

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

L2

FILE:

MSC 01 292 60584

Office: NEW YORK, NEW YORK

Date: FEB 09 2009

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

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

The director denied the application on December 20, 2007 because she found that the evidence in the record failed to demonstrate that it was more likely than not that the applicant resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

On appeal, the applicant indicated that the evidence does demonstrate that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988, and that he is otherwise qualified to adjust to lawful permanent resident status under the LIFE Act.

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 depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

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).

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

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.

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. Here, the applicant has not met that burden.

On or near November 27, 1989, 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 July 19, 2001, he filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The record contains the following statements relating to the applicant’s claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988:

- 1) A copy of the statement of [REDACTED] on what purports to be Masjid Malcolm Shabazz letterhead stationery dated February 6, 1990.² The statement indicates that [REDACTED] works in the “Public Information” department of the Masjid Malcolm Shabazz organization. The statement also indicates that the applicant is a “member of the Muslim community and he has been here since September of 1981.” It states that the applicant attends “Friday, Juman Prayer Service and other Prayer Services here at the Masjid Malcolm Shabazz.” There is no indication in the statement that [REDACTED] is aware of whether or not the applicant was ever away from the Masjid

² The original statement is not in the record.

Malcolm Shabazz for over forty-five days in a single absence during the statutory period.

- 2) A copy of the statement of the Manager of the Hotel Bryant in New York City dated February 6, 1990. The name of the manager is not included in the letter and the manager's signature is not legible. The statement is written on what purports to be Hotel Bryant letterhead stationery. The statement indicates that the applicant lived at the Hotel Bryant in New York City from September 1981 through April 1988. There is no indication in the statement that the manager is aware of whether or not the applicant was ever away from the hotel for over forty-five days in a single absence during the statutory period.
- 3) A copy of the Form I-687 which the applicant signed under penalty of perjury on November 27, 1989 which states at item 35 that the applicant exited the United States on only one occasion since his 1981 entry through the date that he signed that form. The form states that his only absence occurred when he exited the United States on April 4, 1988 and returned on May 7, 1988.
- 4) A copy of the applicant's national identity card bearing his photograph, a fingerprint of his left index finger and his signature issued in Dakar, Senegal on November 14, 1983.
- 5) A copy of the applicant's passport issued in Dakar, Senegal on October 19, 1988 which demonstrates that the applicant was issued a B2 visa at the U.S. Consulate in Dakar on October 21, 1988, and that he entered the United States at New York City on November 5, 1988 as a B2 visitor for pleasure.
- 6) The statement of [REDACTED] of Bronx, New York dated June 28, 2001 which indicates that [REDACTED] has personal knowledge of the applicant's addresses in the United States throughout the statutory period. The statement indicates that [REDACTED] met the applicant when he became interested in driving a taxi, but it does indicate when they met or how frequently they saw each other during the statutory period.
- 7) The statement of [REDACTED] of Bronx, New York dated June 28, 2001 which indicates that [REDACTED] has personal knowledge of the applicant's addresses in the United States throughout the statutory period. The statement indicates that [REDACTED] and the applicant are friends and co-workers, but it does indicate when they met or how frequently they saw each other during the statutory period.
- 8) The statement of [REDACTED] Trading Company, Inc. of New York City dated February 5, 1990 which indicates that the applicant has

been a customer at [REDACTED] store since 1981. It does not indicate how often [REDACTED] and the applicant saw each other during the statutory period.

- 9) The affidavit of [REDACTED] of Bronx, New York dated February 14, 1990 which attests that the affiant has personal knowledge of the applicant's addresses throughout the statutory period. The affidavit does not state how often the affiant and the applicant saw each other during the statutory period.
- 10) The affidavit of [REDACTED] of Bronx, New York dated February 14, 1990 which attests that the affiant has personal knowledge of the applicant's addresses throughout the statutory period. The affidavit does not state how often the affiant and the applicant saw each other during the statutory period.
- 11) The statement of [REDACTED] of Bronx, New York dated October 3, 2007 which indicates that [REDACTED] met the applicant in 1981 in New York and that he knows that the applicant was physically present in the United States from November 6, 1986 through May 4, 1988. The statement does not give any indication as to how often [REDACTED] and the applicant saw each other during the statutory period. This statement was submitted with the rebuttal and includes a photocopy of [REDACTED]'s New York Driver's License issued in 2005.

The record also includes the Form I-690, Application for Waiver of Grounds of Inadmissibility, on which the applicant indicated that he is inadmissible for having obtained a U.S. visa "by lying so that [he] could return to [his] home in the U.S." The Form I-690 has not been adjudicated to date.

There is no contemporaneous evidence in the record relevant to the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988. The applicant did not submit any other affidavits or statements relevant to his claim that he was in the United States during the statutory period.

