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U.S. Citizenship  
and Immigration  
Services

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FILE:

MSC 02 236 62390

Office: NEW YORK

Date:

OCT 02 2007

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. 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, Chief  
Administrative Appeals Office

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

The director denied the application because the applicant had failed to establish that she satisfied the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act.

On appeal, counsel asserts that the applicant "spoke and understood the English language at the interview," but that the interviewing officer "interpreted the [applicant's] Jamaican accent as being a foreign language and not being English." Counsel also states that the interviewing officer did not give the applicant the right to be represented by counsel during the interview. Counsel submitted no additional documentation in support of the appeal.

The regulation at 8 C.F.R. § 245a.17(b) provides that an applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the interview, shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the tests or submit evidence as described in paragraphs (a)(2) or (a)(3) of this section.

The record reflects that on July 7, 2004, the director notified the applicant that she had failed the first test of her citizenship skills, and that she was scheduled for another test on January 14, 2005. The Notice of Intent to Deny (NOID) informed the applicant that "[f]ailure to appear for your final re-examination will result in the denial of your application based solely on 8 C.F.R. 245a.17(b)." The record further reflects that the applicant appeared for her scheduled interview.

The regulation at 8 C.F.R. § 245a.20(a)(2) provides that when an adverse decision is proposed, Citizenship and Immigration Services shall notify the applicant of its intent to deny the application and the basis for the proposed denial. The applicant will be granted 30 days from the date of the notice in which to respond to the notice of intent to deny.

The Notice of Decision (NOD) informed the applicant that her application was denied "for the reasons stated, in the NOID." However, the only basis for the proposed denial stated in the NOID was for failure to appear for a second interview. As the applicant attended her scheduled second interview, she overcame the proposed ground for denial set forth in the NOID. However, it is clear that the basis of the director's denial was the applicant's failure to satisfy the basic citizenship skills requirement of the LIFE Act. The record does not reflect that, prior to issuing her NOD denying the application for this reason, the director issued a NOID advising the applicant of the reasons for her subsequent proposed denial of the application. Nonetheless, we find that the director's failure to issue a NOID notifying the applicant that the application would be denied because she failed the second civics exam constitutes harmless error.

Under section 1104(c)(2)(E)(i) of the LIFE Act ("Basic Citizenship Skills"), an applicant for permanent resident status must demonstrate that he or she:

- (I) meets the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. § 1423(a)) (relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or

- (II) is satisfactorily pursuing a course of study (recognized by the Attorney General) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Attorney General may waive all or part of the above requirements for aliens who are at least 65 years of age or developmentally disabled.

The applicant, who was 61 years old at the time she took the basic citizenship skills test and provided no evidence to establish that she was developmentally disabled, does not qualify for either of the exceptions in section 1104(c)(2)(E)(ii) of the LIFE Act. Further the applicant does not satisfy the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i)(I) of the LIFE Act because she does not meet the requirements of section 312(a) of the Immigration and Nationality Act (the Act). An applicant can demonstrate that he or she meets the requirements of section 312(a) of the Act by "[s]peaking and understanding English during the course of the interview for permanent resident status" and answering questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test . . . by the Legalization Assistance Board with the Educational Testing Service (ETS) or the California State Department of Education with the Comprehensive Adult Student Assessment System (CASAS)." 8 C.F.R. § 245a.3(b)(4)(iii)(A)(1) and (2).

The regulation at 8 C.F.R. § 245a.17(b) provides that an applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the interview, shall be afforded a second opportunity after six months (or earlier at the request of the applicant) to pass the tests or submit evidence as described in paragraphs (a)(2) or (a)(3) of this section.

The record reflects that the applicant was interviewed twice in connection with his LIFE application, first on July 7, 2004 and again on January 14, 2005. On both occasions, the applicant failed to demonstrate a minimal understanding of English and minimal knowledge of United States history and government. Furthermore, the applicant has not provided evidence of having passed a standardized citizenship test, as permitted by 8 C.F.R. § 312.3(a)(1).

