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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
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[Redacted]

FILE:

[Redacted]

Office: NEW YORK

Date: MAY 05 2009

[Redacted] consolidated herein]
[Redacted] consolidated herein]

MSC 02 061 62392

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. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

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

The director denied the application on the ground that the applicant failed to establish that he had entered the United States before January 1, 1982, and had resided continuously in the United States from then through May 4, 1988. The director specifically noted that the applicant had been absent from the United States on two occasions for more than 45 days, and had failed to establish that due to emergent reasons, his return to the United States could not be accomplished within the time period allowed.

On appeal, the applicant submits a brief and additional documentation.

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – 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. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien 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 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. Although the term “emergent reason” is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) holds that *emergent* means “coming unexpectedly into being.”

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 its amenability to verification. *See* 8 C.F.R. § 245a.12(e).

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 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 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 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.

The applicant filed a Form I-485, Application to Register Permanent Resident Status or Adjust Status, under the LIFE Act on November 30, 2001. On October 17, 2005, the director denied the application. The applicant, through counsel, filed a timely appeal from that decision on November 17, 2005.

The issue in this proceeding is whether the applicant has established that he continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988, and whether his absences from the United States were due to emergent reasons for which his return to the United States could not be accomplished within the time period allowed.

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 record reflects, in pertinent part, the following:

- The applicant lawfully entered the United States as a nonimmigrant exchange visitor (J-1) on September 3, 1981, with authorization to remain until August 14, 1982.
- The applicant was absent from the United States from June to September 1982; May 17, 1983 to September 3, 1983; December 1984 to January 1985; and December 1985 to January 1986.
- The applicant lawfully entered the United States as a nonimmigrant student (F-1) in 1982; on September 3, 1983; January 8, 1985; and January 19, 1986.

On July 8, 2005, the director issued a Notice of Intent to Deny (NOID) the application noting that the applicant's absence from June 1982 to September 1982 indicated an absence of at least 64 days and that his absence from May 1983 to September 1983 indicated an absence of at least 95 days. The applicant was afforded 30 days in which to provide a response to the NOID.

On August 5, 2005, the applicant responded to the NOID, stating that he had suffered a head injury from a motorcycle accident in India in 1979 and that he had returned to India in 1982 to undergo an EEG (Electro-Encephala Graph) to monitor activity in his brain, and that the tests took longer than expected due to travel difficulties. The applicant also stated that his absence in 1983 was due to reconstructive surgery on his nose due to severe nose-bleeding and that this delayed his schedule for dental work while in India thereby delaying his return to the United States.

As previously indicated, the director denied the application for the reasons stated in the NOID. The director specifically noted that since the applicant's initial injury had occurred in 1979, he had failed to establish that his extended absences from the United States for the purpose of an EEG in 1982, and an operation for a deviated septum in 1983, were due to emergent reasons that delayed his return to the United States within 45 days.

On appeal, counsel asserts that the applicant could not afford medical treatment in the United States and therefore had to return to India to obtain the treatment he needed. Counsel asserts that the applicant would have returned promptly to the United States within the 45 days allowed in order to continue his studies but for the fact that his doctors asked him to remain in India. Counsel's assertions are not persuasive.

The regulation at 8 C.F.R. § 245a.12(e) provides that "[a]n alien applying for adjustment of status under [section 1104 of the LIFE Act] has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods." Preponderance of the evidence is defined as "evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* 1064 (5th ed. 1979). *See Matter of Lemhammad*, 20 I&N Dec. 316, 320, Note 5 (BIA 1991).

The applicant has not established that his return to the United States could not be accomplished with the 45-day time period allowed. Accordingly, in the absence of evidence that the applicant intended to return within 45 days, it cannot be concluded that an emergent reason "which came suddenly into being" delayed or prevented the applicant's return to the United States beyond the 45-day period.

It is concluded that the applicant has failed to establish, by a preponderance of the evidence, that he entered the United States before January 1, 1982, and maintained **continuous unlawful residence** since such date through May 4, 1988, as required for eligibility for adjustment of status to permanent resident status under section 1104(c)(2)(B)(i) of the LIFE Act and 8 C.F.R.

§ 245a.11(b). Thus, he is ineligible for permanent resident status under section 1104 of the LIFE Act.

As always in these proceedings, the burden of proof rests solely with the applicant. Section 245a.2(d)(5) of the Act.

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