U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529–2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: MAR 2 2 2013 Office: NEWARK FILE: [redacted]

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.

Ron Rosenberg
Acting 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, Newark office, and the Administrative Appeals Office (AAO) dismissed the applicant's subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be rejected.

On October 12, 2005, the director found that the applicant was ineligible for adjustment to permanent resident status under the LIFE Act on two grounds: 1) because the applicant failed to satisfy the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act; and 2) because the applicant failed to establish that he continuously resided in the United States for the duration of the relevant period.

On July 31, 2008, the AAO dismissed the appeal, finding that, although the applicant overcame one of the grounds for denial by submitting detailed witness affidavits establishing his continuous residence during the relevant period, the applicant failed to satisfy the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act. The AAO further found that, since the applicant is not 65 years old or older, and did not establish that he is developmentally disabled, the applicant failed to establish that he qualifies for either of the exceptions listed in section 1104(c)(2)(E)(ii) of the LIFE Act.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) requires that any motion to reopen or reconsider an action by U.S. Citizenship and Immigration Services (USCIS) be filed within 30 days of the decision that the motion seeks to reopen or reconsider, except that failure to file before this period expires may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the control of the petitioner. If the decision was mailed, the motion must be filed within 33 days. *See* 8 C.F.R. § 103.8(b).

On February 15, 2013, the applicant through counsel filed the instant motion to reopen, 1660 days (more than four years and six months) subsequent to the AAO's decision dismissing the applicant's appeal.

Counsel acknowledges that the motion is filed outside the period established by regulation. Counsel requests that he AAO *sua sponte* reopen the proceeding based upon "compelling newly discovered, previously unavailable" evidence that the applicant has a developmental disability which excuses him from the "basic citizenship skills" requirement of the LIFE Act. Upon review, the AAO finds the evidence of record and counsel's assertions are not persuasive for the reasons discussed below and the motion will be rejected as untimely filed.

Under section 1104(c)(2)(E)(i) of the LIFE Act, regarding 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.

An applicant may establish that he or she has met the requirements of section 312(a) of the Immigration and Nationality Act (Act) by demonstrating an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language and by demonstrating a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States. *See* 8 C.F.R. § 245a.17(a)(1) and 8 C.F.R. §§ 312.1 and 312.2.

An applicant may also establish that he or she has met the requirements of section 312(a) of the Act by providing a high school diploma or general educational development diploma (GED) from a school in the United States. *See* 8 C.F.R. § 245a.17(a)(2).

Finally, an applicant may establish that he or she has met the requirements of section 312(a) of the Act by providing evidence that he or she has attended or is attending a state recognized, accredited learning institution in the United States, following a course of study which spans one academic year and that includes 40 hours of instruction in English and United States history and government. The applicant may provide documentation of such on the letterhead stationary of said institution prior to or during the LIFE interview. *See* 8 C.F.R. § 245a.17(a)(3).

The applicant who fails to pass the English literacy and/or the United States history and government tests at the time of the initial LIFE interview shall be afforded a second opportunity after 6 months: to pass the tests; to submit evidence of a high school diploma or GED from a school in the United States; or to submit evidence that he or she has attended or is attending a state-recognized, accredited learning institution in the United States, following a course of study which spans an academic year and that includes 40 hours of instruction in English and United States history and government. *See* 8 C.F.R. § 245a.17(b).

The applicant filed his Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act on December 17, 2001.

On November 5, 2002, the applicant was interviewed in connection with his application for LIFE legalization. He failed to demonstrate a minimal understanding of ordinary English and a basic knowledge of U.S. history and government during the examination portion of the interview. On May 2, 2003, the applicant was again interviewed in connection with his LIFE application and he failed to demonstrate a minimal understanding of ordinary English during the examination portion of the interview. On August 11, 2005, the applicant was once more interviewed in connection with his LIFE application and, although he successfully demonstrated knowledge and understanding of

the history and government of the United States, he failed to demonstrate a minimal ability to write words in ordinary usage in the English language during the examination portion of the interview.

On August 12, 2005, therefore, the director issued a notice of intent to deny (NOID). The applicant was advised of his failure to pass the basic citizenship skills examination at all three of his LIFE interviews, and of his failure to establish his continuous residence in the United States during the relevant period.

