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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



FILE: [Redacted] Office: National Benefits Center Date: MAY 19 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director in Portland, Oregon. It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The district director concluded that the applicant had not established that he (1) resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act, and (b) was continuously physically present in the United States from November 6, 1986 through May 4, 1988, as required by section 1104(c)(2)(C) of the LIFE Act.

On appeal, the applicant asserts that the district director erred in finding that the applicant (1) did not meet the threshold requirement of being in unlawful status before January 1, 1982, (2) did not meet the continuous unlawful residence requirement through May 4, 1988, and (3) did not meet the continuous physical presence requirement from November 6, 1986 to May 4, 1988.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in one of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“CSS”), *League of United Latin American Citizens v. INS*, vacated sub nom. *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993) (“LULAC”), or *Zambrano v. INS*, vacated sub nom. *Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993) (“Zambrano”). See section 1104(b) of the LIFE Act and 8 C.F.R. § 245a.10.

The regulations provide an illustrative list of documents that an applicant may submit to establish that he or she filed a written claim for class membership before October 1, 2000. Those regulations also permit the submission of “[a]ny other relevant document(s).” See 8 C.F.R. § 245a.14.

When he filed his LIFE application in August 2001 the applicant also submitted, among other documents, (1) an original Form I-687, Application for Status as a Temporary Resident (Under section 245A of the Immigration and Nationality Act), signed by the applicant, dated November 7, 1990, and bearing a stamp of the same date by the Immigration and Naturalization Service (INS) office in Seattle, Washington, as well as (2) an original Affidavit for Determination of Class Membership in LULAC, likewise signed by the applicant and dated November 7, 1990. These documents establish that the applicant filed a timely claim for class membership in LULAC, as required under section 1104(b) of the LIFE Act.

To be eligible for adjustment to permanent resident status under the LIFE Act, however, the applicant must also establish his continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, and his continuous physical presence in the United States from November 6, 1986 through May 4, 1988. The pertinent statutory provisions read as follows:

Section 1104(c)(2)(B) – Continuous Unlawful Residence

- (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 that were most recently in effect before the date of the enactment of this Act shall apply.
- (ii) Nonimmigrants – In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien’s period of authorized stay as a

nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

Section 1104(c)(2)(C) – Continuous Physical Presence

- (i) In general – The alien must establish that the alien was continuously physically present in the United States during the period beginning on November 6, 1986, and ending on May 4, 1988, except that -
 - (I) an alien shall not be considered to have failed to maintain continuous physical presence in the United States for purposes of this subparagraph by virtue of brief, casual, and innocent absences from the United States; and
 - (II) brief, casual, and innocent absences from the United States shall not be limited to absences with advance parole.

The “continuous unlawful residence” provision of the statute is further defined in the following pertinent regulations:

8 C.F.R. § 245a.15(c)(1) – Continuous residence

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.

8 C.F.R. § 245a.15(d)(2) – Unlawful status, Nonimmigrants

The following categor[y] of aliens [otherwise eligible for legal permanent resident status and who meet the continuous residence requirement] may file for adjustment of status: An eligible alien who entered the United States as a nonimmigrant before January 1, 1982, whose authorized period of admission as a nonimmigrant expired before January 1, 1982, through the passage of time, or whose unlawful status was known to the Government before January 1, 1982. Known to the Government means documentation existing in one or more Federal Government agencies' files such that when such document is taken as a whole, it warrants a finding that the alien's status in the United States was unlawful. Any absence of mandatory annual and/or quarterly registration reports from Federal Government files does not warrant a finding that the alien's unlawful status was known to the Government.

8 C.F.R. § 245a.1(d) – “unlawful status known to the government”

An alien's unlawful status was *known to the government* [emphasis in the original] only if: (1) [t]he [INS] received factual information constituting a violation of the alien's nonimmigrant status from any [entity] of the Federal government, and such information was stored or otherwise recorded in the official [INS] file . . . or . . . (4) the applicant produces documentation from a school approved to enroll foreign students under § 214.3 which establishes that the said school forwarded to the [INS] a report that clearly indicated the applicant had violated his or her nonimmigrant student status prior to January 1, 1982. A school may submit an affirmation that the school did forward to the [INS] the aforementioned report and that the school no longer has

available copies of the actual documentation sent. In order to be eligible under this part, the applicant must not have been reinstated to nonimmigrant student status.

