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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 03 100 60228

Office: NEW YORK, NEW YORK

Date: MAR 02 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.

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 17, 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 throughout the statutory period, 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).

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 October 3, 1991, 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 January 8, 2003, he filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The record includes 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, and that he is otherwise eligible to adjust, such as:

- 1) The statement of [REDACTED] which is written on what purports to be [REDACTED] letterhead stationery. However, the heading on the letter does not include a telephone number for this hotel which lists an address in New York City. Also, while the document has an original signature, the stationery heading has been photocopied. Further, the phrase [REDACTED] in the same large font as that seen in the heading of this stationery appears again toward the middle of the page, where it has been whited-out. The statement indicates that the applicant lived at the [REDACTED] from July 1981 through August 5, 1989. The year that the applicant is stated to have moved out of the hotel has been whited-out, and written in by hand, in this otherwise typed document, is the year 1989.
- 2) The applicant's sworn statement completed during the LIFE legalization interview in which the applicant attested: that he arrived in the United States prior to 1981; that he visited Senegal in 1987 for 45 days; that he left the United States in early December [1987] and returned in late January [1988]; and that he did not travel to Canada in 1988.
- 3) The Form I-687 which the applicant signed under penalty of perjury and on which the applicant specified at item 16 that he made an entry into the United States on July 20, 1981, and at item 35 that he visited Canada from April 4, 1988 through April 20, 1988. He also specified at item 35 that he made no other exits from the United States after the date he entered in 1981 through the date that he signed the Form I-687, October 3, 1991.
- 4) The Form for Determination of Class Membership in *CSS v. Thornburgh* (Meese) on which the applicant specified that he first entered the United States on July 20, 1981 and that he departed the United States on only one occasion subsequent to May 1, 1987. He stated that that departure occurred on April 4, 1988, and that he returned to the United States on April 20, 1988.

- 5) The statement of [REDACTED] in which [REDACTED] indicated that he drove from Bronx, New York to Toronto, Canada with the applicant on April 4, 1988, and that the two of them returned to the United States on April 20, 1988.

There is an envelope in the record which is postmarked May 5, 1987 and addressed to the applicant at an address in New York. There is no other contemporaneous evidence in the record relating to the applicant's claim that he resided continuously in the United States throughout the statutory period.²

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 applicant testified that he exited the United States for 45 days during December 1987 through January 1988 and that he made no other exit from the United States during 1988. However, on the Form I-687 the applicant stated that in 1988 he exited the United States from April 4, 1988 through April 20, 1988. Also, the statement of [REDACTED] indicates that [REDACTED] and the applicant visited Canada from April 4, 1988 through April 20, 1988. The director stated that these inconsistencies in the evidence in the record cast doubt on all the evidence of record. As her authority, the director cited *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988), in which the Board found that 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, that it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and that attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Also, the director stated that the statements 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

The applicant submitted another envelope into the record that is not postmarked. The AAO finds that this envelope has no probative value in this matter. The applicant also submitted evidence relating to a [REDACTED] who has the date of birth August 15, 1941, over 23 years earlier than the applicant's March 9, 1965 date of birth. The evidence submitted displays the A-number [REDACTED] for the individual named [REDACTED] born August 15, 1941. This office reviewed A-file [REDACTED]

This record includes a copy of a passport for a [REDACTED] born in 1941. This Senegalese passport bears a different number than the applicant's Senegalese passport: No. [REDACTED]. Also, this [REDACTED] has a different signature than the applicant in this matter. While there is no photo in A-file [REDACTED] the AAO finds that a preponderance of the evidence indicates that this [REDACTED] and the applicant are two different people. Thus, this office will not consider any evidence that relates to [REDACTED], date of birth August 15, 1941, as evidence which relates to the applicant. It is also noted that the applicant submitted a photocopy of a B1/B2 visa issued for [REDACTED] on October 21, 1986 at the U.S. Consulate in Bangui, Central African Republic. This same visa appears in A-file [REDACTED]. The photocopy in this other record makes clear that this is the visa for [REDACTED] born in 1941. The applicant also submitted a photocopy of a New York Interim License/Identification Card issued on September 8, 1987 for a [REDACTED] born on August 15, 1941. A copy of the New York State Record of Convictions issued in conjunction with the interim license/identity card on September 8, 1987 is also in the record.

wrote the statements resided in the United States during the statutory period. The director also pointed out that the [REDACTED] letter in the record seems to have been edited such that the date on the letter has been modified. The director noted other apparent deficiencies in this letter such as the fact that it is written on letterhead stationery that does not include a telephone number.

Thus, the director concluded that the applicant failed to submit credible evidence to support his claim of continuous residence in the United States during the statutory period.