On September 15, 2007, the director issued a notice of intent to deny (NOID) in which she indicated that she intended to deny the application for reasons which include the following: the statements and affidavits submitted into the record are not sufficiently detailed and credible in that they do not include: any copies of identity documents of the individuals who wrote the statements, nor any documentary evidence that supports the claim that those who wrote the statements resided in the United States during the statutory period.

In the NOID, the director also indicated that she had determined that the Masjid Malcolm Shabazz and Hotel Bryant statements in the record are fraudulent. This point in the NOID is 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). Further, if the decision

will be adverse to the applicant and is based on derogatory information considered by USCIS of which the applicant is unaware, 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 specific information or evidence to support the finding that these statements are fraudulent, nor does it include evidence that the applicant was ever provided notice of any such derogatory information.

This office would also note that a LIFE legalization applicant does not have an obligation to provide documentary evidence of having made an entry into the United States prior to January 1, 1982. Any language in the NOID that indicates that the applicant must in all instances submit documentary evidence of such entry is withdrawn.

The rebuttal submitted in response to the NOID included the statement of [REDACTED] dated October 3, 2007. [REDACTED] also failed to provide any proof of having resided in the United States during the statutory period. In addition, his statement gave no indication that he had personal knowledge of the applicant's address in the United States during the statutory period or personal knowledge of the accuracy of the applicant's claim that he never exited the United States for more than 45 days in a single absence during the statutory period.

On December 20, 2007, the director denied the application based on the reasons set forth in the NOID. The director also indicated that the applicant provided inconsistent evidence regarding when he was present in the United States in that he stated on the Form I-687 that he entered the United States in September 1981 and had never exited through the date in 1989 that he signed the Form I-687, other than one brief absence from April 4, 1988 through May 7, 1988. However, the record indicates that the applicant had to have been in Dakar, Senegal during November 1983 in order to obtain his national identity card; that in October 1988 he had to have been in Dakar to receive his passport; that in October 1988 he was at the U.S. Consulate in Dakar to obtain a B2 visa to enter the United States; and that on November 5, 1988, he entered the United States as a B2 visitor at New York City. The director also pointed out that the statement of [REDACTED] submitted with the rebuttal, like all the other statements in the record, did not include any documentary evidence that [REDACTED] resided in the United States during the statutory period or evidence that he had personal knowledge of the applicant's residency in the United States such as copies of correspondence between the two, photographs of the two, etc. The director determined that without such supporting evidence the statements in the record were not probative. The director also stated that the inconsistencies in the record could only be overcome by independent, objective evidence, making reference to the Board's holding in *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

On appeal, the applicant asserted that the evidence in the record supports his claim that he resided continuously in the United States throughout statutory period. The applicant also indicated that he did not need to be present in Senegal to receive his national identity card and passport because the Senegalese government allowed his parents to retrieve these documents in Dakar during 1983 and 1988, respectively. The applicant indicated that he obtained a visa to enter the United States while visiting his family in Senegal during 1988.

The AAO finds that the applicant failed to address the point made by the director in the December 20, 2007 Notice of Decision that the U.S. Consulate in Dakar issued him a B2 visa in October 1988 which he used to enter the United States in November 1988; yet, on the Form I-687 he specified that his only absence from the United States, between 1981 and 1989, was from April 4, 1988 through May 7, 1988. Also, the applicant's national identity card issued in 1983 includes the fingerprint of the applicant's left index finger, his signature and his photograph. Thus, a preponderance of the evidence indicates that the applicant was also present in Senegal during 1983 for the production and/or receipt of this card.

These discrepancies cast serious doubt on all the evidence in the 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. 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 during the statutory period.

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).

This office finds that the various statements and affidavits in the record which were submitted to substantiate the applicant's claim of continuous residence in the United States during the statutory period are not objective, independent evidence such that they might overcome the deficiencies in the record regarding the applicant's claim that he maintained continuous residence in the United States from a date prior to January 1, 1982 and throughout the statutory period, and that these documents are not probative in this matter.

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.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Thus, beyond the decision of the director, the AAO would note that the applicant is not eligible for permanent resident status under the late legalization provisions of the LIFE Act because he is inadmissible under section 212(a)(6)(C)(i) of the Act.

According to the record in November 1988, when the applicant presented himself for entry into the United States, he misrepresented himself as a B2 nonimmigrant visitor for pleasure. In fact,

according to his own account, his intent upon returning was to continue residing unlawfully in the United States. Thus, in November 1988, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

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 is admissible to the United States. *See* 8 C.F.R. § 245a.12(e). The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c).

The applicant is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act for the reasons stated above, with each considered as an independent and alternative basis for denial.

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