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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEW YORK Date: MAY 02 2008

MSC 02 043 65484

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. 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.

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 (AAO) on appeal. The appeal will be dismissed.

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

On appeal, counsel asserts that the applicant successfully demonstrated a minimal understanding of English and U.S. history and government, and that he failed what amounted to a spelling test. Counsel submitted a brief 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 April 9, 2004, the director notified the applicant that he had failed the first test of his citizenship skills, and that he was scheduled for another test on October 15, 2004. 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 his 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 his application was denied "for the reasons stated in the Notice of Intent to Deny." 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 his scheduled second interview, he 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 his application. Nonetheless, we find that the director's failure to issue a NOID notifying the applicant that the application would be denied because he failed the second civics exam constitutes harmless error. 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). As discussed below, the applicant, in his response to a NOID, would be unable to cure the deficiency regarding his eligibility based on his failure of the civics exam.

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 48 years old at the time he took the basic citizenship skills test and provided no evidence to establish that he 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 he 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 applicant has not provided evidence of having passed a standardized citizenship test, as permitted by 8 C.F.R. § 312.3(a)(1). The record reflects that the applicant was interviewed twice in connection with his LIFE application, first on April 9, 2004, and again on October 15, 2004. During the second interview, the interviewing officer determined that the applicant had not successfully passed the writing portion of the citizenship skills test. The director denied the application on June 2, 2005.

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, while the applicant can submit evidence that he has attended, or is attending, a state recognized, accredited

learning institution, a state recognized, the regulation at 8 C.F.R. § 245a.17(a)(3) requires that the applicant submit such certification 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, therefore, documentation from a state recognized, accredited learning institution would have had to be submitted to Citizenship and Immigration Services prior to, or at the time of, the applicant's second interview on October 15, 2004.

On appeal, counsel asserts that the applicant was not represented by counsel during his interviews and was unaware of the provisions of 8 C.F.R. § 245a.17(a)(3). Counsel asserts that due process demands that the applicant be given another chance to register and to attend a qualifying school.

The requirements for demonstrating the basic citizenship skills required for adjustment of status are clearly set forth in the regulations. The regulation at 8 C.F.R. § 103.2(a)(3) also provides that the applicant has the right to be represented by counsel or by an accredited representative. Counsel does not allege, and provides no evidence, that representatives of CIS denied the applicant his right to competent representation or otherwise denied him due process. Accordingly, counsel's argument is without merit.

Counsel also asserts that the interviewing officer "administered the interviews in an arbitrary, inconsistent and intimidating manner, "and "imposed extraordinary and unreasonable conditions on the" applicant. Counsel alleges that the interviewing officer rushed the applicant during the interview process, was impatient and did not give the applicant "a reasonable opportunity to be tested on his ability to write English," and was disrespectful to the applicant. Counsel alleges that, as a result of this, the applicant "became afraid and felt intimidated by the procedural manner in which the interview process was administered." Counsel submits no documentation or other evidence to support his allegations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Citing 8 C.F.R. § 245a.1(t), counsel asserts that the applicant "demonstrates more than the minimal understanding of ordinary English as he can read or write simple words and phrases and satisfy basic survival needs and routine social demands." Nonetheless, the applicant did not demonstrate these skills during his interviews. While counsel asserts that the applicant failed what amounted to a "spelling test," spelling is an essential part of written communication. A review of the record indicates that the tests administered to the applicant were at an elementary level and did not contain any complicated words or phrases. Therefore, the record does not support counsel's assertions that the applicant can write "simple" words and phrases. Furthermore, although not required by the regulation, the applicant was scheduled for a third interview on March 10, 2006, to give him an opportunity to demonstrate his writing and spelling skills. However, he failed to appear and thus take advantage of this extra opportunity.

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 his two interviews did he demonstrate a minimal understanding of the English language.

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 he 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.