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 applicant did not submit a reply to the NOID. The director denied the application based on the reasons set forth in the NOID.

On appeal, the applicant asserted that the evidence in the record supports his claim that he resided continuously in the United States throughout the statutory period. He also submitted additional evidence such as notes from a class membership interview for a different [REDACTED] having A-number: [REDACTED]. At that interview, [REDACTED] stated that he departed the United States during June 1986 and did not return until January 1987. The applicant also submitted a photocopy of a B-1/B-2 visa issued at the U.S. Consulate in Bangui, Central African Republic on October 21, 1986 to [REDACTED]. As noted earlier, this office finds that this evidence for the [REDACTED] having A-number [REDACTED] and date of birth August 15, 1941 does not relate to the applicant in this matter.

As indicated by the director, the applicant's sworn statement taken at the LIFE legalization interview indicated that the applicant exited the United States for 45 days during December 1987 through January 1988 and that he made no other exit from the United States during 1988. However, on the Form I-687 the applicant stated that in 1988 he exited the United States from April 4, 1988 through April 20, 1988. Also, the statement of [REDACTED] indicates that [REDACTED] and the applicant visited Canada from April 4, 1988 through April 20, 1988. The director stated that these inconsistencies cast doubt on all the evidence. The AAO concurs. The AAO also finds that the applicant's attempt to use evidence that relates to a different individual named [REDACTED], date of birth August 15, 1941, to support his claim of continuous residence in the United States cast further doubt on all the evidence.

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. As noted above, such inconsistencies 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. *See 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 relating to 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. Also, the one envelope postmarked in 1987 and addressed to the applicant in New York is not sufficient to overcome the deficiencies in the evidence and establish that the applicant resided 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. The appeal is dismissed on this basis.

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).

Beyond the decision of the director, the AAO notes that the record indicates the following arrest history for the applicant:

- 1) On June 17, 2000, the applicant was arrested and charged under New York Penal Code (NYPC) § 165.71 with trademark counterfeit in the third degree. On June 18, 2000, at the Criminal Court of the City of New York, County of New York, the applicant pled guilty to and was convicted of disorderly conduct, a violation, under NYPC § 240.20. The judge ordered him to serve two days of community service. The Docket Number for the case is [REDACTED]. The applicant used the name [REDACTED] and date of birth March 15, 1965 at the time of the arrest and conviction.³ The case was placed under seal subsequent to the conviction.
- 2) On July 13, 2001, the applicant was arrested and charged under NYPC § 165.71 with trademark counterfeit in the third degree, and under the New York Administrative Code § 20.453 with operating as a general vendor without the required license. On August 7, 2001, at the Criminal Court of the City of New York, County of New York, the applicant pled guilty to and was convicted of disorderly conduct, a violation, under NYPC § 240.20. The judge ordered him to serve two days of community service. The Docket

³ The AAO notes incidentally that the record indicates that the applicant is not literate. As such, the variations in name and date of birth in the record may be related to the applicant's inability to read and write.

Number for the case is [REDACTED] The applicant used the name [REDACTED] and date of birth March 15, 1965 at the time of the arrest and conviction. The case was placed under seal subsequent to the conviction.

- 3) On June 8, 2003, the applicant was arrested and charged under New York Administrative Code § 20.453 with operating as a general vendor without the required license. On June 9, 2003, at the Criminal Court of the City of New York, County of New York, the applicant pled guilty to and was convicted of disorderly conduct, a violation, under NYPC § 240.20. The docket number for the case is [REDACTED] The applicant used the name [REDACTED] and the date of birth September 30, 1965 at the time of the arrest and conviction. The case was placed under seal subsequent to the conviction.

The applicant has been convicted of a violation under NYPC § 240.20 on three occasions. An alien who has been convicted of a felony or of three or more misdemeanors committed in the United States is not eligible to adjust to lawful permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.18(a)(1). A misdemeanor includes any offense which is punishable by imprisonment of a term of one year or less, except that it shall not include offenses for which the maximum sentence is five days or less. *See* 8 C.F.R. § 245a.1(o). A conviction of a violation under NYPC § 240.20 is an offense that may lead to a term of imprisonment of up to 15 days. *See* NYPC § 70.15(4)(noting that, unless the sentence is specified in the law which defines the offense, the term of imprisonment for a violation shall not exceed 15 days). Thus, the AAO finds that these three convictions for disorderly conduct constitute 3 misdemeanors under the Act.

The applicant has been convicted of three misdemeanors in the United States. Thus, the applicant is not eligible to adjust to lawful permanent resident status under the LIFE Act. *See* 8 C.F.R. § 245a.18(a)(1). The appeal is also dismissed on this basis.

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.