**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship and Immigration Services**

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**PUBLIC COPY**

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[redacted]

Date: APR 08 2011 Office: SALT LAKE CITY FILE: [redacted] MSC-03-105-62058

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.

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the Director, Salt Lake City, Utah on July 23, 2008 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 failed to establish residence in the United States in an unlawful status from January 1, 1982 through May 4, 1988 as required by section 1104(c)(2)(B) of the LIFE Act. Specifically, the director found that the applicant entered the United States using an F-1 nonimmigrant student visa and was authorized to remain for the duration of his stay, while he was enrolled in school. The director noted that the applicant's transcripts and other correspondence from the University of Utah indicate that he was a full-time student in lawful F-1 student status from 1978 when he entered the United States and at least until 1983 when he reentered the United States in F-1 status. Thus, the director concluded that the applicant was not eligible for the benefit sought.

On appeal, the applicant indicates that he violated his lawful student status prior to January 1, 1982 by working without authorization, by transferring schools without prior permission, and by failing to submit required address reports to United States Citizenship and Immigration Services (USCIS) for the time period between his entry in 1978 and December 31, 1981 as required.

On December 30, 2010, the AAO issued a Notice of Intent to Deny (NOID) providing the applicant notice that it intended to dismiss the appeal. The applicant was provided 30 days to respond to the issues raised in the NOID. The AAO received the applicant's response and has considered it, along with the entire record of proceedings. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO finds that the applicant has failed to overcome the grounds explained in the NOID. The appeal will be dismissed.

First, the AAO notes that the applicant is ineligible for benefits under the LIFE Act on three separate grounds. As explained below, the applicant testified that he departed the United States on two separate occasions during the relevant period, each absence exceeding the 45 day limit, which interrupted any continuous residence that he may have established.

Second, the applicant is inadmissible to the United States pursuant to Section 212(a)(2)(C)(i), 8 USC 1182(a)(2)(C)(i), as an individual that the United States knows or has reason to believe is a trafficker in any controlled substance, regardless of whether he was in fact convicted of such a crime.

Third, the AAO finds that the applicant willfully misrepresented a material fact when he applied for an F-1 visa in 1983 after knowingly violating his nonimmigrant status and failing to disclose his violations to USCIS. Aliens who willfully misrepresent a material fact to procure admission into the United States or other benefit provided under the Act (e.g., temporary resident status) are

rendered inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

Finally, it is noted that the applicant was ordered deported by the Immigration Judge on November 6, 1986 and on April 14, 1989 the Board of Immigration Appeals upheld the decision. On July 18, 1991 the Immigration Judge granted the applicant thirty days to depart the United States. The applicant failed to depart and is subject to the final order of deportation. It is unclear from the record whether the applicant actually departed the United States, however, he bears the burden of proving that he is admissible to the United States. Section 212(a)(9)(A)(ii)(II) of the Act renders inadmissible aliens who departed the United States while an order of removal was outstanding and who seek admission within 10 years of the date of the alien's departure. Section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

On September 9, 2008 the court approved the NWIRP settlement. 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 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 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
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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').

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 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 settlement agreement. NWIRP provides that I-485 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, 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.

It is presumed that the school or employer complied with the law and reported violations of status to the INS; the absence of such report in government records is not alone sufficient to rebut this presumption. 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. With respect to individuals who obtained their status by fraud or mistake, the applicant bears the burden of establishing that he or she obtained lawful status by fraud or mistake. 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.

It is presumed that the school or employer complied with the law and reported violations of status to the INS; the absence of such report in government records is not alone sufficient to rebut this presumption. 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. With respect to individuals who obtained their status by fraud or mistake, the applicant bears the burden of establishing that he or she obtained lawful status by fraud or mistake. 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.

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).

