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FILE:



Office:



Date: JUL 13 2010

MSC 02 169 63189
[AAO 05 079 50027 – Appeal]

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.

Perry Rhew
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 Houston, Texas. It is now on appeal before the Chief, 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 was continuously physically present in the United States in an unlawful status from November 6, 1986 through May 4, 1988, as required under the LIFE Act and applicable regulations. On appeal counsel asserts that the director misread the regulations, and that the applicant fulfilled the continuous physical presence requirement to qualify for permanent resident status.

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.”

“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.” 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.”

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. 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.

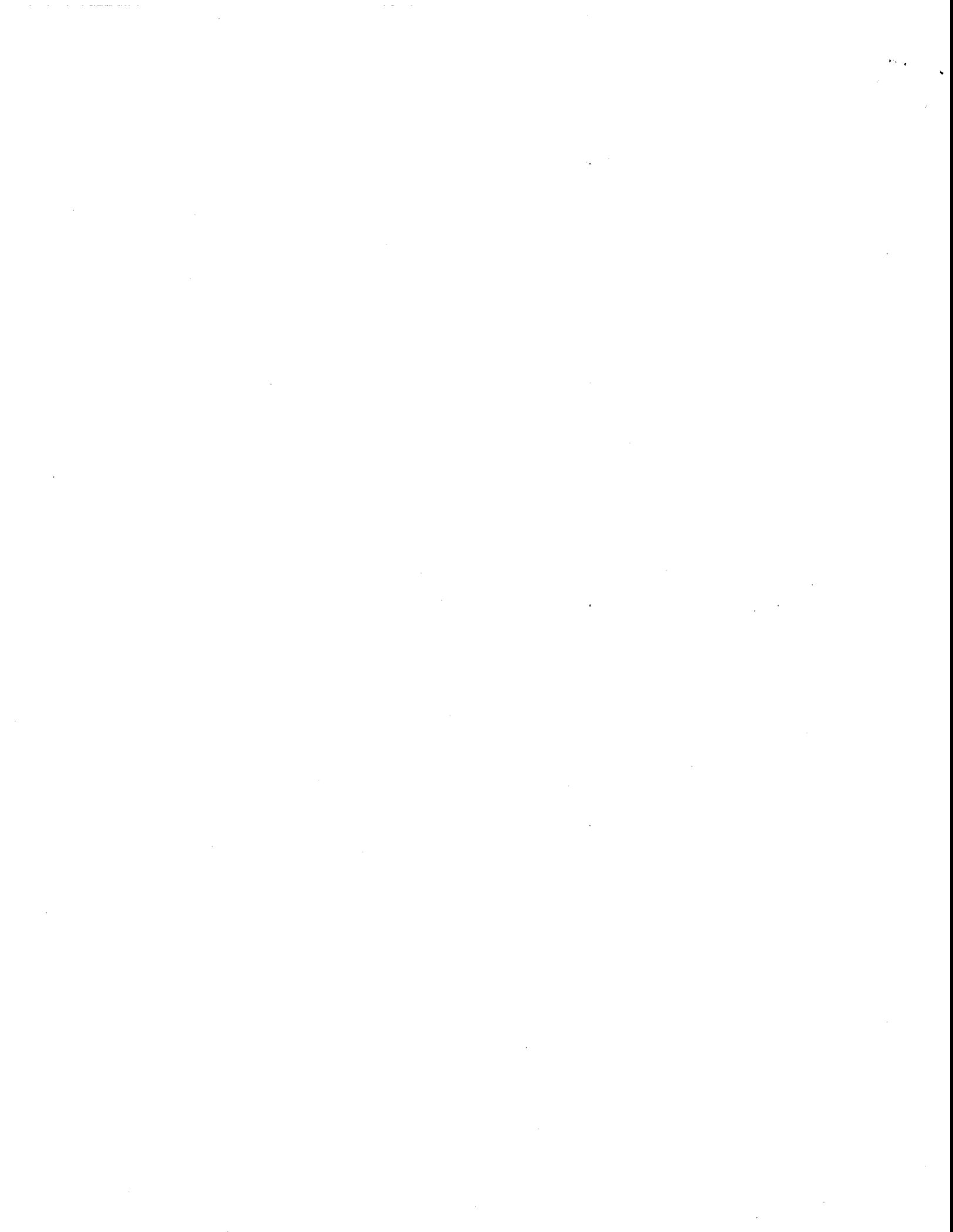
The applicant, a native of [REDACTED] who claims to have resided in the United States continuously since February 1981, filed his application for legal permanent resident status under the LIFE Act (Form I-485) on March 18, 2002.

On August 21, 2003, the director issued a Notice of Intent to Deny (NOID) on the ground that the applicant had not maintained continuous physical presence in the United States between November 6, 1986 and May 4, 1986, citing evidence in the record that the applicant was absent from the United States on a visit to Pakistan from December 10, 1987 to January 20, 1988 – a total of 41 days. According to the director, the duration of this absence did not accord with the regulation at 8 C.F.R. § 245a.16(b) because it exceeded 30 days and did not appear to be “brief, casual, and innocent” within the meaning of the regulation. The applicant was granted 30 days to submit additional evidence.