On October 12, 2005, the director denied the application for the reasons stated in the NOID.

On July 31, 2008, the AAO dismissed the appeal concurring with the director that the applicant failed to satisfy the "basic citizenship skills" required under section 1104(c)(2)(E) of the LIFE Act.

On motion, the applicant does not deny that he failed to demonstrate a basic understanding of English and U.S. government and civics, at all three of his examinations. Nor has the applicant satisfied the basic citizenship skills requirement under the two alternatives established in the regulations. He has not provided a high school diploma or GED from a school in the United States, as required under 8 C.F.R. § 245a.17(a)(2), and he did not provide any evidence at the time of his second examination that he took, or was taking, a one-year course of study that included 40 hours of instruction in the English language and U.S. government and history at a state recognized, accredited learning institution, as required under 8 C.F.R. § 245a.17(a)(3).

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Attorney General may waive all or part of the basic citizenship skills requirements for aliens who are at least 65 years of age or who are developmentally disabled. The pertinent regulation, at 8 C.F.R. § 245a.17(c), reads as follows:

> Exceptions. LIFE Legalization applicants are exempt from the requirements listed under paragraph (a)(1) of this section if he or she has qualified for the same exceptions as those listed for naturalization applicants under §§ 312.1(b)(3) and 312.2(b) of this chapter [physical or mental impairment]. Further, at the discretion of the Attorney General, the requirements listed under paragraph (a) of this section may be waived if the LIFE Legalization applicant:
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> (1) Is 65 years of age or older on the date of filing; or
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> (2) Is developmentally disabled as defined under 8 C. F. R. § 245a.1(v).

The applicant states that he was born on February 3, 1962. Therefore, the applicant is not eligible for the discretionary waiver for 65-year olds described at section 1104(c)(2)(E)(ii) of the LIFE Act and 8 C.F.R. § 245a.17(c)(1), as he was only 39 years of age on the date his application for LIFE legalization was filed in 2001.

It must now be determined whether the applicant is eligible for an exemption from the basic citizenship skills requirements under 8 C.F.R. § 245a.17(c) due to a physical or mental impairment

as described in 8 C.F.R. § 312.1(b)(3) and 8 C.F.R. § 312.2(b), or a discretionary waiver under 8 C.F.R. § 245a.17(c)(2) due to a developmental disability as described in 8 C.F.R. § 245a.1(v).

Physical or mental impairment

The first issue to be addressed is whether the applicant has established he is qualified for an exception to the Basic Citizenship Skills requirements on the basis of a medically determinable physical or mental impairment.

The regulation at 8 C.F.R. § 312.1(b)(3) states, in pertinent part:

> The requirements of [basic citizenship skills] shall not apply to any person who is unable, because of a medically determinable physical or mental impairment or combination of impairments which has lasted or is expected to last at least 12 months, to demonstrate an understanding of the English language . . . . For purposes of this paragraph, the term *medically determinable* means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical or laboratory diagnostic techniques to have resulted in functioning so impaired as to render an individual unable to demonstrate an understanding of the English language as required by this section, or that renders the individual unable to fulfill the requirements for English proficiency, even with reasonable modifications to the methods of determining English proficiency as outlined in paragraph (c) of this section.

All persons applying for naturalization [or seeking to adjust based on a LIFE legalization application] and seeking an exception from the requirements of 8 C.F.R. § 312.1(a) and paragraph (a) of this section based on the disability exceptions must submit Form N-648, Medical Certification for Disability Exceptions, to be completed by a medical or osteopathic doctor licensed to practice medicine in the United States or a clinical psychologist licensed to practice psychology in the United States. . . . 8 C.F.R. § 312.2(b)(2). In the instant case, counsel has not provided a Form N-648 completed by either of the two psychologists who submitted assessments of the applicant. The motion may be rejected on this basis alone.

The regulation at 8 C.F.R. § 312.2(b)(1) states, in pertinent part:

> The requirements of [basic citizenship skills] shall not apply to any person who is unable to demonstrate a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States because of a *medically determinable* physical or mental impairment, that already has or is expected to last at least 12 months . . . . For the purposes of this paragraph, the term medically determinable means an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical or laboratory diagnostic techniques to have resulted in functioning so impaired as to render an individual to be unable to

> demonstrate the knowledge required by this section or that renders the individual unable to participate in the testing procedures for naturalization, even with reasonable modifications.