The "continuous physical presence" provision of the statute is further defined in the following pertinent regulation:

8 C.F.R. § 245a.16(b)

For purposes of this section, an alien shall not be considered to have failed to maintain continuous physical presence in the United States [between November 6, 1986 and May 4, 1988] by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, 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.

In support of the appeal counsel has submitted a brief and additional documentation which he asserts establishes the applicant's continuous unlawful status in the United States from before January 1, 1982 through May 4, 1988 as well as the applicant's continuous physical presence in the United States from November 6, 1986 through May 4, 1988.

1. Was the applicant in unlawful status before January 1, 1982?

Counsel argues that the applicant, who initially came to the United States on an F-1 student visa in January 1980, violated his visa conditions before January 1, 1982 and that his resulting unlawful status was known to the government, as defined in 8 C.F.R. § 245a.1(d)(4). In his decision the district director cited evidence from which "it appears that [the applicant] continued in valid F-1 status until at least the Spring of 1982." That evidence included (1) a statement from the applicant in May 2002 (in an INS interview at the Portland District Office) that he enrolled at Philander Smith College in Little Rock, Arkansas, in 1980 and subsequently transferred to the University of Arkansas, he thinks with permission from the INS, as well as (2) a transcript from the University of Arkansas at Pine Bluff indicating that he was admitted to that school in the July 1981 and was enrolled until the summer of 1982. In his May 2002 statement to the INS the applicant also said that he never took employment in those years, 1980-1982 (which would have violated his F-1 visa). In response to the district director's notice of Intent to Deny the applicant submitted a letter, dated December 2, 2002, changing his story and asserting that "I did engage in unauthorized employment delivering newspapers for the Arkansas Gazette and the Arkansas Democrat publishers in 1980 and 1981 and I also worked briefly for Wendy's restaurant in 1981 washing dishes." According to the applicant he had forgotten about this employment during the intervening twenty years. In the absence of any documentary evidence, however, and in light of the applicant's earlier contradictory statement, the district director did not find the applicant's belated claim of unauthorized employment before January 1, 1982 to be credible.

On appeal counsel submitted the applicant's transcript from Philander Smith College, showing that he was enrolled there in the second semester of the 1979-1980 school year, was enrolled at the University of Arkansas-Little Rock in the summer of 1980, then re-enrolled at Philander Smith College for the 1980-1981 school year as well as the first 1981 summer term. The applicant re-enrolled for the last time at Philander Smith College as a part-time student in the fall of 1982. Counsel also submitted a letter dated June 25, 2003 from Beverly Richardson, Executive Dean and International Student Advisor of Philander Smith College, who stated that "[o]ur current policy is to report to the Immigration Service when a student is out of status." Ms. [REDACTED] indicated that the school's files did not include any

immigration-related records for the applicant. She concluded that “I cannot attest as to what was done in 1981, but it is conceivable that the college did report that Mr. [REDACTED] did not enroll in [the] fall of 1981.”

Whether or not Philander Smith College wrote to the INS about the applicant’s status in the fall of 1981, the transcripts in the record conclusively demonstrate that the applicant was enrolled without interruption at that school or at the University of Arkansas from the winter-spring semester of 1980 through the spring of 1982, followed by a final part-time enrollment at Philander Smith College in the fall of 1982. Moreover, the applicant stated (in his interview at the Portland District Office in May 2002) that he believed his transfer from Philander Smith to the University of Arkansas in the summer of 1981 was done with the permission of the INS. Accordingly, the record does not indicate that the applicant violated his F-1 visa by failing to continue his studies any time prior to January 1, 1982.