In response to the NOID counsel pointed out, correctly, that the regulation cited by the director, 8 C.F.R. § 245a.16(b), does not prescribe a 30-day limit for a single absence from the United States. Counsel then cited the regulation at 8 C.F.R. § 245a.1(c)(1)(i), claiming this it prescribes the maximum amount of time an alien can be absent from the United States as 45 days – which is more than the 41 days taken by the applicant in late 1987 and early 1988. This regulation, however, defines “continuous residence” in the United States between January 1, 1982 and May 4, 1988, not “continuous physical presence” in the United States between November 6, 1986 and May 4, 1988. The definition of “continuous physical presence” in the regulation at 8 C.F.R. § 245a.16(b) does not include a specific time limit for a single absence from the United States.

On July 30, 2004, the director issued a Notice of Denial. The director determined that the applicant’s response to the NOID failed to establish his eligibility for legalization under the LIFE Act, and denied the application “based on the findings” in the NOID.

Counsel filed a timely appeal (Form I-694) on September 1, 2004, repeating the argument that an alien is allowed up to 45 days for each absence from the United States. Once again, counsel incorrectly cites the regulation at 8 C.F.R. § 245a.1(c)(1)(i), which applies to “continuous residence” in the United States. There is no 45-day limit, or any specific numerical limit, in the “continuous physical presence” regulation at 8 C.F.R. § 245a.16(b).



Despite counsel's erroneous citations, the AAO agrees with his central point that the basis of the director's decision was incorrect because the regulation at 8 C.F.R. § 245a.16(b) does not prescribe a 30-day maximum for a single absence from the United States. Thus, the applicant's 41-day absence in December 1987-January 1988 does not *ipso facto* disqualify him for permanent resident status under the LIFE Act. Before deciding whether the applicant's 41-day trip to Pakistan broke his continuous physical presence in the United States, the director should have analyzed and determined whether it was a "brief, casual, and innocent" absence within the meaning of the regulation.

Upon review of the entire record, however, the AAO concludes that the application should have been adjudicated on other grounds. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The salient issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he 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.

On January 6, 2006, the applicant filed a separate application for temporary resident status under section 245A of the Immigration and Nationality Act (the Act) pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al. v. Ridge, et al.*, CIV. NO. S-86-1343-LKK (E.D. Cal) on January 23, 2004, and *Felicity Mary Newman, et al. v. United States Immigration and Citizenship Services, et al.*, CIV. NO. 87-4757-WDK (C.D. Cal) on February 17, 2004 (CSS/Newman Settlement Agreements).

Applicants for temporary resident status under section 245A of the Act must establish their entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status from before January 1, 1982 through the date the application is filed. See section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). Applicants must also establish their continuous physical presence in the United States since November 6, 1986. See section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. See 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in the regulation at 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period from May 5, 1987 to May 4, 1988. See CSS Settlement Agreement, paragraph 11 at page 6; Newman Settlement Agreement, paragraph 11 at page 10.

The application for temporary resident status (MSC 06 098 20031) was denied by the director in Houston, Texas, on May 8, 2008. The director reviewed a series of affidavits submitted by



acquaintances of the applicant, as evidence of his continuous residence and physical presence in the United States during the requisite periods prescribed in section 245A of the Act, determined that they were contradictory and lacked overall credibility, and concluded that the applicant was not eligible for temporary resident status.

The applicant filed an appeal (MSC 08 250 10861), which was dismissed by the Chief, AAO, on February 2, 2010. In his decision the Chief surveyed the entire record, including materials submitted in support of the application for permanent resident status, and concluded, like the director in her 2008 decision, that they contained myriad evidentiary inconsistencies and lacked overall credibility. The appeal was dismissed on the ground that the applicant had failed to establish his continuous unlawful residence in the United States from before January 1, 1982 through the date he attempted to file a Form I-687 during the original one-year application period that ended on May 4, 1988.

The analysis of the evidence in the AAO's adjudication of the Form I-687 appeal is equally applicable to the Form I-485 appeal currently under consideration. Accordingly, the AAO hereby incorporates by reference the language in its decision on the application for temporary resident status, dated February 2, 2010.

There is one set of evidentiary materials that warrants further discussion – namely, the apartment leases from July 1983 to June 1988 and beyond. These are the only documents in the record bearing dates from the 1980s. However, they are in photocopied form, not original documents. Thus, it is difficult to determine their authenticity. Adding to the doubt on this issue, the documents lack any date stamps or official markings to verify that they actually date from the 1980s. All entries on the form documents are in handwritten form with no verification as to when they were actually written. In view of these evidentiary infirmities, and the applicant's overall lack of credibility in these proceedings, the AAO concludes that the apartment leases have little evidentiary weight. They are not persuasive evidence that the applicant resided in the United States during the years 1983-1988, much less before January 1, 1982.

For the reasons discussed above, the AAO determines that the applicant has failed to establish that he 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. Therefore, 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.