On appeal, the applicant asserts that he has a learning disability which prevented him from passing the basic citizenship skills test. As evidence that the applicant has a learning disability counsel has submitted assessments from Dr. and Dr. Upon review, and for the additional reasons below, the applicant has not established that he has a medically determinable impairment as defined in the pertinent regulations.

The assessment of Dr. is dated June 29, 2012. Dr. a licensed psychologist whose letterhead states "Neuropsychology, Board Certified Behavior Analyst – Doctoral," indicates he first met the applicant on June 21, 2012 and examined him an additional time on June 25, 2012. He states that the applicant was given eight "testing instruments." On the basis of the results of tests and interviews conducted on those dates, Dr. diagnosed the applicant as having "a developmental cognitive (mental-organic) impairment." He states the applicant's "test results and interviews consistently identify marked functional limitations in at least six areas of major life activities," including the areas of communication/communication use and functional academics. He states that the applicant has a marked impairment that affects his ability "to learn efficiently or maintain his knowledge," the impairment had lasted or was expected to last 12 months or longer, and impairment is likely not related "to some type of adult pathology or insult (i.e. nerve damage, stroke, or Traumatic Brain Injury – TBI) after [the applicant] was 22 or more years of age." Dr. further diagnosed the applicant as follows:

> During testing [the applicant] obtained an Index score consistent with mild mental retardation . . . If he does not have mild mental retardation, he certainly has a diagnosis of learning disability not otherwise specified.

Dr. did not identify any historical sources reviewed, such as school reports from Pakistan and prior medical records, in reaching his diagnosis. Dr. sweeping statement "although it is hard to say now that [the applicant] was with mental retardation as a child, it is clear his disabilities were evident before his 22nd birthday" appears to rest on little more than the applicant's say-so. According to Dr. the applicant appears to suffer from a physical or mental impairment.

On motion, the applicant also submitted an assessment dated January 18, 2012, from Dr. a licensed psychologist. Dr. indicated that she first met the applicant on November 22, 2011, and examined him an additional time on January 10, 2012. She states that her diagnosis is based upon a clinical interview of the applicant and the administration of eight tests. She diagnosed the applicant with possible dyslexia and a mild to moderate level of emotional distress, anxiety and depression regarding his immigration status. She states that the preliminary diagnosis of dyslexia "may be further confirmed by a neurologist who may having (sic) additional findings regarding the limitations [the beneficiary] is exhibiting." According to Dr. the applicant appears to suffer from a physical or mental impairment.

The record also contains two I-693 Forms, medical examination forms. The first Form I-693 is dated November 1, 2001 and is signed by the applicant and M.D. The second Form I-693 is dated November 1, 2002, and is signed by the applicant and M.D. Upon their respective examinations of the applicant, Drs. indicated that they found "no apparent defect, disease or disability." There is no indication that the applicant has a condition resulting from anatomical, physiological, or psychological abnormalities which can be medically shown to have resulted in functioning so impaired as to render the applicant unable to demonstrate an understanding of the English language.

There is nothing in the record to reconcile the discrepancies between the diagnoses of Drs. and on the one hand with those of Drs. on the other. In one instance, the applicant does not have a physical or mental disability; whereas, in another instance, the applicant does suffer from a mental impairment. The conflicting medical diagnoses cast doubt upon the veracity of the applicant's claim of physical or mental impairment.

Further, the applicant submitted a sworn affidavit dated September 8, 2005, after his third basic citizenship skills examination, wherein he states as follows:

> I have grown used to speaking English regularly over the past two and (sic) half decades, but I had not needed to write or read English on a daily basis or for work. I am truly sorry and ashamed of this. I foolishly relied upon my former lawyer to prepare me when I should have been preparing on my own. I did not realize how important this part was to my application . . . I pray that I will be given another opportunity to demonstrate that I can write in English. If I am given another opportunity, I will work my hardest toward passing my written exam successfully.