In support of his claim of continuous unlawful residence in the United States, the applicant asserts that he entered the United States for the first time in 1978 to attend Highland High School in Salt Lake City, Utah. The record of proceedings contains a copy of the F-1 visa issued to him in Tehran on July 17, 1978, however, the date of entry is not evident. The record contains copies of the applicant's transcripts from Highland High for the 1978-1979 academic year, as well as copies of transcripts from Webster State College for the winter and spring semesters of 1980-1981. The record also contains transcripts from the University of Utah indicating that the applicant enrolled as a student from fall 1981 until the end of the relevant period. Based upon these facts, the director concluded that the applicant was not eligible for legalization benefits because he was not in unlawful status in the United States during the relevant period.

However, the applicant asserts that he violated his F-1 student status in three ways: 1). by transferring schools without prior USCIS authorization; 2). working without authorization; and, 3). failing to submit required address updates.

First, the applicant asserts that he violated his status by transferring schools without prior USCIS authorization. The AAO has reviewed the record and finds no indication that USCIS was informed of the applicant's transfer or that he requested the transfer in accordance with the regulations governing F-1 status.

The applicant also asserts that he violated his F-1 student status by working without authorization. In support of this assertion, the applicant submits a copy of his Social Security Earnings Statement which indicates that he earned taxable wages in the United States beginning in 1981, throughout the relevant period, except for the year 1983. He also submits pay-check stubs and W-2 forms indicating that he was employed by Classic Burger Inc. in 1981, the University of Utah in 1981, and Astro Burgers in 1982. It is not clear whether the applicant received employment authorization pursuant to his F-1 status. Furthermore, the applicant's off-campus employment is inconsistent with his I-256A Application for Suspension of Deportation in which he indicates that he was employed by the University of Utah from 1981 until 1989. He also indicated only one employer, the University of Utah during the relevant period on his G-325A signed on September 27, 1985. Thus, the applicant has not established that he violated his F-1 status by working without authorization.

However, the AAO finds that the applicant failed to submit the required address reports to USCIS. Until Dec. 29, 1981, section 265 of the Act stated that "Any . . . alien in the United States in a lawful temporary residence status shall . . . notify the Attorney General in writing of his address at the expiration of each three-month period during which he remains in the United States, regardless of whether there has been any change in address." *See* section 265 of the Act (1980) and PL 97-116, 1981 HR 4327(1981) which confirms that section 265 was modified, effective December 29, 1981, such that lawful non-immigrants were no longer required to file quarterly address reports regardless of whether there had been any change in address.

The applicant testified that he entered the United States on in 1978 as an F-1 student. He would have been required to provide written updates of his address at the expiration of each three-month period during which he remained in the United States, regardless of whether there was any change in address, for the period 1978 until December 29, 1981. The record of proceedings is void of any address updates.

Following *de novo* review by the AAO, USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 29, 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, he has established that his unlawful status was known to the government prior to January 1, 1982.

Once the applicant establishes that he violated his student status prior to January 1, 1982 in a manner known to the government, he must prove that he resided continuously in the United States for the duration of the relevant period.

In this case, the applicant has submitted transcripts from the University of Utah indicating that he was enrolled as a student throughout the relevant period. However, on his I-256A, the applicant indicated that he was absent from the United States on two occasions during the relevant period: July 24, 1982 until September 21, 1982 and July 27, 1983 until September 25, 1983. This is inconsistent with the Form I-687 signed by the applicant on August 24, 1992 and statements which he provided to USCIS on January 9, 2003 in which he indicated that he was absent from August 21, 1983 until September 25, 1983 and August 3, 1982 until September 17, 1982. On appeal, counsel indicates that the applicant departed the United States on July 31, 1982 and returned on September 17, 1982 for a total of 48 days.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of

deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

As noted by the AAO in the NOID, the applicant's testimony that he was absent from the United States from July 24, 1982 until September 21, 1982 and July 27, 1983 until September 25, 1983 renders him ineligible for permanent resident status under the LIFE Act. The AAO noted that while it is inconsistent with the applicant's later testimony that his absences were shorter in duration, he has not provided independent objective evidence to support his later assertion. The AAO requested that the applicant submit a full copy of his passport to resolve the inconsistencies noted.

