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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

L 2

FILE: [redacted] Office: DALLAS, TX Date: SEP 10 2009

MSC 02 239 64368

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 forwarded to the U.S. Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and 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, Dallas, Texas. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because she found that the applicant was in the United States in lawful status for at least part of the statutory period because he made entries as a B1/B2 nonimmigrant on January 28, 1981 and July 30, 1986.

On appeal, the applicant submitted briefs to support the finding that he was in the United States unlawfully throughout the statutory period. The applicant also indicated through counsel that the record establishes that he is otherwise eligible to adjust status under the LIFE Act.

The AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO's *de novo* review authority. *See,* e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

As a preliminary matter, the AAO notes that the director found the applicant eligible for class membership under the LIFE Act. Also, 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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> (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or
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> (B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

(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

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'),

ii. was denied or whose temporary resident status was terminated, where the INS or USCIS action or inaction was because INS or USCIS 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').

2. Enumerated Categories

(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.

(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.

(3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of

(a) reinstatement to nonimmigrant status;
(b) change of nonimmigrant status pursuant to INA § 248;
(c) adjustment of status pursuant to INA § 245; or
(d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

The AAO finds that the record demonstrates that the applicant is a member of the NWIRP class as enumerated above and will adjudicate the application in accordance with the standards set forth in the NWIRP settlement agreement.

For example, the record indicates that the applicant failed to file the required quarterly address report by April 28, 1981, three months after his January 28, 1981 entry. There is no record of this address report in the record. Thus, the AAO finds that the applicant violated his lawful status in a manner that was known to the government prior to January 1, 1982. There is no indication in the record that the applicant ever admitted to the INS that he had violated his status and asked that his lawful status be properly reinstated. Thus, the AAO finds that any extension of nonimmigrant status that the applicant may have received during the statutory period was obtained through fraud or mistake. Similarly, the record indicates that the applicant obtained entry into the United States during August 1982 and July 1986 through fraud or mistake as he was not in lawful nonimmigrant status in 1982 and 1986 and his actual intent upon entry was to return to an unrelinquished domicile and to reside indefinitely in the United States.

NWIRP provides that LIFE legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudication 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, he violated the terms of his 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. It is presumed that the school or employer complied with the law and reported violations of status to the INS; the absence of a school or employer report in government records is not sufficient on its own to rebut this presumption. Once the applicant makes a *prima facia* showing of having violated nonimmigrant status in a manner known to the government, USCIS then must rebut the evidence that the applicant violated his or her status. If USCIS fails to rebut the evidence, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982. Where an individual claims to have obtained his or her nonimmigrant status by fraud or mistake, the applicant bears the burden of establishing this.

The settlement agreement states further that once USCIS finds that the applicant is a class member, USCIS shall follow the general adjudicatory standards set forth at 8 C.F.R. § 245a.18(d)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Legal Immigration Family Equity (LIFE) Act of 2000] or at 8 C.F.R. § 245a.2(k)(4)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Immigration Reform and Control Act (IRCA) of 1986], whichever is more favorable to the applicant.

The AAO finds that the record indicates that any entries which the applicant made into the United States during the statutory period using the B-1/B-2 visa issued to the applicant in August 1982 were made by fraud or mistake and as such were not lawful. Consequently, these entries do not establish that the applicant was lawfully present in the United States during the statutory period.

The AAO finds that, in keeping with the NWIRP settlement agreement, the record indicates that the applicant was not lawfully present in the United States during any portion of the requisite period.

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 in relevant part:

> (i) In General – The alien must establish that he or she entered the United States before January 1, 1982, and 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.

See also 8 C.F.R. § 245a.11(b).

The regulation at 8 C.F.R. § 245a.15(c) provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

> (1) 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.

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.

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 regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

> (b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:
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> . . .
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> (9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.
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> (10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

> Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

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 application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-,* 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with the regulatory requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a

"relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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. *Id.* at 79-80. 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.* at 80. 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 or applicant 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, 431 (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, to deny the application or petition.

