

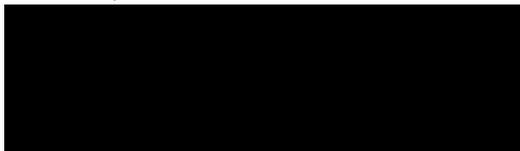
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



L2

FILE:



Office: Houston

Date: SEP 02 2005

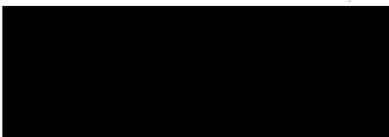
IN RE:

Applicant:



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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the District Director, Houston, Texas, and is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The district director denied the application because the applicant had not demonstrated that she either resided in the United States in a continuous unlawful status from before January 1, 1982 through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act, or that she was continuously physically present in this country from November 6, 1986 to May 4, 1988 as required by section 1104(c)(2)(C) of the LIFE Act. The district director based this decision on the determination that the applicant neither demonstrated that her authorized stay had expired as of January 1, 1982, or that she was otherwise in an unlawful status which was known to the government as of January 1, 1982. The district director also determined that the applicant admitted that she had been absent from this country for approximately two hundred and sixty five (265) days from January 1, 1982 to May 4, 1988, and, therefore, exceeded the one hundred and eighty (180) day limit for the aggregate of all absences during this period, as set forth in 8 C.F.R. § 245a.15(c)(1). The district director further concluded that the applicant was not continuously physically present in the United States as required by 8 C.F.R. § 245a.16(b) because her admitted absences from this country from November 6, 1986 to May 4, 1988 were not brief, casual, and innocent.

On appeal, counsel asserts that the applicant's unlawful status was known to the government as of January 1, 1982, because she had failed to submit required address reports to the Immigration and Naturalization Service, or the Service (now Citizenship and Immigration Services, or CIS). Counsel contends that emergent reasons delayed the applicant's return to the United States on three separate occasions during her absences from this country in the requisite period. The applicant submits documents in support of the appeal.

Section 1104(c)(2)(B) of the LIFE Act states:

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

(ii) Nonimmigrants - In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the Government as of such date.

The word "Government" means the United States Government. An alien who claims his unlawful status was known to the Government as of January 1, 1982, must establish that prior to January 1, 1982, documents existed in one or more government agencies so, when such documentation is taken as a whole, it would warrant a finding that the alien's status in the United States was unlawful. *Matter of P-*, 19 I. & N. Dec. 823 (Comm. 1988).

Congress provided only two ways in which an applicant who had been admitted as a nonimmigrant could establish eligibility for permanent residence under the LIFE Act. The first was to clearly demonstrate the authorized period of stay expired prior to January 1, 1982. The second was to show that, although the authorized stay had not expired as of January 1, 1982, the applicant was nevertheless in an unlawful status that was known to the Government as of that date. In doing so Congress acknowledged it was possible to have an authorized stay and yet still be unlawful due to another reason, such as illegal employment. However, the LIFE Act very clearly states the unlawfulness had to have been known to the Government as of January 1, 1982.

As cited above, pursuant to section 1104(c)(2)(B)(i) of the LIFE Act, 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 the LIFE Act shall apply to determine whether an alien maintained continuous unlawful residence in the United States. Therefore, eligibility also exists for an alien who would otherwise be 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 in order to return to an unrelinquished unlawful residence. 8 C.F.R. § 245a.2(b)(9). An alien described in this paragraph must receive a waiver of the inadmissibility charge as an alien who entered the United States by fraud. Section 212(a)(6)(C) [previously numbered Section 212(a)(19)] of the INA, 8 U.S.C. § 1182(a)(6)(c); 8 C.F.R. § 245a.2(b)(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).

When something is to be established by a preponderance of the evidence it is sufficient that the proof establish that it is probably true. *See Matter of E-- M--*, 20 I. & N. Dec. 77 (Comm. 1989).

The applicant is a class member in a legalization class-action lawsuit and as such, was permitted to previously file a Form I-687, Application for Temporary Resident Status Pursuant to Section 245A of the Immigration and Nationality Act (INA) on December 21, 1989. On the Form I-687 application, the applicant indicated that she first entered the United States with a F-1 student visa in September 1980, and that she subsequently violated such status by failing to submit annual or quarterly address reports to the Service as required by section 265 of the INA. The applicant included a separate affidavit dated December 14, 1989, in which she reiterated this claim.

