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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 02 176 65377

Office: DALLAS

Date: FEB 24 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).

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

The director decided that the applicant had not established that he resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988.

On appeal, counsel put forth a brief disputing the director's findings. Counsel submits copies of documents that were previously provided in support of the appeal.

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).

"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 record contains a Form I-130, Petition for Alien Relative, signed by the applicant's spouse on September 22, 1984. The spouse indicated at item 20 that the applicant last arrived in the United States in March 1984 and his employment at [REDACTED] in Dallas, Texas commenced March 1984.

The record contains a Form OF-230, Application for Immigrant Visa and Alien Registration, filed by the applicant with the American Consulate in Mexico on June 11, 1985. The application indicates that the applicant resided in [REDACTED] San Luis Potosi, Mexico from 1982 to April 1984.

The record contains a memorandum dated June 18, 1985 from a representative of the American Consulate in Monterrey, Mexico. The memorandum reflects that the applicant indicated he was apprehended by the legacy Immigration and Naturalization Service in 1982 and he voluntarily departed the United States and stayed in [REDACTED] until April 1984. The applicant indicated that he reentered the United States in April 1984 and married his spouse on September 11, 1984. The applicant indicated that he has been employed under the alias [REDACTED] at [REDACTED] since 1984.

At the time of his LIFE interview on May 21, 2004, the applicant was placed under oath and admitted in a signed statement that he first arrived in the United States in 1979 or 1980; departed the United States in 1984 while waiting for a visa, but returned immediately; and departed the United States in 1987 and returned a month and a half later.

On April 20, 2006, the applicant was advised in writing of the director's intent to deny the application. In his notice of intent, the director indicated that, due to the applicant's absence in 1987, he had failed to establish continuous residence in the United States. The director also advised the applicant of his voluntary departure in 1982 and of his stay in Mexico until 1984.

Counsel, in response, asserted that the notice "did not specify which consulate did the investigation, nor does it identify with any specificity the evidence the consulate found to support its finding that [the applicant] lived in Mexico from 1982-1984." Counsel asserted that the notice failed to address the evidence presented by the applicant to prove his presence in the United States between 1982 -1984. Counsel asserted that obtaining evidence of the applicant's residence and presence in the United States from 15 to 20 years ago is extremely difficult. Counsel argued that the director did not point to any particular lack of credibility or inconsistency in the supporting documents provided by the applicant, but had instead chose to simply ignore all the evidence provided by the applicant. Regarding the applicant's 1987 absence, counsel asserted the regulation does not require that absences from the United States during the relevant time period be for an emergent reason.

The director, in denying the application, noted in pertinent part:

The Service did fail to specify the information obtained from the Monterrey Consulate, but the information was taken from the I-130 Petition signed by your wife on September 22, 1984 and your own application for a visa and interview that you had on June 11, 1985.

Based on the applicant's sworn statement, and the Forms I-130 and OP-230, the director determined it was more probable that the applicant had an absence from 1982 through March 1984 and an absence of approximately 45 days in 1987.

The AAO agrees with counsel that it is not necessary for the applicant to provide an *emergent reason* for physical presence as the regulation at 8 C.F.R. § 245a.16(b) does not require it. However, *if* the applicant's absence has exceeded 45 days, his absence will be examined utilizing the standard set forth in 8 C.F.R. § 245a.15(c)(1), and evidence would be required to make a determination whether his prolonged absence from the United States was due to an emergent reason.

In instant case, the applicant's absence from July 10, 1987 to August 20, 1987 is less than 45 days and, therefore, the director's findings that the applicant must establish an emergent reason for this absence will be withdrawn.

On appeal, counsel asserts that the applicant has provided verifiable evidence to establish his presence in the United States from 1982 to 1984. Regarding the employment from [REDACTED] counsel asserts that while the applicant did not maintain continuous employment at this company during 1982 to 1984, he was employed there from December 8, 1982 through June 21, 1983 and again on April 9, 1984. Counsel asserts, in pertinent part, “[a]lthough appellant stated on the I-130 petition that he worked for [REDACTED] in 1984, he did so assuming that he was being asked to provide his most recent date of hire which was April 9, 1984.” Counsel asserts that the affidavit from [REDACTED] verified that the applicant was employed under the alias [REDACTED] from September 9, 1982 through December 8, 1982.

Regarding the questions asked by the American Consulate in Monterrey, Mexico counsel asserts that the applicant does not remember claiming to have lived in Mexico from 1982 to 1984. Counsel states, in pertinent part:

Understandably, Appellant was nervous during that interview. His nervousness was exacerbated when the Consular Officer began yelling at Appellant and told him to leave the premises and to wait for a decision on his visa. While he acknowledges that his visa application form reflects the dates as stated by the Consular Officer, Appellant emphatically asserts that he resided and was employed in the United States during the years 1982-1984.

Counsel asserts that at the time of the LIFE interview, the applicant was never given the opportunity to clear up the error that is now a basis for the denial of his application. Counsel asserts that the director did not place any weight on the evidence submitted to support the applicant’s continuous residence in the United States during the requisite period. Counsel argues that the director has not pointed to any particular lack of credibility or inconsistency, but has instead chosen to simply ignore all secondary and primary evidence. Counsel argues that is no indication the director made any attempt to verify the information submitted.

