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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 02 242 60990

Office: TAMPA

Date:

OCT 28 2008

IN RE:

Applicant:

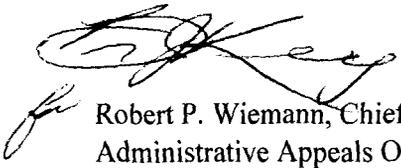
APPLICATION:

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. 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.


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), Tampa, Florida, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The district director denied the LIFE application because she determined that the applicant failed to demonstrate that he had continuously resided in the United States in an unlawful status since before January 1, 1982 through May 4, 1988. The director did not indicate whether she had found discrepancies in the affidavits or other evidence submitted. The director noted that the record reflects that the applicant had an absence of several months outside of the United States during the requisite period. Specifically, the director noted at an interview on November 22, 2006, and on his Biographic Data Form G-325A, the applicant stated that he had departed the United States for Bangladesh in April 1987 and returned to the United States in November 1989. For this reason, the director denied the application.

The director also indicated in her denial that the applicant failed to respond to a November 12, 2002 notice of intent to deny (NOID). The notice, however, indicated only that the applicant appeared ineligible for class membership in one of the following class action lawsuits: CSS, LULAC and/or ZAMBRANO. The record reflects, however, as the applicant points out on appeal, that he timely responded to the NOID and submitted additional evidence. The denial notice, however, did not address the evidence furnished in response to the NOID and indicates a different reason for denial than the reason for the proposed denial as stated in the NOID. On September 2, 2008 the AAO issued a new NOID (discussed below), and the AAO withdrew that portion of the director's decision.

On appeal, the applicant submitted a notarized letter stating that because he was nervous and he is not good at conversational English, he did not understand the question asked regarding his absence from the United States during the requisite period, and, that he did not mean to state that he had been absent from the United States from April 1987 to November 1989. Rather, he meant to say that he had twice departed the United States, in 1987 for one (1) month, and in 1989 for one (1) month.

On September 2, 2006, the AAO issued a NOID informing the applicant of the intent to deny the application based on the determination that the record, as constituted, indicated that the applicant had been absent from the United States from April 1987 to November 1989, and that the prolonged absence (over 45 days for a single absence, and over a 180 days aggregate for all absences) was beyond the period of time allowed by regulation. In that NOID the AAO also notified the applicant that his appeal statement alone without independent and objective evidence from credible sources was insufficient to overcome the evidence of record.

In the applicant's response to the NOID from the AAO, the applicant submitted a letter stating that his friend, [REDACTED], filled out the application, however, he (the applicant) did not have time to verify the information on his biographic data form before submitting it for filing because he was rushed to submit the application on the last day for submission.

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

To be eligible for adjustment to permanent resident status under the LIFE Act, however, the applicant must also establish his continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, and his continuous physical presence in the United States from November 6, 1986 through May 4, 1988. The pertinent statutory provisions read as follows:

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.

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

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).

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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; declare whether the information was taken from company records; and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in one of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“CSS”), *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“LULAC”), or *Zambrano v. INS*, vacated sub nom. *Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993) (“Zambrano”). *See* section 1104(b) of the LIFE Act and 8 C.F.R. § 245a.10.

The regulations provide an illustrative list of documents that an applicant may submit to establish that he or she filed a written claim for class membership before October 1, 2000. Those regulations also permit the submission of “[a]ny other relevant document(s).” *See* 8 C.F.R. § 245a.14.

“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.

The director's determination that the applicant had exceeded the forty-five (45) day limit for a single absence from the United States was based on the applicant's own statement on November 22, 2006, at an interview with an officer of Citizenship and Immigration Services (CIS). In his statement, the applicant indicated that he had been absent from the United States from April 1987 to November 1989. It is also noted that the applicant indicated his Form I-687, and on the *Form for Determination of Class Membership in CSS v. Thornburgh (Meese)*, that he had been absent from the United States from April 1987 to November 1989. Based on the record, by his own testimony, and information provided in his application, the applicant had been outside the United States for over 45 days for a single absence, and over a 180 days aggregate for all absences, beyond the period of time allowed by regulation.

The record, as constituted, does not overcome the evidence pointing to applicant's prolonged absence (over 45 days for a single absence, and over a 180 days aggregate for all absences) beyond the period of time allowed by regulation. The applicant's statement on appeal is insufficient to overcome the evidence of record. As noted above, on appeal, the applicant stated that at the interview he was nervous and he is not good in conversational English, that he did not understand the question asked regarding his absence from the United States during the requisite period, and, that he did not mean to say that he had been absent from the United States from April 1987 to November 1989. Rather, he meant to say that he had twice departed the United States, in 1987 for one (1) month, and in 1989 for one (1) month. However, he did not provide an explanation for his statement on his application, Form I-687, and on his *Form for Determination of Class Membership in CSS v. Thornburgh (Meese)*, that he had been absent from the United States from April 1987 to November 1989. Neither does the applicant provide a satisfactory explanation in his response to the NOID from the AAO. As noted above, the applicant states only that he neglected to verify the information on the biographic data form because he was in a rush to submit his application.

It is also noted that the applicant has not established that his prolonged departure was due to *emergent reasons*, or that his return to the United States could not be accomplished within the time period allowed. No such information has been provided.

These discrepancies cast doubt on the applicant's statement that at the November 22, 2006 interview he did not understand the question asked regarding his absence from the United States during the requisite period because he was nervous and he was not good at conversational English. This in turn casts doubt on the applicant's claim that he had 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).

Such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States 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, he is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act. 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.