In addition, the applicant submitted an Affidavit for Determination of Class Membership in *League of United Latin American Citizens v. INS (LULAC)*, in which she claimed that she violated her F-1 student status when she failed to submit the required address reports, by engaging in unauthorized employment, and by procuring and maintaining F-1 student visa status despite the fact that she intended to permanently reside in this country. The applicant also submitted a Form I-690, Application for Waiver of Grounds of Inadmissibility, to overcome any ground of inadmissibility arising under section 212(a)(19) of the INA (subsequently renumbered as section 212(a)(6)(C)(i)1 of the INA) from any misrepresentation or fraud on her part in obtaining her F-1 student status.

The record contains evidence, the photocopied pages of two separate Venezuelan passports, Service documents, and school records, that demonstrates that the applicant entered the United States with an F-1 student visa in September 1980 and that she remained in F-1 student status through to May 4, 1988. Clearly, the applicant's period of authorized stay did not expire prior to January 1, 1982. It must be determined whether the applicant was nevertheless in an unlawful status which was known to the Government as of that date.

The applicant contended that she violated her F-1 nonimmigrant student status upon her initial entry into the United States in 1980 because she had fraudulently obtained and subsequently maintained such status with the intent to permanently immigrate to this country. Even if the applicant was considered unlawful since entry because of a preconceived intent to reside in the United States, there is no evidence the Government was aware of any unlawfulness.

The applicant asserted that she violated her F-1 student status by engaging in unauthorized employment. While the applicant provided tax documents demonstrating that she began unauthorized employment in 1985 with her Form I-687 application, the record contains no evidence to establish that she violated her status by working prior to this date, much less prior to January 1, 1982. The applicant has subsequently claimed that she worked as a baby-sitter who provided instruction in Spanish and had been paid in cash by her employer prior to January 1, 1982. However, the applicant failed to submit any documentation to corroborate this claim. Even if the applicant had provided documentation to show that she worked for cash, this would not constitute evidence, such as Social Security Administration earnings statements or computer printouts, that would warrant a finding that the applicant's unlawful status in the United States was known to the Government as of January 1, 1982 pursuant to *Matter of P-*, 19 I. & N. Dec. 823 (Comm. 1988). Thus, we cannot conclude the applicant was in an unlawful status which was known to the Government as of January 1, 1982, as a result of unauthorized employment.

The applicant also claimed that she violated her F-1 student status when she failed to submit the quarterly and annual address reports to the Service as required by section 265 of the INA. However, the issue of address reporting was decided in *Matter of H-*, 20 I & N Dec. 693 (Comm. 1993), in which the Associate Commissioner held that the absence of mandatory annual and quarterly registration (address) reports from Government files in violation of section 265 of the Act *does not warrant a finding that the applicant's unlawful status was "known to the Government" as of January 1, 1982.*

On appeal, counsel contends that this issue is currently being litigated before the United States Ninth Circuit Court of Appeals in the pending class action lawsuit *Immigration Assistance Project of the Los Angeles County Federation of Labor v. Immigration and Naturalization Service*, No. 99-354 72 D.C. No. C88-379R. Counsel indicates that the most recent ruling issued in this case restored a previous injunction issued by the United States District Court for the Western District of Washington that prevents CIS from denying a LIFE Act application based upon the finding that an applicant's failure to file address reports did not constitute a violation of status which was known to the Government as of January 1, 1982. However, the record contains no evidence to demonstrate that the applicant is a class member in this particular legalization class-action lawsuit. Further, the fact remains that an injunction issued by a court involved in the litigation of *Immigration Assistance Project of the Los Angeles County Federation of Labor v. Immigration and Naturalization Service, supra.*, is binding only within the jurisdiction of such courts, specifically, the United States District Court for the Western District of Washington and the United States Ninth Circuit Court of Appeals. Moreover, as this case is still being litigated and no final order or decision has been issued, it cannot be considered as a precedent decision. As previously

noted, the controlling precedent was set forth in *Matter of H-*, 20 I & N Dec. 693 (Comm. 1993), in which it was held that the absence of mandatory annual and quarterly registration (address) reports from Government files in violation of section 265 of the Act does not warrant a finding that the applicant's unlawful status was "known to the Government" as of January 1, 1982.

