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U.S. Citizenship
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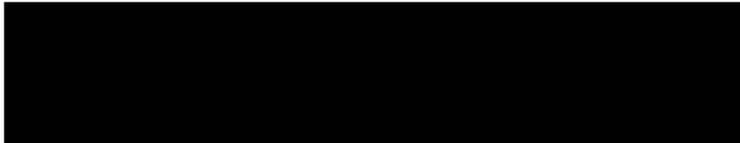
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FILE: [REDACTED] Office: NEW YORK Date: OCT 30 2008
MSC 02 016 60661

IN RE: Applicant: [REDACTED]

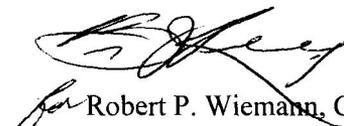
APPLICATION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by Life Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

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 Director, New York, New York, 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, the applicant argues that the director has arbitrarily ignored the evidence that has been submitted in support of his claim and that the documents submitted were sufficient to establish his claim of residence during the requisite period. The applicant asserts that it is not possible to substantiate an entry which was without inspection.

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 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.

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 notarized affidavit from [REDACTED] of Bronx, New York, who attested to the applicant's residences in Astoria, New York from December 1980 to November 1987 at [REDACTED] and since February 1988 at [REDACTED]
- A notarized affidavit from [REDACTED] of Bronx, New York, who indicated when the applicant "came to the United States of America he came to my home at [REDACTED] Astoria, NY 11103." The affiant asserted that the applicant resided with him for almost six years and that the applicant worked at Brass Rail Restaurant.
- A notarized affidavit from [REDACTED] of Bronx, New York, who indicated that he met the applicant in 1981 at the Times Square subway and he has remained friends with the applicant since that time. The affiant attested to the applicant's residence and employment at [REDACTED] Astoria, NY 11103 and at Brass Rail Restaurant, respectively.
- A letter dated March 13, 1992 from [REDACTED], president of the committee of New York City Awami League, who indicated that the applicant has been a member since February 22, 1982. It is noted that the letter was notarized prior to the date it was written.
- A letter dated October 31, 1986 from [REDACTED] managing director of The Brass Rail Seafood and Steak House in New York, New York. The letter indicated that the applicant was employed as a dishwasher from April 1980 to November 15, 1987.
- A letter dated March 5, 1992 from [REDACTED], secretary of Jhanker Sangskritic Protisthan in Astoria, New York, who indicated that the applicant was a member of its organization and had previously resided with him. It is noted that the letter was notarized prior to the date it was written.
- A letter dated March 4, 1992, from [REDACTED] of Jamaica Muslim Center, Inc., in Queens, New York, who indicated that the applicant has been a resident of the United States since March 1980 and has been a member of its organization and the New York City Islamic Counsel of America, Inc. It is noted that the letter was notarized prior to the date it was written.
- A photocopy of an airline ticket from Trans World Airlines (TWA) issued on November 6, 1987, from Bengal Travel Service in New York City. The ticket listed a travel date of November 15th from New York.
- A notarized affidavit from [REDACTED] of Flushing, New York, who attested to the applicant's residence at [REDACTED], Astoria, New York from December 1980 to November 1987. The affiant asserted that he resided in the same apartment building and he and the applicant used to visit each other.

The applicant also provided an affidavit from [REDACTED]; however, the affidavit has no probative value as the affiant failed to list the date he met the applicant.

On October 17, 2006, the director issued a Notice of Intent to Deny, which advised the applicant that: 1) he had failed to submit evidence of a valid entry into Mexico and evidence of his entry into California in March 1980; 2) the affidavit from [REDACTED] appeared to be neither credible nor amenable to verification as no evidence was submitted demonstrating that the affiant had direct personal knowledge of the events

testified in his affidavit; 3) the letters from [REDACTED] and [REDACTED] failed to specify the period of the applicant's membership; 4) the letter from [REDACTED] only served to establish the applicant's membership since February 22, 1982; 5) the letters from [REDACTED] and [REDACTED] do not establish that the applicant was in the United States on January 1, 1982; 6) because the affidavit from [REDACTED] was dated October 31, 1986, it did not seem plausible that it predicted the applicant's employment would terminate a year later on November 15, 1987; 6) a review of the New York public records was conducted by Citizenship and Immigration Services (CIS); however, no information was found for The Brass Rail Seafood and Steak House; 7) because [REDACTED] did not include identification and proof of his position at the respective entity during the requisite period, he failed to carry the burden of proof to establish the applicant's employment claim; 8) The remaining affidavits were vague and recited recollection of unverifiable events; and 9) the issue date on the TWA airline ticket appeared to have been altered and the ticket was not endorsed by the airline establishing that the applicant had flown on the scheduled flight on November 15, 1987.

