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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

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FILE: [redacted] Office: SAN FRANCISCO Date: JAN 21 2009

MSC 02 229 61484

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Director, San Francisco, and is before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the application will be remanded.

The director denied the application because the applicant had not demonstrated that he was turned away or was discouraged from filing the Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (the Act) (Form I-687), as he had filed a Form I-687 on April 21, 1988. The director found that the applicant failed to file a completed application for class membership in any of the legalization class action lawsuits. The director also found that the applicant was not in the United States continuously and unlawfully in a manner known to the government since before January 1, 1982. Therefore, the director found that the applicant was not entitled to benefits under the LIFE Act and denied the application.

On appeal, the applicant asserts that the Immigration & Naturalization Service (INS) erred in finding that the applicant was ineligible for class membership in one of the legalization lawsuits, and that the director erroneously found that the applicant failed to show that his continuous unlawful presence was known to the government prior to January 1, 1992. The applicant states alternatively that he is entitled to file the Form I-485 LIFE Act application, because the INS, now United States Citizenship & Immigration Services (USCIS), failed to properly notify counsel of the decision denying the Form I-687, and thus deprived the applicant of the right to appeal.

The record reflects that the applicant initially filed a Form I-687 on April 1, 1988. The applicant did not list any absences from the United States on that application. The director denied the Form I-687 application on February 22, 1990, finding that the applicant failed to prove that he was unlawfully present in the United States or that such unlawful status was known to the government prior to January 1, 1982.[1] In January 1996, the applicant filed a Form I-687 in an attempt to establish membership in the *CSS v. Reno* class action. In that application the applicant stated that he went to Mexico and reentered the United States on June 12, 1987. Accompanying affidavits of [redacted] and [redacted] state that the applicant went to Mexico on June 12, 1987, and brought back gifts from Mexico. On January 9, 1996 the director denied the applicant's application for class membership, noting inconsistencies between the Form I-687 filed in January 1996 and the initially filed Form I-687 with respect to whether the applicant was absent from the United States on June 12, 1987. The director found further that because the applicant filed a Form I-687 in April, 1988, he did not attempt to file and was not discouraged from filing a Form I-687 during the application period.

On May 17, 2002 the applicant filed the Form I-485 application claiming eligibility under the LIFE Act.

[1] The applicant filed a motion to reopen this denial *sua sponte* on July 31, 2000 on the grounds that the decision was not properly served. The director was not required to and did not reopen the Form I-687 adjudication or address counsel's argument in the motion that the applicant lost his right to timely appeal. For the purposes of the present adjudication, the AAO notes that whether or not counsel was properly served with the Form I-687 denial does not determine the applicant's eligibility to seek benefits under the LIFE Act.

On May 23, 2005, the director issued a Notice of Intent to Deny (NOID), stating that the applicant failed to establish that he attempted to file a legalization application between May 5, 1987 and May 4, 1988, and that such application was rejected, and further that he did not establish that he was continuously unlawfully present in the United States prior to January 1, 1982. On November 18, 2005 the director denied the Form I-485 LIFE Act application, noting that LIFE legalization only applies to persons who were unsuccessful in applying for a legalization program and who subsequently applied for class membership in the CSS, LULAC or Zambrano lawsuits, and that because the applicant filed a Form I-687 during the original filing period, he was not discouraged from filing the same. The director also stated that the applicant was not in the United States unlawfully during the requisite period in a manner known to the government. The director found that the applicant was ineligible for benefits under the LIFE Act.

On appeal, counsel asserts that the applicant is a member of the class as defined in *CSS v. Reno*, that alternatively he is entitled to file the LIFE Act application because the INS failed to serve the I-687 denial properly, and that his unlawful status was known to the government.

The AAO finds that the director correctly denied the Form I-485 application for failing to establish eligibility under LIFE Act Legalization under the terms of the class action settlements then in effect. An applicant for permanent resident status under 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 any 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* 8 C.F.R. § 245a.10.