Counsel cites a 1989 memorandum of the legacy Immigration and Naturalization Service (INS) entitled “Documentary Evidence for Legalization Applications (Form I-687),” which provided the following guidance on the evidentiary weight of affidavits in legalization applications under section 245A of the Immigration and Nationality Act (the Act) (enacted as part of the Immigration Reform and Control Act of 1986, or “IRCA”):

In those applications where the only documentation submitted is affidavits, if the affidavits are credible and verifiable, are sufficient to establish the facts at issue and there is no adverse information, the application shall be approved. If found insufficient or not credible, attempts to verify the authenticity of the information should be made ...

The statements issued by counsel have been considered and the AAO agrees that the 1989 INS memorandum provides valid guidance for adjudicating legalization applications under section 1104 of the LIFE Act. Applying that guidance in the instant case, however, the AAO does not view the

documents discussed above as substantive enough to establish with reasonable probability that the applicant was in the United States during the latter part of 1982 to March 1984 as he has presented inconsistent documents, which undermines his credibility. Specifically:

1. In an attempt to establish continuous unlawful residence from 1982 to April 1984 the applicant provided: a) an employment letter dated August 10, 1990, from [REDACTED] of [REDACTED], who attested to the employment of [REDACTED] from December 6, 1982 to June 21, 1983 and from April 9, 1984 to May 31, 1985; b) 1984 wage and tax statement addressed to [REDACTED] from [REDACTED]; c) an affidavit from [REDACTED] of [REDACTED], who attested to the employment of [REDACTED] from September 11, 1982 to December 8, 1982; and d) an affidavit from [REDACTED], who attested to the applicant's employment from January 5, 1981 to August 30, 1982.

The employment documents from [REDACTED] and [REDACTED] have no probative value or evidentiary weight as neither affiant indicated that the applicant and [REDACTED] are one and the same person. The wage and tax statement also has no probative value or evidentiary weight as the applicant provided no evidence from the entity indicating that he and [REDACTED] are one and the same person. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the employment documents failed to include the applicant's address at the time of employment as required under 8 C.F.R. § 245a.2(d)(3)(i). Likewise, 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 regulations, 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

2. The applicant submitted affidavits from [REDACTED] and [REDACTED] attesting to the applicant's residence in the United States since 1981 and 1982, respectively. However, none of the affiants state the applicant's place of residence during the requisite period, provide any details regarding the nature of their relationship with the applicant or the basis for their continuing awareness of the applicant's residence. The remaining affiants attested to the applicant's moral character, but made no attestation to the applicant's residence in the United States during the requisite period. 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.

3. The applicant indicated on his Form I-687 application, item 34, that he was affiliated with San Mateo in Arlington, Texas since February 1982. However, the letter dated June 25, 2004, from the representative of St. Matthew Catholic Church in Arlington, Texas indicates that the applicant has been a registered member since October 27, 2000.
4. The photographs submitted have no identifying evidence that could be extracted which would serve to either prove or imply that the photographs were taken in the United States and during the period in question.
5. Counsel asserts that at the time of the LIFE interview, the applicant was never given the opportunity to clear up the error that is now a basis for the denial of his application. Because the applicant, on his LIFE and Form I-687 applications, did not indicate that a Form I-130 had been filed on his behalf and he had filed a Form OP-230, the interviewing officer was not aware of the contradicting Forms I-130 and OP-230, and memorandum from the Consulate Office in Monterrey, Mexico. It is noted that on his Form I-687 application, the applicant indicated that he was not married¹ and on his Form G-325A that accompanied the LIFE application, the applicant did not list a date of marriage. The regulation at 8 C.F.R. § 245a.20(a)(2) requires the director to notify the applicant of his intent to deny the application when an adverse decision is proposed. The director did so in his notice of August 19, 2006.

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 period in question. 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 the requisite period.

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. However, in the instant case, that was not the situation. There is no evidence to indicate that an emergent reason delayed the applicant’s return to the United States within the 45-day period. The applicant’s prolonged absence would appear to have been a matter of personal choice, not a situation that was forced upon him by unexpected events.

Accordingly, the applicant’s 1982 to March 31, 1984 absence from the United States exceeded the 45-day period allowable for a single absence, as well as the 180-day aggregate total for all absences, 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,

¹ The marriage certificate obtained from the applicant’s prior A-file () indicates he was married on September 11, 1984, in Dallas, Texas.

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 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).

The record contains a Form G-56, General Call-in Letter, dated January 8 1987, which requested the applicant and his spouse to appear on February 9, 1987, to discuss the applicant's immigration status. According to the interviewing officer's notes, the spouse stated the same information the applicant told the Consulate Officer in Monterrey, Mexico. The spouse also stated that the applicant was still residing at [REDACTED] with his parents and has been there since his visa interview; that she goes to visit the applicant in Mexico approximately every six months; and that she and the applicant used to reside at [REDACTED] with her elder sister, but she had moved in with her mother and step-father since the applicant went to Mexico.²

The record reflects that the applicant did not claim on his Form I-687 application to have resided at [REDACTED] during the requisite period.

Section 101(a)(33) of the Act defines the term "residence" as "the place of general abode; the place of general abode of a person means his principal, actual dwelling place, in fact, without regard to intent." The applicant has provided no credible evidence that he maintained any "principal, actual dwelling place" in the United States from 1982 to March 31, 1984. Whether or not the applicant's departure from the United States to Mexico was voluntary, his actual dwelling place during the period in question was out of the United States intent notwithstanding.

These factors further undermine the credibility of the applicant's claim to have resided in the United States from 1982 to March 1984. 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 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.

² The record contains a copy of the final decree of divorce, which indicates the applicant and his spouse were divorced on May 13, 2003.