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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Immigration Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
MSC-02 233 61135

Office: BOSTON

Date: MAY 06 2009

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:

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 in Boston, Massachusetts. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for lack of prosecution because the applicant failed to appear on four separate occasions for his LIFE legalization interview.

On appeal counsel asserts that the director's decision to deny the application for lack of prosecution is erroneous because the applicant had valid reasons why he did not appear for his LIFE interviews, one of which was for a valid medical reason.

To be eligible for adjustment to permanent resident status under the LIFE Act applicants must establish their continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as their continuous physical presence in the United States from November 6, 1986 through May 4, 1988. See section 1104(c)(2)(B)(i) and (C)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A) and (3)(A).

"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." (Emphases added.)

"Continuous physical presence" is described in section 1104(c)(2)(C)(i)(I) of the LIFE Act, 8 U.S.C. § 245A(a)(3)(B), and 8 C.F.R. § 245a.16(b), in the following terms: "An alien 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." (Emphasis added.) The regulation further explains that "[b]rief, casual, and innocent absence(s) as used in this paragraph 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." (Emphasis added.) 8 C.F.R. § 245a.16(b).

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.

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 regulation at 8 C.F.R. § 245a.2(d)(3)(i) states that letters from employers attesting to an applicant’s employment must: provide the applicant’s address at the time of employment; identify the exact period of employment; show periods of layoff; state the applicant’s duties; 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.

The applicant, a native of Pakistan who claims to have lived in the United States since October 1981, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on May 21, 2002.

In a Notice of Intent to Deny (NOID), dated November 10, 2004, the director indicated that the applicant had failed to appear for his interviews on more than two occasions. The director notified the applicant to submit a rebuttal and additional evidence in support of his application. The applicant was granted 30 days to submit additional evidence.

The record reflects that counsel requested a reschedule of the November 1, 2004, interview (the fourth time) due to the applicant’s illness and submitted copies of medical records showing that the applicant underwent a knee surgery on October 15, 2004. On May 24, 2005, the director issued a Notice of Denial denying the application for lack of prosecution because the applicant failed to appear for his LIFE legalization interview on four separate occasions.

On appeal counsel asserts that the director’s decision to deny the application is erroneous. Counsel contends that the request to reschedule the November 1, 2004 interview was fair, reasonable and due to necessity. Counsel submitted copies of medical documents from Cambridge Health Alliance Department of Orthopedics and Surgical Day Care Discharge Instruction, indicating that the applicant had a left knee arthroscopy on October 15, 2004.

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 reflects that the applicant was scheduled for interview on April 21, 2003. By a letter dated April 10, 2003, counsel requested the interview to be rescheduled because he will be out of town during that period. The interview was rescheduled to April 6, 2003. By a letter dated September 26, 2003, counsel requested the interview to be rescheduled due to a scheduling conflict. The interview was rescheduled to April 20, 2004. By a letter dated April 7, 2004, counsel requested the interview to be rescheduled due to another scheduling conflict. The interview was rescheduled to November 1, 2004. By a letter dated October 22, 2004, counsel requested a reschedule of the interview for the fourth time, stating that the applicant underwent a knee surgery. Counsel submitted copies of medical documents from Cambridge Health Alliance with the request.

The regulation at 8 C.F.R. § 245a.19(a) states in pertinent part that all aliens filing application for adjustment of status with the Service under this section must be personally interviewed, . . . an applicant failing to appear for the scheduled interview may for good cause, be afforded another interview. Where an applicant fails to appear for two scheduled interviews, his or her application shall be denied for lack of prosecution. It is undisputed that the applicant has failed to appear for his scheduled interviews on four separate occasions. The record reflects that the applicant requested a reschedule of the interviews citing a good cause for his requests. The director, on each occasion granted the applicant his request. The director notified the applicant that his application will be denied for the excessive failures to appear for his interview, and granted him the opportunity to submit a rebuttal and additional information in support of his application. The applicant did not submit any rebuttal information, rather counsel contends that the applicant's reason for not appearing for the fourth and final interview on November 1, 2004, was for a valid medical reason. Although the surgery by the applicant on October 15, 2004, may have qualified as a good cause under 8 C.F.R. § 245a.19(a), the director was correct in denying the application for lack of prosecution after the applicant's repeated failures to appear for interviews. The AAO, however will review the application on a *de novo* basis to determine whether the evidence in the record is sufficient to establish that the applicant is eligible to adjust status under the LIFE Act. The AAO will evaluate the evidence in the record to reach a determination on the application and will not draw any negative inference on the applicant's failure to appear for his interview.