On appeal, the applicant submits a detailed explanation, along with a full color copy of his passport. These documents affirm that the applicant obtained a visa to enter Germany at the German Embassy in Washington D.C. on July 29, 1982. The passport also contains an entry stamp to Germany which is partially obscured but which does affirm that the applicant entered Germany in August 1982. The passport also contains an entry stamp dated September 17, 1982 evidencing the applicant's return to the United States via New York City on that date. Therefore, this absence may constitute a break in the applicant's continuous residence, because it could have been for as long as 47 days. The dates of the applicant's second absence have not been clarified. The passport indicates that the applicant reentered the United States in F-1 status on September 25, 1983, however, there is no evidence of the date of his departure from the United States. Since the applicant has provided conflicting testimony regarding the date of his departure, July 27, 1983 or August 21, 1983, this inconsistency must be resolved by independent objective evidence. The applicant has failed to meet this burden.

Doubt cast on any aspect of the evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. It is incumbent upon an 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).

Furthermore, the evidence establishes that the applicant has not met his burden of proving that he is admissible to the United States. 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 adjustment to permanent resident status under the LIFE Act.

The record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. He applied for and obtained a nonimmigrant F-1 visa and entered the United States on September 25, 1983 in F-1 status. Thus, the applicant provided

material misrepresentations to USCIS officers to obtain a nonimmigrant visa to enter the United States.

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). As noted in the NOID, the applicant is therefore inadmissible and ineligible for legalization benefits.

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 has filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation, indicating that he is eligible for a waiver because he attained his professional degree in the United States. As the waiver application has not been adjudicated, the applicant is not admissible and is ineligible for legalization benefits under the LIFE Act. Furthermore, even if the waiver were approved, the application would not be approvable since the applicant failed to establish his continuous residence for the duration of the relevant period.

Additionally, as the AAO noted in the NOID, on August 1, 1984 the applicant was convicted in the Third Judicial District Court in Salt Lake County, Salt Lake City, Utah of two counts of Attempted Possession of a Controlled Substance, Cocaine, with Intent to Distribute for Value in violation of Title 58, Chapter 37, Section 8 (1)(a)(ii) of the Utah Code Annotated. The AAO noted in the NOID, that he is inadmissible to the United States pursuant to Section 212(a)(2)(C)(i). 8 USC 1182(a)(2)(C)(i), as an individual that the United States knows or has reason to believe is a trafficker in any controlled substance, regardless of whether he was in fact convicted of such a crime or whether his conviction was overturned on procedural grounds. This ground of inadmissibility may not be waived.[1]

On appeal, through counsel, the applicant asserts that his controlled substance conviction was vacated on constitutional grounds, not merely procedural grounds. The applicant resubmits a copy of an Order Setting Aside the Plea Agreement, which indicates that the conviction was vacated on May 7, 1990. The AAO agrees that convictions that have been vacated due to procedural or substantive defects in the underlying proceedings are no longer valid convictions for immigration purposes. *See e.g., Alim v. Gonzales*, 446 F.3d 1239, 1248-50 (11th Cir. 2006); *In re Adamiak*, 23 I & N Dec. 878,879-80, 2006 WL 307908 (BIA Feb. 8, 2006). However, the inadmissibility grounds founds at Section 212(a)(2)(C)(i), 8 USC 1182(a)(2)(C)(i) do not require that the applicant was convicted of the crime. They render inadmissible any alien " . . .who the consular officer or the Attorney General knows or has reason to believe **(i)** is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 802 of title 21), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . ."

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[1] The record indicates that the applicant was also convicted on April 16, 1990 of violating Utah Code Ann. § 11.16.100(c), *Disorderly Conduct*, a misdemeanor. The conviction was later expunged on procedural grounds.

Section 212(a)(2)(C)(i), 8 USC 1182(a)(2)(C)(i) Thus, the applicant is inadmissible despite the subsequent order vacating his conviction.

Given the applicant's failure to establish either his continuous residence in the United States for the entire relevant period and his inadmissibility, the AAO finds that the applicant is 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.