On appeal counsel submitted an affidavit by the applicant, dated July 2, 2003, in which the applicant asserted as follows:

“I did not attend school after [the] summer of 1981 and I received several phone calls from Philander Smith College informing me that I was out of status and that if I do not provide an explanation to this I would be reported to the INS. I had run out of money and got scared that I might be picked up by the INS and I moved out of my apartment and started sleeping in friend’s [sic] apartments and houses. I never applied for re-instatement of my F-1 status. In 1980 and 1981, I worked for [the] Arkansas Gazette and Arkansas Democrat newspaper companies delivering newspapers and also worked briefly for Wendy’s restaurant. Out of fear of being picked up by the INS for being out of status, I moved to Boston, MA in the fall of 1982.”

The applicant’s statement that “I did not attend school after [the] summer of 1981” is contradicted by the record. The applicant’s transcripts clearly show that the applicant transferred from Philander Smith College to the University of Arkansas at Pine Bluff between the first and second summer terms in 1981 and that the applicant continued to be enrolled as a full-time student at the latter school through the spring semester of 1982, before enrolling for the last time, as a part-time student, at the former school in the fall of 1982. Though the applicant asserts that Philander Smith College threatened to report him to the INS when he did not re-enroll there in the fall of 1981, there is no evidence that it did so since the applicant’s file at the college does not contain any correspondence with the INS, or any immigration-related documents for that matter. As for the applicant’s allegations that he was employed by two newspapers and a restaurant at various times in 1980 and 1981, this information is contradicted by the applicant’s original statement in May 2002, previously discussed, that he was not employed at all in the years 1980-1982. Moreover, the record contains no primary evidence of his alleged unauthorized employment, such as company records from the Arkansas Gazette, the Arkansas Democrat, and Wendy’s restaurant. The applicant has submitted, on appeal, a statement from an old acquaintance in Arkansas who declared “that I know that [the applicant] worked for [the] Arkansas Gazette and Arkansas Democrat daily newspapers as a delivery boy and also briefly for Wendy’s restaurant.” The declarant provides no details about the applicant’s alleged employment, however, does not appear to have been a co-worker, and does not reveal anything more than second-hand information about the alleged employment. The scanty information in the declaration is not sufficient to overcome the contradictory evidence provided by the applicant, in particular his initial statement to the INS that he was not employed at all from 1980 to 1982.

For the reasons discussed above, the record does not establish that the applicant violated the conditions of his F-1 student visa, and was therefore in unlawful status, before January 1, 1982. Thus, the applicant does not meet the statutory requirement, set forth in section 1104(c)(2)(B) of the LIFE Act, of having been an unlawful resident of the United States *before January 1, 1982*. (In view of this determination, the issue of whether “unlawful status” was “known to the government” does not even arise.)

2. Did the applicant reside continuously in the United States (in unlawful status) from before January 1, 1982 through May 4, 1988?

In addition to finding that the applicant, so far as the record indicated, was not in unlawful status before January 1, 1982, the district director determined that the applicant failed to establish his continuous unlawful residence in the United States through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. In particular, it was found that (1) the applicant failed to demonstrate that he was in the United States at all between the spring of 1982 and July 5, 1983, when he re-entered the country on a B-1 visa, and (2) the applicant departed the United States again on March 27, 1985, returning on a date uncertain in July or September 1985. According to the district director, therefore, the applicant twice departed the United States for more than 45 days and was absent from the country for an aggregate of more than 180 days. These absences exceeded the limits prescribed in 8 C.F.R. § 245a.15(c)(1) for “continuous residence” in the United States. Moreover, the applicant’s return to the United States on a B-1 visa in July 1983 meant that he was in lawful status for awhile thereafter, further diminishing the continuity of his unlawful residence in the United States between January 1, 1982 and May 4, 1988.