On or near April 2, 1990, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On May 27, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The director issued a notice of decision in which she denied the application because she found that the record indicates that the applicant was in the United States in lawful status for at least part of the statutory period. As previously stated, the AAO finds that under the terms of the NWIRP settlement agreement, the record indicates that during the statutory period the applicant was never in lawful nonimmigrant status.

Thus, the applicant has overcome the basis of denial set forth by the director.

On June 30, 2009, the AAO issued a notice of intent to dismiss stating that at issue in this proceeding is whether the applicant is able to establish: that he resided continuously in the United States from some date prior to January 1, 1982 through May 4, 1988; that he is admissible to the United States; and that he is otherwise eligible to adjust under the LIFE Act.

The record indicates that the applicant represented himself as a lawful nonimmigrant upon admission to the United States at least twice during the statutory period. Yet, according to the claims which he

made in this proceeding, his actual intent upon returning each time was to return to an unrelinquished domicile, to work without authorization and to reside indefinitely in the United States. Thus, twice during the statutory period, the applicant procured entry into the United States by willfully misrepresenting a material fact. He is inadmissible under section 212(a)(6)(C)(i) of the Act based on these misrepresentations.

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 is admissible to the United States. *See* 8 C.F.R. § 245a.12(e). The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c).

The applicant submitted the Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. On this form, the applicant was instructed to state reasons why his request should be granted. He did not provide a reason that directly relates to family unity considerations or humanitarian or public interest reasons for granting a waiver, as required by that form. Also, he did not submit any documentation with that form to support his request that any grounds of inadmissibility to which he is subject be waived. The Form I-690 has not yet been adjudicated. As such, the applicant currently remains inadmissible under section 212(a)(6)(C)(i) of the Act.

As the director was provided the Form I-690 but has not yet made a decision on the matter, the AAO stated in the notice of intent to dismiss that the applicant could file, in response to that notice, documentation that might support the request made on that form and develop reasons why that request should be granted.

This office also stated in the notice of intent to dismiss that the record also includes the following adverse or inconsistent evidence regarding the applicant's claim that he resided continuously in the United States throughout the statutory period and that he is otherwise eligible to adjust under the LIFE Act:

1. The Form I-687 submitted January 5, 2006 filed under a legalization class action settlement agreement that the applicant signed under penalty of perjury on which he indicates at item 32 that he was absent from the United States: during July/August 1982 to get married; during January/February 1983 to visit his daughter; from October 1985 through December 1985 to visit his daughter; during July 1986 to visit his wife who was ill; during November 1987 to renew his passport; during October 1989 to bring his daughters to the United States; and during October/November 2002 to take care of legal matters. The applicant indicated that these were his only absences from the United States between January 1, 1982 and December 29, 2005, the date that he signed that form.

2. The Form I-687 which the applicant signed on April 5, 1990 which states that his only absences from the United States between the date that he entered the United States and when he signed that form in 1990 were during July/August 1982 to get married, during July 1986 to be with his wife who was ill, during November 1987 to renew his passport and during October 1989 to bring his daughter to the United States. On this Form I-687, the applicant did not state that he was absent from the United States from October 1985 through December 1985 and during January/February 1983.

3. The Form I-687 which the applicant signed in 1990 and the Form I-485 both indicate that the applicant's daughter [redacted] was born on January 22, 1983 and that his daughter [redacted] was born on October 26, 1985. Both daughters were born in Mexico, and given that the applicant visited his wife in Mexico in 1986, the record indicates that his daughters' mother, [redacted] was still residing in Mexico through at least 1986. Thus, the record suggests that in approximately April 1982 and January 1985 the applicant's two daughters were conceived while his wife was residing in Mexico. However, the record does not indicate that the applicant was absent from the United States during either April 1982 or January 1985.

4. The Form I-687 filed on January 5, 2006 which states at item 30 on page 3 that the applicant resided: on [redacted] Dallas, Texas from January 1981 through April 1981; at [redacted] Whittier, California from April 1981 through January 1986; and on [redacted] Whittier, California from January 1986 through May 1992.

