcome of proceedings, rather than as independent, objective and disinterested third parties.

Item 36 of the Form I-687 application requests the applicant to list all employment in the United States since first entry. The applicant, however, did not list employment with [REDACTED] on the application and the affiant, in his affidavit, did not attest to the applicant's employment.

[REDACTED] and [REDACTED] attested to have known the applicant in 1982 and 1984, respectively, but did not provide any details as to the nature or origin of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence.

The applicant, in his sworn statement, made no mention of residing in the state of Utah until 1995. Mr. [REDACTED] in his affidavit, however, indicated that the applicant resided in Utah from September 1987 to December 1987.

Regardless of what was stated at the time of the interview regarding the existence of Bit of Bengal Restaurant, the fact remains that on June 15, 2004, the applicant was provided the opportunity to present evidence establishing that the restaurant was in business during the period of his alleged employment. The applicant, however, failed to do so. On September 30, 2005, the director gave the applicant sufficient notice of the deficiencies in the evidence. However, to date, neither counsel nor the applicant has submitted any credible evidence to refute the director's findings, which was obtained from the New York Corporation & Limited Partnership Records on June 22, 2004. Therefore, the documentary evidence submitted by the applicant cannot be considered as having any probative value or evidentiary weight.

These factors tend to establish that the applicant utilized documents in a fraudulent manner in an attempt to support his claim of residence in the United States during the requisite period. By engaging in such an action, the applicant has irreparably harmed his own credibility as well as the credibility of his claim of continuous residence in the United States for requisite period.

Doubt cast on any aspect of an applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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 regulation at 8 C.F.R. § 245a.12(e) provides that "[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods." Preponderance of the evidence is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). See *Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991). Given the credibility issues arising from the documentation, it is determined that the applicant has not met his burden of proof. The applicant has not established, by a preponderance of the evidence, that he entered the United States before January 1, 1982 and resided in this country in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required under 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R. § 245a.11(b). Given this, the applicant 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.