The applicant was granted 30 days in which to submit a response to the notice. However, no response was submitted prior to the issuance of the director's Notice of Decision dated March 20, 2007.

On appeal, the applicant asserts that he mailed a response to the Notice of Intent to Deny. A thorough review of the record, however, does not support the applicant's assertion. The applicant has neither provided a copy of his response nor evidence that a response was received at the New York Office.

Regarding [REDACTED]'s affidavit, the applicant asserts, "I wonder how an affiant can prove direct personal knowledge of events and circumstances of residency." The applicant asserts that the airline ticket is genuine and suspecting its authenticity is just a biased presumption. Regarding the remaining affidavits, the applicant asserts, in pertinent part:

The affidavits are considered secondary evidence to demonstrate eligibility for the benefit sought. In the absence of any sample of a credible/standard type of affidavit made available to the applicants, I submitted the affidavits from the affiants who know me intimately. On oath they executed the affidavit about my stay in the United States furnishing as much information as possible. All affidavits I submitted are bonafide and genuine.

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 issued by the applicant have been considered. However, the AAO does not view the documents discussed above as substantive enough to support a finding that the applicant entered the United States prior to January 1, 1982, and resided since that date through May 4, 1988. Specifically:

[REDACTED] in his affidavit, failed to specify the exact period of time the applicant resided with him. [REDACTED], and [REDACTED] attested to the applicant's residence in the United States, but

provided no details regarding the nature of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence. The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period seriously detracts from the credibility of his claim.

As inconsistencies have been addressed, it is reasonable to expect an explanation from the affiants in order to resolve the discrepancies. However, neither [REDACTED] nor [REDACTED] has provided a statement to resolve the questionable affidavits. As such, the affidavits have little probative value or evidentiary weight.

The discrepancies outlined by the director regarding the employment letter from [REDACTED] have not been addressed. In addition, the employment affidavit from [REDACTED] failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Under the same regulation, the affiant also failed to 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.

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 provided by the applicant, 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.

The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

"Continuous residence" is defined in the regulations at 8 C.F.R. § 245a.15(c)(1), as follows:

Continuous residence. 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. [Emphasis added.]

The applicant indicated on his Form for Determination of Class Membership that he departed the United States on November 15, 1987 because his mother was sick and returned on December 31, 1987. Along with his Form I-485 application, the applicant submitted a declaration, indicating that he departed the United States on November 15, 1987 to visit his family in Bangladesh. The applicant indicated that he reentered the United States on December 31, 1987.

The applicant's absence exceeded the 45-day limit for a single absence during the requisite period.

However, an absence of more than 45 days must be "due to emergent reasons" significant enough that the applicant's return "could not be accomplished." In other words, the reasons must be unexpected at the time of departure from the United States and of sufficient magnitude that they made the applicant's return to the United States more than inconvenient, but virtually impossible. That was not the applicant's situation in this case. The applicant's continued stay in Bangladesh would appear to have been a matter of personal choice, not a situation that was forced upon him by unexpected events. The applicant's extended absence from the United States – far beyond the 45 days allowed by 8 C.F.R. § 245a.15(c)(1) – was not "due to emergent reasons" outside of his control that prevented his from returning far sooner.

The applicant on two separate occasions has signed documentation which indicates he was outside of the United States for over 45 days during the requisite period. Accordingly, the applicant's 1987 departure from the United States exceeded the 45-day period allowable for a single absence and interrupted his "continuous residence" in the United States. The applicant has, therefore, failed to establish that he resided in the United States in an unlawful status continuously from before January 1, 1982 through May 4, 1988, as required by the statute, section 1104(c)(2)(B)(i) of the LIFE Act, and by the regulations, 8 C.F.R. §§ 245a.11(b) and 245a.15(c)(1). Accordingly, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.