In this case the applicant's authorized stay did not expire prior to January 1, 1982. Moreover, neither counsel nor the applicant has established that she was in unlawful status which was known to the Government as of January 1, 1982. The applicant has, therefore, failed to establish that she resided in continuous unlawful status in the United States from before January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B) of the LIFE Act.

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if 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. 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."

With her Form I-687 application, the applicant provided an attachment in which she listed fourteen separate absences from the United States during the requisite period and indicated that the duration of such absences ranged from a minimum of three days to a maximum for fifty days. In her affidavit dated December 14, 1989 that was included with the Form I-687 application, the applicant stated the following:

Also attached as Exhibit 5 is a list of periods I was absent from the United States. All of these absences were due when I was on school holidays. The longest period of time was from June 12, 1985 to August 1985. That was a 50 day period in Israel. I had gone for holiday. It was during that time that a number of hijackings took place in the Middle East. My family was frightened for me to return. I stayed a longer period than planned until we thought it was safe to return. I have been outside the United States for an approximate total of 267 days.

The applicant also included an affidavit signed by her sister, [REDACTED] and dated December 18, 1989, in support of her claim that an emergent reason had delayed her return to the United States after being absent from June 12, 1985 to August 1985. [REDACTED] stated in pertinent part:

During the summer of 1985, [REDACTED] [the applicant] and myself went to Israel for a vacation. Due to an unexpected hijacking that took place in Europe during our trip, and as a safeguard to the hostile condition erupting over the hijacking, we extended our stay in Israel over 30 days.

The record shows that the applicant subsequently filed her Form I-485 LIFE Act application on June 20, 2001. With the Form I-485 LIFE Act application, the applicant included a "Statement of Departure and Return of Absences from the United States from before January 1, 1982 to May 4, 1988," which listed sixteen absences for this period. In her statement, the applicant declared in pertinent part:

All of these of these absences were due while I was on holiday/vacation. The longest period of time was from June 12, 1985 to August 7, 1985 with 50 days in Israel. I would have come back much sooner but this was during the period of hijackings and we were all frightened to leave at this time.

The applicant initially admitted that she had been absent from the United States on fourteen occasions for approximately 267 days during the period from January 1, 1982 to May 4, 1988. The applicant subsequently revised her claim by acknowledging that she had been absent from this country sixteen times without specifying the length of these two previously unmentioned absences. Clearly, the applicant's absences of at least 267 days exceeds the 180 day limit for the aggregate of all absences from this country in the requisite period as put forth at 8 C.F.R. § 245a.15(c)(1). In addition, the applicant has admitted that she was absent from the United States from June 12, 1985 to August 7, 1985. This is a period of fifty-five days and exceeds the forty-five day limit for single absences from the United States set forth in 8 C.F.R. § 245a.15(c)(1).

The applicant has consistently testified that she spent fifty days in Israel during her absence from this country from June 12, 1985 to August 7, 1985, and that her return to the United States had been delayed by an emergent reason, specifically her fear of travel caused by hijackings of commercial airliners that occurred during her trip. An article posted at the internet website, [REDACTED] states that: "Airliner hijackings have declined since the peak of 385 incidents between 1967-1976. In 1977-86 the total dropped to 300 incidents and in 1987-1996 this figure was reduced to 212." In light of the fact that approximately 897 commercial airliner hijacking incidents occurred in the thirty years from 1967 through the end of 1996, it must be concluded that hijacking incidents were a foreseeable consequence of air travel during this period. However, the applicant has admitted to at least fourteen and as many as sixteen absences from this country in the period from January 1, 1982 to May 4, 1988. The record contains the photocopied pages of two Venezuelan passports that had been issued to the applicant on May 25, 1979 and November 6, 1986, respectively. A review of the multiple entry and exit stamps contained in these passport pages reveals that the applicant traveled almost exclusively by commercial airliner during the requisite period, despite the fact that hundreds of airliner hijackings occurred in this timeframe. Further, it must be noted that the applicant decided of her volition to travel to the Middle East, specifically Israel, despite the fact that travel to this region markedly increased the likelihood that she would be exposed to terrorist violence of all kinds including commercial airliner hijackings. Although it is acknowledged that Trans World Airlines Flight 847 from Athens, Greece was diverted to Beirut, Lebanon by Lebanese Shiite hijackers on June 14, 1985, the applicant's claim that such hijackings delayed her return to the United States after her fifty-five day absence from June 12, 1985 to August 7, 1985 is suspect.