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 resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988. The AAO determines that he has not.

The documentation submitted by the applicant in support of his claim that he entered the United States before January 1, 1982 and resided continuously in the country in an unlawful status through May 4, 1988, consists of the following:

An undated letter from [REDACTED] stating that the applicant lived with him at [REDACTED] [REDACTED] Houston, Texas, from June 1987 to the present, and that prior to that, they lived together at [REDACTED] Houston, Texas, from May 1985 to June 1987.

- A letter of employment from the manager at Kabob-B-Q in Houston, Texas, stating that the applicant was employed from October 10, 1981 to July 15, 1982, performing various duties such as cleaning tables, washing dishes and filling food trays, and was paid \$3.25 per hour.
- A letter of employment from [REDACTED], manager at Shalimar Theater, in Houston, Texas, dated December 28, 1989, stating that the applicant was employed from September 1982 to February 1985, as a cleaning and maintenance assistant, and was paid \$4.50 per hour. [REDACTED] stated that the Theater is no longer in business, but did not specify when the Theatre went out of business.
- A letter of employment from the manager at High Times Records and Tapes, in Houston, Texas, dated December 21, 1989, stating that the applicant was employed from 1985 as a sales clerk and was paid \$5.00 per hour.

The AAO has reviewed each document in its entirety to determine the applicant's eligibility. Here, the evidence submitted is not probative or credible.

There is no contemporary documentation from the 1980s that shows the applicant to have resided continuously in the United States during the requisite period for LIFE legalization. For someone claiming to have lived in the United States since October 1981, it is noteworthy that the applicant is unable to produce a solitary piece of primary evidence during the following seven years through May 4, 1988.

The employment letters from Kabob-B-Q, Shalimar Theatre, and High Times Records and Tapes, do not comport with the regulatory requirements of 8 C.F.R. § 245a.2(d)(3)(i) because they did not provide the applicant's address at the time of employment, did not indicate whether the information about the applicant's employment was taken from company records, and did not indicate whether such records are available for review. The letter from Shalimar Theatre indicated that the Theatre is no longer in business, but did not indicate when the Theatre went out of business, thereby precluding the Service from verifying the company records. The signatories of the letters from High Times Records and Tapes and Kabob-B-Q did not identify the name of the person who signed the letters. The letters are not supplemented by any earnings statements, pay stubs, or tax records demonstrating that the applicant actually had the jobs during any of the

years claimed. For the reasons discussed above, the AAO determines that the employment letters have limited probative value. They are not persuasive evidence of the applicant's continuous residence in the United States during the years 1981 through 1988.

The undated letter from _____ stating that the applicant resided with him from 1985, has marginal evidentiary value. There is no evidence in the record to establish that _____ was residing in the United States during the period claimed, or that he resided at the addresses he claimed. Neither the applicant nor _____ submitted documentary evidence such as a rental or lease agreement, rent receipts or utility bills to show that _____ actually resided at the addresses claimed, much less the applicant. In view of these substantive deficiencies, the letter has limited probative value. It is not persuasive evidence of the applicant's continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988.

Given the paucity of evidence in the record, the AAO concludes that the applicant has failed to establish that he entered the United States before January 1, 1982 and resided continuously in the United States in an unlawful status from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B)(i) of the LIFE Act, 8 U.S.C. § 245A(a)(2)(A). Accordingly, the applicant is ineligible for permanent resident status under the LIFE Act.

The appeal will be dismissed, and the application denied.

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