Counsel asserts that the applicant was not given the opportunity to be represented by counsel during the interview. We note that present counsel did not represent the applicant during the initial stages of the application. According to the G-28, Notice of Entry of Appearance as Attorney or Representative, present counsel began her representation of the applicant on June 20, 2005. Prior to her first test on July 7, 2004, the applicant specifically stated that she wished to continue the interview without the presence of her then counsel. Although the record does not contain a statement by the applicant waiving counsel's presence during the second interview, the record also does not reflect that either counsel or the applicant requested a delay because counsel could not be present, or that the applicant or counsel objected to proceeding with the interview without counsel present. Therefore, the record does not reflect that the applicant was denied the opportunity to have counsel present at her second interview.

Counsel also asserts on appeal that the applicant spoke and understood English during the interview, and that the interviewer misinterpreted the applicant's Jamaican accent as "a foreign language." As discussed above, the applicant must not only speak and understand English during the interview, he or she must also answer questions based on the subject matter of approved citizenship training materials, or "[b]y passing a standardized section 312 test." 8 C.F.R. § 245a.3(b)(4)(iii)(A)(1) and (2). Accordingly, even though the applicant may speak and understand English, she must also read, write and answer questions on U.S. history

and government. The record reflects that the applicant failed to demonstrate basic citizenship skills as she failed to successfully pass the test administered from training materials made available to applicants.

The applicant, however, could still meet the basic citizenship skills requirement under section 1104(c)(2)(E)(i)(II) of the LIFE Act, if he meets one of the criteria defined in 8 C.F.R. §§ 245a.17(a)(2) and (3). In part, an applicant must establish that he meets the following under 8 C.F.R. § 245a.17:

- (2) has a high school diploma or general educational development diploma (GED) from a school in the United States; or
- (3) has attended, or is attending, a state recognized, accredited learning institution in the United States, and that institution certifies such attendance. The course of study at such learning institution must be for a period of one academic year (or the equivalent thereof according to the standards of the learning institution) and the curriculum must include at least 40 hours of instruction in English and United States history and government.

The record does not reflect that the applicant has a high school diploma or a GED from a United States school, and therefore does not satisfy the regulatory requirement of 8 C.F.R. § 245a.17(a)(2). Additionally, the applicant submitted no evidence that she had attended or was attending a state recognized, accredited learning institution in the United States. Furthermore, 8 C.F.R. § 245a.17(a)(3) requires that the applicant submit certification on letterhead stationery from a state recognized, accredited learning institution either at the time of filing the Form I-485, subsequent to filing the application but prior to the interview, or at the time of the interview. In the instant case, documentation from a state recognized, accredited learning institution should have been submitted to Citizenship and Immigration Services prior to or at the time of the applicant's second interview on March 4, 2005. Therefore, assuming, arguendo, that the applicant had attended a state recognized, accredited learning institution, the applicant still would not qualify for the benefit being sought as the documentation from such an institution was not presented prior to the applicant's second interview as required by 8 C.F.R. § 245a.17(a)(3).

As previously discussed, the applicant failed to meet the "basic citizenship skills" requirement of section 1104(c)(2)(E)(i)(I) of the LIFE Act because at neither of her two interviews did he demonstrate a minimal understanding of the English language and U.S. history and government.

Therefore, the applicant does not satisfy either alternative of the "basic citizenship skills" requirement set forth in section 1104(c)(2)(E)(i) of the LIFE Act. Accordingly, the applicant is ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act.

The director also considered the applicant's eligibility for adjustment of status to that of a temporary resident pursuant to regulation at 8 C.F.R. § 245a.6, and determined that she was also ineligible for adjustment to temporary resident status under section 245A of the Act, as in effect before enactment of section 1104 of the LIFE Act (part 245a, Subpart A). We concur with the director that the evidence of record does not establish the applicant's eligibility for adjustment of status pursuant of section 245A of the Act.

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