The photocopied pages of the applicant's Venezuelan passports show that she acquired four separate visas prior to her absence from this country from June 12, 1985 to August 7, 1985. The applicant obtained a transit visa good for seven days of travel from the date of entry and valid until August 14, 1985 from the French Consulate in Houston, Texas, on May 30, 1985. The applicant then procured an entry visa valid for ninety days from the date of issue and good for ninety days of travel from the date of entry from the Spanish Consulate in Houston, Texas, on May 31, 1985. The applicant next obtained a B-2 visa to be utilized within thirty days of the date of issue and good for ninety days of travel from the Israeli Consulate in Houston, Texas on June 3, 1985. The applicant also procured an ordinary entry visa valid until September 2, 1985 and good for one month of travel from the Italian Consulate on June 3, 1985. The fact that the applicant procured visas to four different countries, France, Italy, Spain, and Israel that allowed her to remain in these countries for

seven days, one month, ninety-days and ninety days, respectively, tends to demonstrate that she intended to depart the United States and remain outside the country for an extended vacation.

The record shows that applicant departed the United States and arrived at Ben Gurion Airport in Tel Aviv, Israel on June 12, 1985. Although the applicant claimed that she remained in Israel for "50 days," an entry stamp in her passport shows that she departed Ben Gurion Airport in Tel Aviv, Israel only forty-two days later on July 28, 1985. The applicant's passport contains an entry stamp that reflects she arrived at Charles De Gaulle Airport in Paris, France on July 28, 1985. The applicant's passport contains an exit stamp that shows that she exited France on July 29, 1985 from Modane, France. The record contains no indication of the applicant's travels from July 29, 1985 to August 7, 1985, the date she reentered the United States. However, Modane, France is a city in the Rhone Alps region of Savoie on the French and Italian border. The nearest commercial airport is located approximately forty-seven miles away in Aix les Bains, France, and the nearest seaport is approximately one hundred miles away on the Mediterranean Sea in Nice, France. The only means to exit the country at Modane, France, is to cross the border into Italy via the Frejus Tunnel and enter at Bardonecchia, Italy. The fact that the applicant traveled to Israel, France, and Italy for fifty-five days only reinforces the conclusion that she had a preconceived intent to depart the United States and remain outside the country for an extended vacation. The applicant has not provided any evidence, such as airline tickets or a travel itinerary, which reflects she made any changes in prearranged travel plans during the course of her absence from June 12, 1985 to August 7, 1985. Consequently, it cannot be concluded that an emergent reason as defined in *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) delayed the applicant's return to United States upon the occasion of her absence from June 12, 1985 to August 7, 1985.

Both in response to the notice of intent to deny and on appeal, counsel asserts that the applicant's return to the United States was delayed by emergent reasons during two additional absences from this country during the period from January 1, 1982 to May 4, 1988. Counsel contends that the applicant went to Venezuela on December 3, 1982 and that she subsequently became ill with what was believed to be Lupus. Counsel declares that the applicant was physically unable to travel until her symptoms disappeared after she received medical treatment and that she returned to the United States on January 17, 1983. Counsel states that this same situation occurred again when the applicant became ill on a subsequent trip to Venezuela from July 18, 1983 to August 20, 1983. Counsel provides a letter signed by [REDACTED] who stated that he treated the applicant on both of these occasions. Counsel asserts that the applicant had not previously claimed an emergent reason delayed her return to this country during these two absences because her prior attorney did not explain how her aggregate absences could affect her eligibility.

