

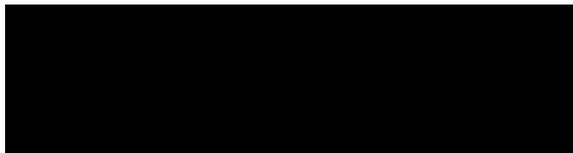
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U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



L2

FILE:



Office: Phoenix

Date: JUN 16 2005

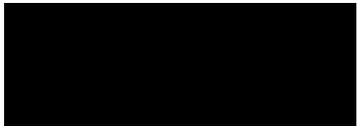
IN RE:

Applicant:



PETITION: 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. All documents have been returned to the office that originally decided your case. 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, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director denied the application because the applicant had not established that he 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. This decision was based on the district director's conclusion that the applicant lawfully entered the country with a H-2 temporary worker visa in February 1987, and subsequently maintained lawful H-2 status based upon his employment as a horse groom.

On appeal, counsel asserts that the applicant's entry into the United States with a H-2 visa on February 2, 1987 was not lawful because he was returning to his prior unlawful residence. Counsel contends that the applicant also violated the terms of his visa by remaining in this country past the May 17, 1987, expiration date of his period of authorized stay as a H-2 horse groom.

To be eligible for adjustment to permanent resident status under the LIFE Act the applicant must establish his or her continuous unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988. 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.

As cited above, pursuant to section 1104(c)(2)(B)(i) of the LIFE Act, 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 the LIFE Act shall apply to determine whether an alien maintained continuous unlawful residence in the United States. Therefore, eligibility also exists for an alien who would otherwise be eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, but who reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence. 8 C.F.R. § 245a.2(b)(9). An alien described in this paragraph must receive a waiver of the inadmissibility charge as an alien who entered the United States by fraud. Section 212(a)(6)(C) [previously numbered Section 212(a)(19)] of the INA, 8 U.S.C. § 1182(a)(6)(c); 8 C.F.R. § 245a.2(b)(10).

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

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E-- M--*, 20 I. & N. Dec. 77 (Comm. 1989).

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 record shows that that the applicant is a class member in a legalization class-action lawsuit who submitted a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the INA, on January 3, 1991. The applicant also submitted an Affidavit for Determination of Class Membership in League of United Latin American Citizens v. INS (LULAC), in which he claimed that he first entered the United States without inspection as an undocumented alien by crossing the border from Mexico in July 1981. On both the Form I-687 application and the affidavit, the applicant indicated that he subsequently obtained a H-2 visa for employment as a horse groom, which he later used to enter the United States at Nogales, Arizona on February 2, 1987.

In support of his claim of unlawful residence in the United States from prior to January 1, 1982, the applicant submitted four affidavits of residence, three employment letters, photocopies of two separate applications for licenses from the Arizona Department of Racing, a photocopy of a Form W-2, Wage and Tax Statement, and two photocopied Form 1099 MISC's. The record contains a photocopy of a page from the applicant's Mexican passport containing his H-2 visa. The H-2 visa reflects that the applicant obtained the visa from the American Consulate in Hermosilla, Mexico on February 2, 1987, as a result of the Immigration and Naturalization Service's, or the Service's (now Citizenship and Immigration Services, or CIS) approval of a Form I-129, Petition for a Nonimmigrant Worker, that had been filed on the applicant's behalf for his employment as a horse groom. The record also contains a photocopy of the applicant's Form I-94, Arrival/Departure Record. The front portion of the Form I-94 contains an entry stamp that reflects that the applicant subsequently entered the United States at Nogales, Arizona with a H-2 visa on either February 2, 1987 or February 8, 1987. The entry stamp shows that the applicant was initially granted a period of authorized stay as H-2 groom until May 17, 1987. However, the back portion of the Form I-94 reflects that the applicant's period of authorized stay as H-2 groom was subsequently extended through May 17, 1988.

In the notice of intent to deny issued on July 14, 2003, the district director determined that applicant's entry into the United States with a H-2 visa in February of 1987 was a lawful entry. The district director concluded that the continuity of the applicant's prior unlawful residence in this country had been broken by this lawful entry. The district director did not determine whether the claim of entry in July 1981 and continuous residence was valid, but rather focused on the fact that the applicant was apparently in valid, lawful nonimmigrant H-2 status beginning with his entry into the United States in February of 1987. The applicant was granted thirty days to respond to the notice.

In response, counsel submitted a brief in which he asserted that in 1987, the applicant received advice from an individual whose name he could not remember that the only way he could remain in this country was to obtain a H-2 visa. Counsel contended that the applicant returned to Mexico in February 1987 for the sole purpose of obtaining the H-2 visa to return to his residence in the United States and work as a horse groom. Counsel declared that the applicant would have not left this country and applied for the H-2 visa if he had known that such action would have had a negative impact on the current proceedings. Counsel also stated that the applicant "...tried to apply for late amnesty but was not successful."

The district director determined that the applicant had failed to overcome the grounds of denial put forth in the notice of intent to deny, and denied the LIFE Act application on September 11, 2003.

On appeal, counsel reiterates the arguments he had put forth in response to the notice of intent to deny. However, counsel's assertion that that applicant "...tried to apply for late amnesty but was not successful," is

without merit in that he did apply for late amnesty by putting forth a claim to class membership when he submitted the Form I-687 application on January 3, 1991. Furthermore, neither counsel nor the applicant provides any explanation as to why the applicant would have attempted to submit a timely Form I-687 application during the legalization application period from May 5, 1987 to May 4, 1988, as he was in possession of a valid H-2 visa that allowed him to lawfully reside and work in the United States from February 1987 to May 17, 1988.

Counsel now contends that it was a Service employee who advised the applicant in 1987 that the only way he could remain in this country was to obtain a H-2 visa. Counsel again asserts that the applicant returned to Mexico in February 1987 for the sole purpose of obtaining the H-2 visa to return to work as a horse groom in the United States. He restates that the applicant would have not left this country and applied for the H-2 visa if he had known that such action would had a negative impact on the current proceedings. However, counsel's assertions regarding the circumstances that motivated the applicant to obtain the H-2 visa can neither be confirmed nor denied from the record. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I. & N. Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980).

The applicant claimed employment as a groom for multiple horse trainers from July 1981 through at least 1990. The applicant provided employment verification letters from three of these trainers, as well as other documentation reflecting that he worked as a horse groom from 1981 through 1990. There is a lengthy record of the applicant's employment in the United States as a horse groom prior to his admission as an H-2 visa holder in February 1987. Therefore, we cannot conclude that the applicant's admission to the United States in February of 1987 was obtained through fraud, as the applicant evidently worked for the petitioning H-2 employer. Even when there is a record of prior unlawful residence in the United States, it cannot be presumed that an alien acquired a nonimmigrant visa and entry by fraud when there is evidence that the alien did engage in the employment for which the visa was issued. As a result of the applicant's lawful entry, the continuity of his claimed prior unlawful stay had been interrupted, making the applicant ineligible for temporary resident status.

Given the fact that the applicant lawfully entered the United States in February 1987 with an H-2 visa and subsequently complied with the terms of the visa by lawfully working for the petitioning H-2 employer through May 17, 1988, it is concluded that he has failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B) of the LIFE Act. The applicant is, therefore, 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.