The applicant's failure to raise the issue of his learning disability until after his application for permanent residence was denied, rather than raising this issue prior to completing the examination portions of the three interviews casts doubt on the applicant's claim that a mental impairment prevented him from demonstrating a minimal ability to write words in ordinary usage in the English language.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record contains no independent objective evidence to explain the above inconsistencies. Therefore, the applicant has not established that he is qualified for an exception to the Basic Citizenship Skills requirements on the basis of a medically determinable physical or mental impairment.

Since the applicant has not established that he has a medically determinable mental (or physical) impairment as defined in the foregoing regulations, he is not eligible for an exemption from the basic citizenship skills requirements for LIFE legalization under 8 C.F.R. § 245a.17(c).

Developmentally disabled

The next issue to address is whether the applicant has established he is qualified for an exception to the Basic Citizenship Skills requirements on the basis of a medically determinable developmental disability.

The regulation at 8 C.F.R. § 245a.1(v) states:

> The term developmental disability means a severe, chronic disability of a person which:
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> (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
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> (2) Is manifested before the person attains age twenty-two;
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> (3) Is likely to continue indefinitely;
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> (4) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) Self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
>
> (5) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

On appeal, counsel submits evidence in an attempt to establish that the applicant is eligible for an exception to the basic citizenship skills requirement based on his suffering from a disability which is attributable to a mental impairment due to a learning disability from childhood.

As previously discussed, Dr. sweeping statement "although it is hard to say now that [the applicant] was with mental retardation as a child, it is clear his disabilities were evident before his 22nd birthday" appears to rest on little more than the applicant's say-so. No documentary evidence has been offered in the form of medical and school records to support this conclusion. Thus, the record does not demonstrate that the applicant's "learning disorder" manifested itself before he turned 22, as required under 8 C. F. R. § 245a.1(v)(2).

Although Dr. indicates that the applicant's functional limitations touch more than three of the major life activity areas listed at 8 C.F.R. § 245a.1(v)(4), there is no evidence that the

applicant suffers from a disability resulting in his need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated pursuant to 8 C.F.R. § 245a.1(v)(5).

The evidence in the record is insufficient to establish that the applicant is qualified for an exception to the Basic Citizenship Skills requirements on the basis of a medically determinable developmental disability pursuant to 8 C.F.R. § 245a.1(v). In addition, the previously noted discrepancies among the diagnoses of the doctors that have examined him cast doubt on the credibility of the applicant's claim to suffer from a developmental disability. Further, as stated above, the applicant's failure to raise the issue of his learning disability until after his application for permanent residence was denied, rather than raising this issue prior to completing the examination portions of the three interviews, casts doubt on the applicant's claim that a mental impairment prevented him from demonstrating a minimal ability to write words in ordinary usage in the English language.

For the reasons stated above, it cannot be concluded that the applicant suffers from a physical or mental disability or impairment that would allow him to be considered developmentally disabled so as to qualify for the exceptions contained at 8 C.F.R. § 312.1(b)(3) and 8 C.F.R. § 312.2(b). As the applicant has failed to establish that he is developmentally disabled, he is not eligible for a discretionary waiver under 8 C.F.R. § 245a.1(v).

Accordingly, the applicant is ineligible for adjustment to permanent resident status under section 1104 of the LIFE Act.

Finally, the applicant has not submitted any evidence in support of his assertion that his failure to file the instant motion within the period allowed should be excused as either reasonable or beyond his control. The motion was filed more than four years and six months after the appeal was dismissed. The applicant has offered no explanation as to why this delay should be considered reasonable, such as circumstances beyond the petitioner's control that would exempt the petitioner from adhering to the 30-day timeframe for the filing of a motion established by regulations. The petitioner's failure to file the motion within the period allowed will not be excused as either reasonable or beyond the control of the petitioner.

Motions to reopen a proceeding or reconsider a decision on an application for permanent resident status under section 1104 of the LIFE Act are not permitted. 8 C.F.R. § 245a.20(c). The AAO may, however, *sua sponte* reopen any proceeding conducted by the AAO under 8 C.F.R. § 245a and reconsider any decision rendered in such proceeding. 8 C.F.R. § 103.5(b). For the previously stated reasons the AAO finds the record in this case does not warrant a reopening *sua sponte.*

Accordingly, the motion will be rejected. The application will remain denied and the appeal will remain dismissed for the previously stated reasons.

ORDER: The motion is rejected.