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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

L-2

FILE:

MSC-03-123-60392

Office: NEW YORK

Date:

MAY 04 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 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.

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

The director denied the application, finding that the applicant had not established by a preponderance of the evidence that he entered the United States before January 1, 1982, and resided in a continuous unlawful status through May 4, 1988.

On appeal, the applicant asserts that he has established his unlawful residence for the requisite time period. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

An applicant for permanent resident status under section 1104 of the LIFE Act must establish that he or she entered the United States before January 1, 1982, and resided in continuous unlawful status since that date through May 4, 1988. See LIFE Act § 1104(c)(2)(B) and 8 C.F.R. § 245(a).11(b).

An applicant shall be regarded as having resided continuously in the United States if no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceed one hundred and eighty (180) days between January 1, 1982, and May 4, 1988, unless the applicant can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.15(c)(1).

The application must also be accompanied by evidence establishing an applicant's continuous physical presence in the United States from November 6, 1986, through May 4, 1988. 8 C.F.R. § 245a.16(a). For purposes of this section, an applicant shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States. Brief, casual and innocent absences means temporary, occasional trips abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States. 8 C.F.R. § 245a.16(b).

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

¹ 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 long been recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

the evidence, to determine whether the fact to be proven is probably true. *See* 8 C.F.R. § 245a.2(d)(6).

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 or petitioner 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 or petition.

On August 4, 1990, the applicant filed a Form I-687, Application for Status as a Temporary Resident, to establish class membership in a legalization class-action lawsuit.

On January 31, 2003, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.²

The director issued a notice of intent to deny (NOID) the application, in which she stated that, due to the applicant's statement that he was absent from the United States from January 1987 until December 1988, he had failed to establish continuous residence and continuous physical presence in the United States. The record reflects that the NOID was mailed to the applicant at his address of record.

The applicant did not submit a response to the NOID.

In the notice of decision, the director stated that the applicant failed to provide a response to the NOID, and the director denied the application based on the reasons set forth in the NOID.

On appeal, the applicant states that he did not receive the NOID. The evidence of record does not reflect that the NOID was returned by the postal service.

The applicant has not submitted any additional evidence on appeal.

The AAO finds that the director issued the NOID as required, and declines to reissue the NOID.

The issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered the United States before January 1, 1982, and that he continuously resided in the United States in an unlawful status since that date and through May 4, 1988. In addition, the applicant must furnish sufficient credible evidence to demonstrate his continuous physical presence in the United States from November 6, 1986, through May 4, 1988. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of his own applications, statements, and a copy of passport number [REDACTED] issued by The Gambia. The AAO has

² The applicant also filed a Form I-690, Application for Waiver of Grounds of Excludability, based upon his absences from the United States. However, there is no waiver available for failure to maintain continuous residence.

reviewed each document in its entirety to determine the applicant's eligibility. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

Regarding the applications and statements of the applicant, on his Form I-687 the applicant listed absences from the United States between July 1985 and December 1988 which appear to be in excess of 180 days. A copy of the United States Citizenship and Immigration Services (USCIS) adjudicating officer's notes from the applicant's first legalization interview indicate that the applicant stated that he departed the United States in May 1984, obtained a passport in 1985, obtained a visa, and re-entered the United States with the visa on September 24, 1985. The USCIS officer's notes indicate that this absence would constitute a break in any claim by the applicant of continuous residence in the United States during the requisite period. On May 4, 2004, in support of the instant application, the applicant completed a sworn statement that he was absent from the United States from January 1987 until December 1988. In addition, in support of the instant application, the applicant filed a Form G-325A, biographic information sheet, which requests applicants to list their last address outside the United States of more than one year. On the Form G-325A, the applicant stated that he resided in Banjul, Gambia from November 1986 until December 1988. Although there are discrepancies among the applicant's statements regarding his periods of absence from the United States during the requisite period, each of the applicant's statements supports the decision of the director to deny applicant's claim for failure to establish continuous residence and continuance physical presence during the requisite period.

In addition, the record contains a photocopy of many pages of the applicant's Gambia passport number [REDACTED]. These pages document two absences of the applicant from the United States, each in excess of 45 days, during the requisite period. Firstly, the applicant was absent from the United States for some time prior to April 30, 1985 until September 24, 1985, an absence of at least 147 days.³ During this absence, passport number [REDACTED] was issued in Gambia and the applicant obtained a nonimmigrant visitor's visa in Gambia. Secondly, the applicant was absent from the United States from May 7, 1987 until July 15, 1987, an absence of 69 days.⁴ Furthermore, the aggregate of these absences exceeded 180 days.

The applicant's passport pages support the finding of the director that the applicant has failed to maintain continuous residence and continuous physical presence in the United States during the requisite period. The evidence confirms that on at least two occasions, the applicant's absence from the United States exceeded forty-five (45) days during the requisite period. Furthermore, the evidence confirms that the aggregate of these absences exceeded 180 days during the requisite period. Nor has the applicant offered any evidence to establish that due to emergent reasons his return to the United States could not be accomplished within the time period allowed. 8 C.F.R. § 245a.15(c)(1). In addition, the evidence confirms that the applicant failed to establish continuous physical presence in the United States during the requisite period. 8 C.F.R. § 245a.16(a).

³ The applicant's passport number [REDACTED] was issued in Gambia on April 30, 1985. However, it cannot be determined for how long the applicant was in Gambia prior to the passport's issuance.

⁴ The applicant had obtained another nonimmigrant visitor's visa in February 1987 on a separate trip to Gambia of unknown duration.

The applicant has failed to establish that he continuously resided in the United States from January 1, 1982 through May 4, 1988. He has also failed to establish that he was continuously physically present in the United States during the period of November 6, 1986 through May 4, 1988. Therefore, he is ineligible for adjustment to permanent residence under section 1104 of the LIFE Act.

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