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U.S. Citizenship and Immigration Services
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U.S. Citizenship
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[Redacted]

FILE: [Redacted]
MSC 02 068 62739

Office: NEW YORK, NEW YORK

Date: APR 10 2009

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:
[Redacted]

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 U.S. 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.

John F. Grissom
Acting 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. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to submit sufficient evidence to establish that he had resided continuously in the United States throughout the statutory period as required under section 1104(c)(2)(B) of the LIFE Act.

On appeal, the applicant asserted that the record did include sufficient evidence to establish that he had resided continuously in the United States in an unlawful status throughout the entire 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).

The regulation at 8 C.F.R. § 245a.15(c) provides, in relevant part, that 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.

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

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).

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).

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 U.S. Citizenship and Immigration Services (USCIS) regulations. *See id.* 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. *Id.* at 79-80. 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 or near September 23, 1990, 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 December 7, 2001, he filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The director issued a notice of intent to deny (NOID) in which she indicated that she intended to deny the application because the applicant had not established that he resided continuously in the United States during the statutory period.

The director indicated that [REDACTED], the person who prepared the Form I-687 and class membership application, was being investigated based on the suspicion that she assisted in preparing fraudulent class member applications. The director indicated that this investigation cast doubt on the credibility of the assertions that the applicant made in these proceedings and on all the evidence of record. These points in the NOID are withdrawn. Each application is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding in this instance consists of the material in the applicant's A-file. *See* 8 C.F.R. § 103.8(d). If the decision will be adverse to the applicant and is based on derogatory information considered by USCIS of which the applicant is not aware, he shall be advised of this and offered an opportunity to rebut the information and present evidence in his own behalf before the decision is rendered. *See* 8 C.F.R. § 103.2(b)(16)(i). The applicant's A-file does not contain evidence to support the finding that the instant application and the assertions made in these proceedings are fraudulent.

In the NOID, the director also indicated that the applicant has an obligation to provide documentary evidence of having made an entry into the United States prior to January 1, 1982. This point in the NOID is withdrawn. There is no statutory or regulatory requirement that a LIFE legalization applicant must, in all instances, submit documentary evidence of having made an entry prior to January 1, 1982.

The director indicated in the NOID that the applicant testified to having been outside the United States for 36 days during October/November 1987 to be with his sick mother in Peru, but that he had failed to submit evidence that his mother was ill during this period. The director indicated that because of this lack of evidence, she had concluded that the applicant's 36 day absence was not brief, casual and innocent, nor was it due to emergent reasons. The director indicated that this absence undermined the applicant's claim to continuous residence and continuous physical presence during the relevant periods. In the rebuttal, the applicant indicated through counsel that such an absence did not represent a break in his continuous residence and physical presence during the relevant periods, regardless of whether he submitted evidence that his mother was undergoing medical treatment at this time. He indicated that evidence of a single absence of up to 45 days during the relevant period, without more, would not break his continuous residence or

continuous physical presence during the statutory period. The AAO concurs. *See* 8 C.F.R. § 245a.15(c)(1). The director's point is withdrawn.

The director also stated in the NOID that the applicant's evidence is contradictory in that one document in the record indicates that he attended classes in the United States from September 14, 1987 through April 20, 1988, but elsewhere in the record he stated that he was absent from the United States from October 15, 1987 through November 20, 1987 to be with his sick mother in Peru. In the rebuttal, the applicant indicated through counsel that this is not an inconsistency in that students manage to leave classes to tend to family emergencies and then return to complete their studies on a regular basis. The AAO concurs. A certificate of satisfactory pursuit in the record indicates that the applicant completed at least 40 hours of a course which is in its entirety is a minimum of 60 hours within the Freeport Public Schools Adult Education Program. Thus, this point in the NOID is withdrawn.

The director also indicated that the only other evidence in the record is statements and affidavits. She indicated that those statements which the applicant submitted lacked credibility because, for example, they failed to include a photocopy of each affiant's identification card, they failed to include a telephone number at which the affiant might be reached, etc. In the rebuttal, the applicant did include statements and affidavits, which were lacking in detail, but that did include a copy of an identification card for each affiant and a telephone number for each affiant.

In the notice of decision, the director indicated that the applicant failed to provide a timely response to the NOID, and the director denied the application for the reasons set forth in the NOID.

The record establishes that the applicant did submit a timely reply to the NOID. The AAO will consider in this analysis all evidence submitted with the rebuttal and on appeal.

At issue in this proceeding is whether the applicant is able to establish that he resided continuously in the United States from some date prior to January 1, 1982 through May 4, 1988.

On March 24, 2009, the AAO provided the applicant with a notice of intent to dismiss which stated that the record includes the following adverse or inconsistent evidence regarding these points:

The applicant included in the record a statement signed by [REDACTED], which indicates that he worked at [REDACTED] Flushing, NY from December 1981 through July 1989. The statement is on what purports to be letterhead stationery. The heading on the stationery does not include a telephone number for this supermarket. In the body of the letter, the word supermarket is misspelled as "supermarked." At the LIFE legalization interview, when the applicant was asked to give the name of his supervisor at this supermarket at which he claimed to have worked for over seven years, he indicated that he could not remember his supervisor's name. Also in the record is a Form W-2, Wage and Tax Statement, for 1988. According to that document, during 1988, the applicant earned \$22,029

working at a dry cleaning business known as [REDACTED] in Elmont, NY.² In addition, the applicant's 1988 Form 1040, U.S. Income Tax Return, is in the record and it lists his gross income for the year at line 7 as \$22,029.

The applicant stated on the Form I-687 at item 36, where he was to list his places of employment in the United States since entry, that he worked at [REDACTED] from December 1981 through July 1989; and that he worked as a self-employed carpenter from September 1989 through the date that he signed that document in September 1990. He indicated that he had had no other jobs since entering the United States.