The AAO finds that the applicant is not a class member under the terms of the *CSS v. Reno* Settlement Agreement, which provides that the following subclasses are entitled to relief as class members:

> A. All persons who were otherwise prima facie eligible for legalization under section 245A of the INA, and who tendered completed applications for legalization under section 245A of the INA and fees to an INS officer or agent acting on behalf of the INS, including a QDE, during the period from May 5, 1987 to May 4, 1988, and whose applications were rejected for filing because an INS officer or QDE concluded that they had traveled outside the United States after November 6, 1986 without advance parole.
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> B. All persons who filed for class membership under *Catholic Social Services, Inc. v. Reno*, CIV No. S-86-1343 LKK (E.D. Cal.) and who were otherwise prima facie eligible for legalization under Section 245A of the INS, who, because an INS officer or QDE concluded that they had traveled outside the United States after November 6, 1986 without advance parole were informed that they were ineligible for legalization, or were refused by the INS or its QDEs legalization forms, and for whom such information, or inability to obtain the required application forms was a substantial cause of their failure to timely file or complete a written application

The AAO affirms the director's finding that the applicant is ineligible for benefits under the LIFE Act under the terms of the *CSS v. Reno* Settlement Agreement. The applicant was neither rejected nor discouraged from filing the Form I-687 during the application period.

On September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al,* 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

> 1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –
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> (C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and whose application
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> i. has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as 'Sub-class C.i. members'),
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> ii. was denied or whose temporary resident status was terminated, where the INS or CIS action or inaction was because INS or CIS believed the applicant had failed to meet the 'known to the government' requirement, or the requirement that s/he demonstrate that his/her unlawful residence was continuous (hereinafter referred to as 'Sub-class C.ii members').
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> 2. Enumerated Categories
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> (1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.
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> (2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.

NWIRP further provides that LIFE Act applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that prior to January 1, 1982, the applicant violated the terms of his or her nonimmigrant status in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government. Once the applicant makes such a showing, USCIS then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the alien's unlawful status was known to the government as of January 1, 1982. The settlement agreement further stipulates that the general adjudicatory standards set forth in 8 C.F.R. § 245a.18(d) or 8 C.F.R. § 245a.2(k)(4), whichever is more favorable to the applicant, shall be followed to adjudicate the merits of the application once class membership is favorably determined.

The record establishes the following facts. The applicant entered the United States as an F-1 student and attended high school from July 1978 to June 1980. He subsequently attended university as an F-1 student from 1980 to 1984 and graduated with a B.A. on February 28, 1985. The applicant did not file quarterly or annual address reports as required on or before December 31, 1981.

The INS commenced deportation proceedings against the applicant on January 27, 1986, charging the applicant with entering the United States on July 7, 1978 with an F-1 visa, and remaining in the United States after September 19, 1985 without authorization. The immigration judge (IJ) denied the applicant's applications for suspension of deportation, adjustment of status to permanent residence and voluntary departure, and ordered the applicant deported. The applicant appealed the IJ's decision to the Board of Immigration Appeals (BIA). The BIA dismissed the appeal of the denial of the applications for adjustment of status and suspension of deportation and granted the applicant voluntary departure. The applicant later filed a Motion to Reopen with the BIA, and on May 25, 2001 the BIA dismissed the motion. The applicant applied for a review of the BIA denial with the 5th Circuit Court of Appeals, and the 5th Circuit affirmed the BIA decision on February 21, 2002.

The AAO finds that the applicant is a class member covered by the terms of NWIRP. He filed a legalization application under INA § 245A and the application has not been finally adjudicated. He failed to file quarterly or annual address reports required on or before December 31, 1981. He has made a *prima facie* showing that he violated the terms of his nonimmigrant status in a manner known to the government because he did not file quarterly or annual address reports required on or before December 31, 1981. The AAO withdraws the director's finding that the applicant is not a member of any legalization class action lawsuit and finds that the applicant is a class member under NWIRP. The AAO will adjudicate the LIFE Act application in accordance with the terms of NWIRP.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date through May 4, 1988. *See* § 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.11(b).

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).

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 states 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 petitioner 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 or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 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 or petition.

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).

Here, the submitted evidence is relevant, credible and probative.

The applicant filed the Form I-485 application on May 17, 2002. In support of his claim of residence in the United States since a date prior to January 1, 1982 through May 4, 1988, the applicant submitted copies of his visa, passport, Forms I-20 from the schools he attended through 1985, transcripts, lease agreements, a marriage certificate for his first marriage, employment records, records of deportation proceedings, and copies of tax returns for 1986 and 1987. USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 31, 1981. In accordance with the terms of NWIRP, the AAO finds that the evidence establishes by a preponderance of the evidence that the applicant was unlawfully present in a manner known to the government prior to January 1, 1982. Consequently, the applicant has overcome the grounds for denial cited by the director.

