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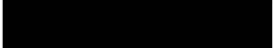


U.S. Citizenship
and Immigration
Services

L2



FILE:



MSC 03 053 60139

Office: NEW YORK CITY

Date: MAY 06 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:



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 New York City. 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 is statutorily barred to adjust status to lawful permanent resident under the LIFE Act, because the applicant was unlawfully present in the United States after a previous order of deportation in violation of section 212(a)(9)(C) of the Immigration and Nationality Act (The Act), and failed to establish that he qualified for a waiver under the Act.

On appeal the applicant asserts that the director should not have dismissed the application because the applicant had filed a Form I-690 (application for waiver of grounds of excludability), which had not been adjudicated.

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.”

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 applicant, a native of Mexico who claims to have lived in the United States since January 1981, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on November 22, 2002. As evidence of his continuous residence in the United States during the period 1981-1988, the applicant submitted a series of letters and affidavits from individuals who claim to have employed, resided with or otherwise known the applicant in the United States during the 1980s.

In a Notice of Intent to Deny (NOID), dated February 21, 2003, the director, indicated that the applicant is inadmissible into the United States under section 212 (a)(9)(C) of the Act, as an alien **unlawfully present after previous immigration violations**.¹ The director notified the applicant that he is eligible to apply for a waiver of inadmissibility, however, that such waiver does not absolve the applicant the requirement to establish continuous residence in the United States from before January 1, 1982 through May 4, 1988. The director further notified the applicant that his application cannot be granted without an approved waiver of inadmissibility. The applicant was granted 30 days to submit additional evidence in support of his application, and notified that if the applicant failed to respond, a decision would be made based upon the evidence in the file.

¹ The record reflects that the applicant was apprehended in New York City on September 18, 1998, during a consensual employee survey at his place of employment. It was determined that the applicant did not have legal permission to remain and work in the United States. The applicant was issued a Notice to Appear (NTA) and placed in removal proceedings before the Executive Office of Immigration Review (EOIR) in New York City and detained. Subsequently, the applicant filed a Form EOIR -42B (application for cancellation of removal and adjustment of status for certain nonpermanent residents) on September 25, 1998. On February 14, 2000, following a trial, the Immigration Judge denied the application for cancellation of removal, granted the applicant a voluntary departure order, and ordered that if the applicant failed to depart voluntarily as required, the VDO will be withdrawn and the applicant will be deported from the United States. The record also reflects that the applicant appealed the order to the Board of Immigration Appeals (BIA). On October 3, 2002, the BIA affirmed the decision of the Immigration Judge and noted that if the applicant fails to depart the United States as required, that the applicant shall be subject to civil penalty of . . . and shall be ineligible for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act.

The applicant did not respond to the NOID.² On July 11, 2007, the director issued a Notice of Decision denying the application based on the reasons stated in the NOID.

On appeal the counsel asserts that the applicant had filed a Form I-690 (application for waiver of grounds of excludability), which had not been adjudicated, and that the director erred when he denied the application. Counsel did not submit any additional documentation with the appeal.

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 AAO agrees with counsel that the applicant's Form I-690 had not been adjudicated before the director made the decision to deny the application on July 11, 2007. The record reflects that the Form I-690 waiver application was administratively closed on January 8, 2008. The record also reflects that the Immigration Judge and BIA denied the applicant's request for withholding of removal because the applicant failed to establish that his removal from the United States will result in extreme hardship to his family, and ordered the applicant deported from the United States. The record reflects that the applicant remained in the United States in violation of section 212 (a)(9)(C) of the Act. The applicant was not granted a waiver of inadmissibility as required under 8 C.F.R. § 245a.18(c)(1). Thus, the applicant is ineligible for LIFE legalization under the LIFE Act.

Beyond the decision of the director, the applicant has failed to establish that he meets the continuous unlawful residence requirement for Legalization under the LIFE Act.

The record reflects that the applicant submitted a series of letters and affidavits, of questionable credibility from individuals who claim to have employed, resided with, or otherwise known that the applicant resided in the United States since 1981. These letters and affidavits are however, contradicted by other documentation in the record. For example, on the Form EOIR-42B, the applicant stated in response to question #19, that he first entered the United States through Tijuana/Mexico border in November 1983. Therefore, by his own admission, the applicant did not enter the United States before January 1, 1982, as required under the LIFE Act. Also the information on the Form EOIR-42B is contrary to the applicant's statement on the two Forms I-687 (application for status as a temporary resident) in the file, dated October 15, 1992, and October 12, 1993. On both forms, the applicant stated that he last came to the United States in

² The record reflects that the applicant submitted a Form I-690 on March 18, 2003, which was administratively closed on January 8, 2008.

January 1981, and traveled out of the United States once during the 1980s – from September to October 1987 – a trip to Mexico because his grandmother died.

The contradictions discussed above and the lack of objective evidence in the record to justify or explain the contradictions, undermines the veracity of the applicant's claim that he entered the United States before January 1, 1982, as well as the overall credibility of the documentation in the record attesting to the applicant's residence in the United States from 1981. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice without competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of other evidence in the record. *See id.*

Based on the analysis of the evidence, the AAO finds that the applicant has failed to establish that he entered the United States before January 1, 1982, and resided continuously in an unlawful status in the country from before January 1, 1982 through May 4, 1988, as described at 1104(c)(2)(B)(i) of the LIFE Act. On this ground as well, therefore, the applicant has failed to establish his eligibility for legalization 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.