However, counsel's explanation cannot be considered as sufficient as the applicant retained the services of her prior attorney as early as July 12, 1988, the date the Form I-687 application was prepared and executed by the office of her prior attorney. The record shows that the applicant specifically claimed that an emergent reason had delayed her return to this country on only one occasion when she had been absent from June 12, 1985 to August 7, 1985 in the supporting documents that were included with the filing of her Form I-687 application on December 21, 1989. It is evident that the applicant's previous attorney was fully knowledgeable regarding the impact of the applicant's absences upon her eligibility, and the fact that an emergent reason could remove an absence from consideration. Therefore, it would be reasonable to conclude that the applicant's prior attorney would have urged her to advance any additional claims that an emergent reason had delayed her return to this country during any other of her admitted absences. In addition, the applicant reiterated her original claim that an emergent reason delayed her return to this country on only one occasion, her absence from June 12, 1985 to August 7, 1985, in a separate statement that was included with the Form I-485 LIFE

Act application filed on June 20, 2001. The applicant failed to advance any other claims that an emergent reason delayed her return to this country during any of her other absences that occurred in the period from January 1, 1982 to May 4, 1988, prior to the response to the notice of intent to deny. These additional claims that the applicant's return to this country because of emergent reasons were not put forth until the response to the notice of intent to deny, after she and current counsel had been informed that the total number of days she had been absent from the United States exceeded the one hundred and eighty day limit for the aggregate of all absences. Therefore, the credibility of the claim that the applicant's return to the United States was delayed when she became ill during trips to Venezuela from December 3, 1982 to January 17, 1983, and again from July 18, 1983 to August 20, 1983 must be deemed to be as questionable at best.

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).

The applicant has specifically admitted that she exceeded the forty-five day limit for a single absence and the one hundred and eighty day limit for the aggregate of all absences from this country in the period from January 1, 1982 to May 4, 1988. The applicant has failed to submit sufficient credible evidence to establish that an emergent reason delayed her return to the United States on any of the many occasions she was absent from the country in the requisite period. The applicant has failed to establish having resided in continuous unlawful status in the United States from prior to January 1, 1982 through May 4, 1988, as required under section 1104(c)(2)(B) of the LIFE Act. The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act on this basis as well.

An applicant for permanent resident status must establish continuous physical presence in the United States in the period beginning on November 6, 1986 and ending on May 4, 1988. *See* 8 C.F.R. § 245a.11(c).

The regulation at 8 C.F.R. § 245a.16(b) reads as follows:

For purposes of this section, an alien shall not be considered to have failed to maintain continuous physical presence in the United States by virtue of brief, casual, and innocent absences from the United States. Also, brief, casual, and innocent absences from the United States are not limited to absences with advance parole. Brief, casual, and innocent absence(s) as used in this paragraph means temporary, occasional trips abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States.

On appeal, counsel asserts the applicant's absences from the United States in the period from January 1, 1982 to May 4, 1988 should be considered as brief, casual, and innocent departures. Counsel is correct in concluding that a brief, casual, and innocent departure by the applicant from the United States in the period from November 6, 1986 to May 4, 1988 would not interrupt her continuous physical presence in this country. However, the applicant has specifically acknowledged that she obtained her F-1 student visa despite the fact that she intended to permanently reside in this country. The applicant submitted a Form I-690 waiver application to overcome any ground of inadmissibility arising under section 212(a)(19) of the INA (subsequently renumbered as section 212(a)(6)(C)(i) of the INA) from any misrepresentation or fraud on her part in procuring and

maintaining her F-1 student status. The fact that the applicant admits using a F-1 nonimmigrant student visa that had been procured by misrepresentation or fraud to re-enter the United States each time she returned from her multiple absences with the intent to permanently reside in this country cannot be considered as being consistent with the policies reflected in the immigration laws of the United States. As such, it cannot be concluded that the purpose of any of the applicant's absences in the requisite period, including that portion from November 6, 1986 to May 4, 1988, was innocent within the meaning of 8 C.F.R. § 245a.16(b).

Thus, the applicant failed to establish that she was continuously physical present in the United States in the period beginning on November 6, 1986 and ending on May 4, 1988 as required by 8 C.F.R. § 245a.11(c), and, therefore, is ineligible to adjust permanent resident status under the provisions of the LIFE Act on this basis as well.

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