The application may not be approved, however, as the record does not establish that the applicant was continuously physically present in the United States throughout the requisite period, or that he maintained continuous, unlawful residence status from a date prior to January 1, 1982 through May 4, 1988, as required for eligibility for legalization under section 1104(c)(2)(B)(i) of the LIFE Act. The record contains conflicting information about whether the applicant exited and reentered the United

States on June 12, 1987, and thus self-deported under the March 13, 1987 deportation order. Evidence of record submitted with the applicant's Form I-687 filed in 1996 indicates that the applicant went to Mexico on June 12, 1987, and reentered the United States subsequent to the deportation order. On his initial Form I-687 and current Form I-485, however, the applicant claims he did not leave the United States in the 1980s. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On remand, the director should give the applicant the opportunity to submit evidence clarifying whether he exited and reentered the United States in 1987 as claimed on his 1996 Form I-687. Continuous unlawful residence is broken when the applicant departs the United States under an order of deportation. Section 245A(g)(2)(B)(i) of Act, 8 U.S.C. § 1255a(g)(2)(B)(i). The applicant's claimed self-deportation to Mexico during the requisite period would constitute a break in his unlawful continuous residence in the United States, and he would not be entitled to benefits under the LIFE Act.

The AAO notes additionally that the application may not be approved, as the evidence establishes that the applicant is inadmissible to the United States. On remand, the director should determine whether the grounds of inadmissibility may be waived.

Section 245A(a)(4)(A) of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for temporary resident status.

Inconsistencies in the applicant's submissions to USCIS indicate that he sought through misrepresentation to procure an immigration benefit under the Act. The record reflects that the applicant filed inconsistent Forms I-687 with respect to his absence from the United States on June 12, 1987. In his initial Form I-687 filed April 21, 1988 the applicant indicated that he had no absences from the United States during the requisite period. On the second Form I-687 filed in January 1996, the applicant stated that he went to Mexico and reentered the United States on June 12, 1987. Affidavits submitted in support of the second Form I-687 application state that the applicant went to Mexico on June 12, 1987, and returned to the United States. On the current Form I-485 the applicant states that he did not leave the United States after the IJ entered the order of deportation. The AAO finds that the applicant materially misrepresented the facts of the case to procure an immigration benefit. Additionally, the BIA decision reflects that the IJ found that the applicant misrepresented his testimony with respect to payment of taxes during the 1980s. The BIA affirmed, finding that the record supported the IJ's conclusion that the applicant had not been straightforward with the INS and the immigration court. An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for benefits under the LIFE Act.

The applicant is also inadmissible to the United States as he was deported from the United States and seeks readmission to the United States within 10 years of the date of removal under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II). The record indicates that the applicant voluntarily left the United States in 1987 and reentered the United States within 10 years of the date of

deportation. Further, the record indicates that the applicant again left the United States, and is currently living in Canada.[2] For this additional reason, the applicant is inadmissible.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that the applicant filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the order of deportation. The AAO will remand for the director to adjudicate the Form I-690 with respect to the applicant's seeking readmission to the United States after deportation. Further, as the applicant is inadmissible for misrepresentation as noted above, the AAO will remand in order for the director to provide the applicant with the opportunity to seek a waiver of inadmissibility with respect to the misrepresentation.

Accordingly, the decision of the district director is withdrawn and the application remanded. The director shall give the applicant the opportunity to clarify the inconsistencies in the record with respect to his claimed absence from the United States on June 12, 1987. The director shall determine whether the applicant has established continuous residence in the United States throughout the requisite period. The director shall also enter a decision on the unadjudicated Form I-690 with respect to the applicant's self-deportation from the United States and the material misrepresentation. Upon consideration of the Form I-690 application and review of the evidence, the director shall enter a new decision determining whether the applicant is entitled to benefits under the LIFE Act. If adverse to the applicant, the decision shall be certified to the AAO for review.

ORDER: The director's decision denying the LIFE Act application is withdrawn. The application is remanded to the director for further action in accordance with the foregoing and entry of a new decision that, if adverse to the applicant, is to be certified to the Administrative Appeals Office for review.

[2] The record establishes that the applicant has married three United States citizens, all of whom filed a Form I-130 petition for alien relative on the applicant's behalf. The first two marriages were dissolved and the related Form I-130 petitions were denied. The applicant currently has an approved Form I-130 and must seek permission to reapply for entry after deportation and for waiver of the noted grounds of inadmissibility before he may reenter the United States.