On appeal counsel submitted various documents which allegedly prove that the applicant’s absences from the United States complied with the “continuous residence” parameters of 8 C.F.R. § 245a.15(c)(1). With respect to the first time period at issue – from the spring of 1982 to July 5, 1983 – the aforementioned transcripts from Philander Smith College and the University of Arkansas indicate that the applicant was in Arkansas during the spring and fall of 1982. In his affidavit of July 2, 2003 the applicant indicated that he resided in Arkansas without interruption until the fall of 1982. At that point in time, the applicant stated, he moved to Boston, Massachusetts. The applicant has submitted a letter from the Commonwealth of Massachusetts, Registry of Motor Vehicles, confirming that a driver’s license was issued to the applicant on December 3, 1982. In his affidavit the applicant states that, after failing to find work in Boston, he moved to Denver, Colorado, in January 1983 and “live[d] with my cousins” there until the spring of 1984. The applicant has submitted a declaration from Obiora Nkwonta, dated June 26, 2003, stating that he is the applicant’s first cousin, that the applicant moved to Denver in January 1983 to live with him and four other cousins, and that he and the applicant subsequently moved to Oregon in the spring of 1984 to attend school. During his time in Denver, the applicant states, he traveled to Nigeria to visit his ill father in late May 1983 and returned to the United States on July 5, 1983. His period of absence was less than 45 days, the applicant asserts, and thus did not interrupt his “continuous residence” in the United States, as defined in 8 C.F.R. § 245a.15(c)(1). Based on the evidence of record, it is concluded that the applicant has satisfactorily accounted for his places of residence from the spring of 1982 until July 5, 1983 and that there were no absences from the United States of 45 days or more during that period of time.

With regard to the applicant’s return to the United States on a B-1 visa in July 1983, counsel asserts on appeal that the applicant “was living in the United States illegally for more than a year before he left . . . [the applicant] failed to disclose that fact when he applied for entry with a B-1 . . . [and] misrepresenting his intent [to stay in the United States] resulted in a continuation of his unlawful . . . residence.” Regardless of the merits of that argument, it is clear that the applicant cannot satisfactorily account for the second time period he was absent from the United States – March to July (or September) 1985. The applicant initially stated (on the Form I-687 he submitted in November 1990 to the INS office in Seattle, Washington) that he was in Nigeria on a “business/family” trip from June to September 1985. As the district director pointed out in his Notice of Intent to Deny, however, INS (now Citizenship and Immigration Services, or CIS) records show that the applicant departed the United States on March 27, 1985. In his response to that notice in December 2002 the applicant acknowledged that he departed the United States on March 27, 1985 and stated that he returned in July 1985 – an absence of more than 45 days. According to the applicant, his return to the United States was delayed “because of the political

unrest in Nigeria during that period[.] [A]ll borders were closed and so I could not accomplish my return to the U.S. within [the] time period allowed.” In his affidavit on appeal, dated July 2, 2003, the applicant explained that he went to Nigeria to visit his ill father once again. “I had planned on being gone for one month,” the applicant stated, “but while I was in Nigeria there was an attempted military coup which led to the government closing the borders and suspending all flights coming in and going out of Nigeria. As a result, I could not return to the US until July 2, 1985.” The applicant argues that his delayed return to the United States was “due to emergent reasons,” within the meaning of 8 C.F.R. § 245a.15(c)(1), and therefore did not violate the 45-day time limit for absences from the United States.

It is a matter of public record, however, that the military coup to which the applicant refers did not occur until August 27, 1985, when Maj. Gen. [REDACTED] overthrew the government of Muhammadu Buhari. That was nearly two months after the applicant’s return to the United States. The applicant has not explained why a coup that took place in late August 1985 would affect his efforts to leave Nigeria months beforehand. The applicant asserts that he intended to return to the United States after a month, which would have been in late April or early May 1985. But he stayed two months longer – essentially the months of May and June 1985 – before returning to the United States on July 2, 1985. There is no evidence in the record, aside from the applicant’s unsupported assertions, of political unrest serious enough in the spring of 1985 – three or four months before the coup – that would have prevented the applicant from leaving Nigeria, as intended, in mid-spring. In fact, there is no evidence that political turmoil affected foreign travel to and from Nigeria at the time the applicant did finally depart in early July 1985, which was still almost two months before the coup. In short, the applicant was absent from the United States for over 90 days (between March 27 and July 2, 1985) visiting Nigeria, which was double the 45-day time limit prescribed in 8 C.F.R. § 245a.15(c)(1) for maintaining “continuous residence” in the United States. Moreover, the applicant has not established that his delay in returning to the United States was “due to emergent reasons” – *i.e.*, events outside of his control – that prevented an earlier return. *Id.*