On the Form I-687 at item 33 the applicant stated that from February 1987 through September 1989 he resided at [REDACTED] and from September 1989 through the date that he signed that form in September 1990 he resided at [REDACTED] Philadelphia, Pennsylvania. Also in the record is the Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents. On that form he stated that from 1988 through 1996 he resided at [REDACTED]; and he resided at [REDACTED] from 1996 through the date that he submitted that form on May 30, 2000.

The applicant included in the record a statement signed by his preparer, [REDACTED] which indicates that he resided at her home at [REDACTED] Philadelphia, Pennsylvania from September 1989 through the date that she signed that statement on November 30, 1990. The applicant also submitted a statement that he wrote which indicates that he worked as a carpenter in Philadelphia from September 1989 through the date that he signed that document on August 30, 1990. On the Form EOIR-42B, he stated at part 5, item 40 that he had been employed at [REDACTED] Greenvale, NY from 1989 through the date that he submitted that form, [May 30, 2000.]

Also in the record is the statement of [REDACTED] Greenvale, NY, which indicates that the applicant worked for [REDACTED] at this address in Greenvale, NY from 1988 through the date that this statement was signed on April 1, 2004. The statement is on what purports to be letterhead stationery. In the heading of this stationery, [REDACTED] is misspelled as "[REDACTED]".

The applicant also submitted the statement of [REDACTED] dated April 10, 2004 which indicates that [REDACTED] has personal knowledge that since 1982 the applicant has regularly

² The full name of this dry cleaning company is not legible on the Form W-2 in the record. The company name on the form appears to begin with one or two letters that are not legible followed by the letter "F". After this the company name on the Form W-2 reads: [REDACTED]. A search conducted using the Internet led to a dry cleaning business named [REDACTED] which currently operates at this same address. See [http://www.merchantcircle.com/business/\[REDACTED\]](http://www.merchantcircle.com/business/[REDACTED]) (accessed April 8, 2009).

attended the 11:30 a.m. Spanish Sunday Mass in Our Lady's Chapel which is located in St. Brigid-Our Lady of Hope Regional Catholic School in Westbury, New York, where [REDACTED] has attended since 1970 and where she currently serves as the treasurer of the Spanish Counsel of St. Brigid. According to maps available online at mapquest.com, St. Brigid's Catholic School, Westbury, New York is approximately 124 miles away from the address in Philadelphia where the applicant claimed to have lived from September 1989 through at least November 1990.

In the record is also the statement of [REDACTED], Guidance Counselor within Freeport Public Schools dated October 26, 1987. In her statement, [REDACTED] indicated that the applicant attended an Adult Continuing Education Program in Freeport, NY from September 14, 1987 through April 20, 1988. The credibility of this document is undermined by the fact that the letter is dated approximately six months prior to April 20, 1988.

Thus, there are contradictions in the record regarding where the applicant was employed during the statutory period and where he resided during the relevant period. For example, on the Form I-687, the applicant stated that from December 1981 through July 1989 he worked at [REDACTED] in Flushing, NY. He submitted an employer statement from [REDACTED] meant to corroborate this period of employment. Yet, the 1988 Form W-2 in the record establishes that he worked at [REDACTED] in Elmont, NY during 1988, earning a gross salary of \$22,029. The 1988 Form 1040 in the record establishes that all his earnings during 1988 came from his employment at [REDACTED]. On the Form I-687, he stated that from February 1987 through September 1989, he resided at [REDACTED], Freeport, NY, and that after this he resided in Philadelphia for at least one year. Yet, on the Form EOIR-42B, the applicant stated that from 1988 through 1996 he resided at [REDACTED] Hicksville, NY.

The AAO pointed out in the notice of intent to dismiss that these discrepancies cast doubt on the authenticity of all the evidence of record, including the applicant's claim that he 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).

As stated in the notice of intent to dismiss, 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 AAO noted that the record does contain a copy of the identity pages of the applicant's passport issued in New York during 1987 and of a March 25, 1988 telephone bill issued to the applicant at an address in Elmont, NY which is different from the Freeport, NY address which he stated on the Form I-687 was his address throughout 1988. However, this evidence dated at the end of the statutory period

is not sufficient to overcome the various inconsistencies in the record relating to the applicant's claim that he resided in the United States throughout the statutory period.

The AAO also stated that the various statements and affidavits currently in the record which attempt to substantiate the applicant's residence and employment in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period. This office also noted that the affidavits and statements in the record lack detail relating to the applicant's claim of continuous residence. The AAO determined that these statements and affidavits are not probative.

The AAO found that the applicant 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. The AAO provided the applicant with fifteen days to provide evidence that might overcome these findings.

The AAO stated that the applicant must offer independent, objective evidence from credible sources which thoroughly address and rebut the discrepancies described above or this office would dismiss the appeal.

In response to the notice of intent to dismiss the applicant failed to provide any independent, objective evidence to support his claim that he resided continuously in the United States during the statutory period. The applicant submitted only a statement in which he asserted that he did reside continuously in the United States during the relevant period and in which he attempted to provide explanations for the various discrepancies listed in the notice of intent to dismiss.

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. The appeal is dismissed on this basis.

Finally, the AAO notes that the record shows that the applicant requested to be placed in removal proceedings that he might file the Form EOIR-42B. On May 30, 2000, the Executive Office of Immigration Review (EOIR) granted this request. On November 7, 2003, based on his pending LIFE legalization claim, the Immigration Judge (IJ) administratively closed the applicant's removal proceedings, again at his request. The IJ rendered no decision on his request for cancellation of removal, nor did he issue a removal order or other order in that matter.

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