5. The Form I-687 signed on April 5, 1990 which states at item 33 that the applicant resided at [redacted] Whittier, California from December 1980 through the date that he signed that form in 1990.

6. The statement of [redacted] on [redacted], Whittier, California letterhead stationery on which [redacted] verified that [redacted] employed the applicant part-time from February 1981 through April 16, 1990, the date that [redacted] signed that statement. He also stated that the applicant had lived in one of [redacted] and properties from February 1981 through the date that he signed that document. Mr. [redacted] stated that he had no [rent] receipts because the applicant's [rental] costs, including utilities, were deducted from his salary. [redacted] did not include any documentation of the applicant's salary. The AAO notes that [redacted] is the applicant's wife's maiden name and that there is no contemporaneous evidence in the record that the applicant worked for [redacted] at any time.

7. The Form I-687 signed in April 1990 on which the applicant stated at item 36 that he worked for [redacted], Whittier, CA from February 1981 through December 1988. The Form I-687 filed on January 5, 2006 on which the applicant made this same statement at item 33 on page 6, except that he listed the company's address as [redacted] instead of [redacted]. Neither Form I-687 indicates that the applicant worked for [redacted] through 1990 as stated by [redacted] in the document summarized at number 6 above.

8. The statement of [redacted] on Mayflower Transit, Hidden Valley Moving & Storage, Inc., Irvine, California letterhead stationery on which Mr. stated that the applicant had worked for Hidden Valley Moving and Storage, Inc. from 1982 through the date that he signed that letter on September 29, 2005. The applicant did not list this employment on either of the Forms I-687 in the record, where he was required to list all his employment since his first entry/January 1, 1982 and following.

9. The statement of [redacted] on H&R Cleaning, Garland, Texas letterhead stationery on which [redacted] stated that the applicant began working for H&R Cleaning in January 1981 when he first arrived in Texas from Mexico. According to [redacted] in March 1981, the applicant moved to California but he continued to have seasonal work with her company.

10. The Form I-687 signed in April 1990 on which the applicant stated that he first entered the United States during January 1980.

11. The Affidavit for Determination of Class Membership in *League of United Latin American Citizens v. INS* (LULAC) which the applicant signed on April 2, 1990 and on which he stated that he first entered the United States during January 1981.

The record includes inconsistent information regarding, for example: when the applicant was absent from the United States during the statutory period; whether his first address in the United States was in California beginning in December 1980 or whether he first resided in Texas from January 1981 through April 1981; whether the applicant began working in California in February 1981; and whether he resided at the address of [redacted] in Whittier, California from December 1980 through April 1990 or whether he resided at several different addresses during the statutory period. Also, the evidence currently in the record appears to suggest that the applicant was in the United States and that his wife was in Mexico during the period when his wife conceived his two daughters.

The AAO stated in the notice of intent to dismiss that these discrepancies cast doubt on the authenticity of all the evidence of record, including the applicant's claim that he resided continuously in the United States throughout the statutory period.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Such inconsistencies in the record may be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988. This office stated in the notice of intent to dismiss that the various statements and affidavits in the record are not sufficient to overcome these discrepancies.

The AAO explained in the notice of intent to dismiss that in order to overcome these findings, the applicant should present: independent evidence from credible sources which overcomes any discrepancy related to the claim that he was continuously residing in the United States throughout the statutory period. He should also present documentation and related information that might support his request for a waiver of inadmissibility set forth on the Form I-690.

The applicant did not reply to the notice of intent to dismiss during the time period allowed.

The applicant has failed to establish continuous residence in an unlawful status in the United States from a date prior to January 1, 1982 through May 4, 1988. He also failed to establish that he is admissible to the United States or that he qualifies for a waiver of the grounds of inadmissibility to which he is subject.

The applicant is not eligible to adjust to permanent resident status under section 1104 of the LIFE Act for the reasons stated above, with each considered as an independent and alternative basis for denial.

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