Based on the above analysis, it is concluded that the period from March 27, 1985 to July 2, 1985 represents a break in the applicant’s “continuous residence” in the United States, as defined in 8 C.F.R. § 245a.15(c)(1). Thus, the applicant does not meet the statutory requirement, set forth in section 1104(c)(2)(B)(i) of the LIFE Act, of having maintained continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988.

2. Did the applicant maintain continuous physical presence in the United States from November 6, 1986 through May 4, 1988?

The district director determined that the applicant failed to establish that his absences from the United States between November 6, 1986 and May 4, 1988 were “brief, casual, and innocent,” as required under 8 C.F.R. § 245a.16(b). (As defined in the regulation, “brief, casual, and innocent absences from the United States . . . means temporary, occasional trips abroad.” *Id.*) According to the district director, therefore, the applicant did not satisfy the statutory requirement, prescribed in section 1104(c)(2)(C) of the LIFE Act, of “continuous physical presence in the United States” between November 6, 1986 and May 4, 1988.

On appeal counsel submitted the applicant’s transcript from Oregon State University (OSU), which he began attending in the fall of 1984 after his move to Oregon from Denver the previous spring. The transcript documents that the applicant was enrolled at OSU, in Corvallis, Oregon, for the fall and winter quarters of the 1984-1985 school year, the winter and spring quarters in 1986, the fall, winter and spring quarters of the 1986-1987 school year, as well as the spring and summer quarters of 1988, at the end of which he received a bachelor of science degree in pharmacy (on September 2, 1988). In his affidavit of July 2, 2003, the applicant declared that he moved (from Corvallis) to Portland, Oregon, in July 1987 to live with his girlfriend and got an internship job at Woodlawn Pharmacy, where he worked until the

pharmacy was purchased by Safeway in May 1989. (In the Form I-687 he filed with the INS in November 1990 the applicant stated that his employment at Woodlawn Pharmacy commenced in February 1988.) The applicant's story is bolstered by (1) a declaration from Marcy Satalich, dated July 1, 2003, who confirms that the applicant "moved to Portland in 1987 and we lived together until 1990," and (2) a declaration dated July 1, 2003 from Russell Wendt, the applicant's former supervisor at Woodlawn Pharmacy, who states that "I have known [the applicant] since approximately 1987, when he worked as an intern and later as a pharmacist at the Woodlawn Pharmacy, an independent pharmacy which has since sold out to Safeway."

Though the foregoing materials may not provide airtight proof of the applicant's whereabouts for the entire time period of November 6, 1986 to May 4, 1988, the AAO concludes that they do establish, by a preponderance of the evidence, that he was "continuously physically present in the United States" within the meaning of 8 C.F.R. § 245a.16(b). If the applicant had any absences from the United States during that one and a half year period, the AAO is persuaded that they were "brief, casual, and innocent absence(s)" – *i.e.*, that they did not involve anything more than "temporary, occasional trips abroad." *Id.* Accordingly, the applicant satisfies the statutory requirement, set forth in section 1104(c)(2)(C) of the LIFE Act, of having maintained continuous physical presence in the United States from November 6, 1986 through May 4, 1988.

Conclusion

Thus, the applicant has established his continuous physical presence in the United States from November 6, 1986 through May 4, 1988, as required under section 1104(c)(2)(C) of the LIFE Act.

However, he has failed to establish that he was in unlawful status before January 1, 1982 or that he resided continuously (and unlawfully) in the United States from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B) of the LIFE Act.

Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

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