

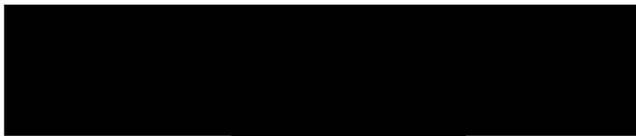
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

L2



FILE: [REDACTED]
MSC 03 249 60717

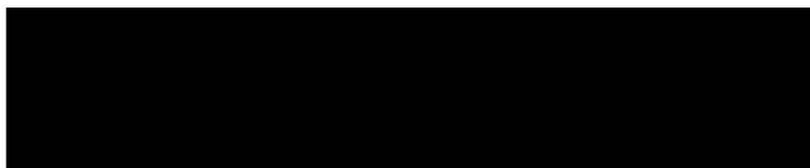
Office: DENVER, COLORADO

Date: DEC 29 2006

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. 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 District Director (director), Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for lack of prosecution because the applicant failed to appear for his October 28, 2004, February 3, 2005, April 27, 2005 and July 14, 2005 scheduled interviews. He also denied the application because the applicant failed to establish that he had satisfied the basic citizenship skills requirement described at section 1104(c)(2)(E) of the LIFE Act. In addition, he denied the application because the evidence submitted to demonstrate the applicant's residence in the United States from a date prior to January 1, 1982 through May 4, 1988 was not sufficient to establish continuous residence.

On appeal, counsel indicated that the applicant qualified for an exception to the basic citizenship skills requirement and that he is otherwise qualified to adjust to lawful permanent resident 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

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* LIFE Act § 1104(c)(2)(B) and 8 C.F.R. § 245a.11(b).

8 C.F.R. § 245a.19(a) indicates that all applicants filing for permanent resident status under section 1104 of the LIFE Act must be personally interviewed, except where the applicant is a child under the age of 14, or when it is not practical due to the health or advanced age of the applicant. An applicant who, for good cause, fails to appear for the scheduled interview may be afforded another interview. *See Id.* Where the applicant fails to appear for two scheduled interviews, the application shall be denied for lack of prosecution. *See Id.*

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).

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).

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 U.S. Citizenship and Immigration Services (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 such 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.

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 [Secretary of Homeland Security]) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Secretary of Homeland Security may waive all or part of the above requirements for aliens who are at least 65 years of age or who are developmentally disabled. *See also* 8 C.F.R. § 245a.17(c) which provides in relevant part:

Exceptions. LIFE legalization applicants are exempt from the requirements listed under (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.

8 C.F.R. § 312.1(b)(3) states the following:

The requirements of paragraph (a) of this section [regarding demonstrating an ability to read, write and speak words in ordinary usage in the English language] 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 as noted in paragraph (a) of this section. The loss of any cognitive abilities based on the direct effects of the illegal use of drugs will not be considered in determining whether a person is unable 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.

8 C.F.R. § 312.2(b) states the following:

Exceptions.

(1) The requirements of paragraph (a) of this section [regarding demonstrating a knowledge and understanding of the fundamentals of the history, and of the principles and form of government of the United States] 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 as least 12 months. The loss of any cognitive skills based on the direct effects of the illegal use of drugs will not be considered in determining whether an individual may be exempted. 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 diagnosis

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 individuals unable to participate in the testing procedures for naturalization, even with reasonable modifications.

(2) Medical certification. All persons applying for naturalization [or seeking to adjust based on a LIFE legalization application] and seeking an exception from the requirements of § 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 (including the United States territories of Guam, Puerto Rico, and the Virgin Islands). Form N-648 must be submitted as an attachment to the applicant's Form N-400, Application for Naturalization. These medical professionals shall be experienced in diagnosing those with physical or mental medically determinable impairments and shall be able to attest to the origin, nature, and the extent of the medical condition as it relates to the disability exceptions noted under § 312.1(b)(3) and paragraph (b)(1) of this section. In addition, the medical professionals making the disability determination must sign a statement on the Form N-648 that they have answered all the questions in a complete and truthful manner, that they (and the applicant) agree to the release of all medical records relating to the applicant that may be requested by [USCIS] and that they attest that any knowingly false or misleading statements may subject the medical professional to the penalties for perjury pursuant to title 18, United States Code, Section 1546 and to civil penalties under section 274C of the Act. [USCIS] also reserves the right to refer the applicant to another authorized medical source for a supplemental disability determination. This option shall be invoked when [USCIS] has credible doubts about the veracity of a medical certification that has been presented by the applicant. An affidavit or attestation by the applicant, his or her relatives, or guardian on his or her medical condition is not a sufficient medical attestation for purposes of satisfying this requirement.

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 1104(c)(2)(E)(i) of the LIFE 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). The GED or high school diploma may be submitted either at the time of filing the Form I-485 LIFE Act application, subsequent to filing the application but prior to the interview, or at the time of the interview. *Id.*

Finally, an applicant may establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by establishing that:

He or she has attended, or is attending, a state recognized, accredited learning institution in the United States, and that institution certifies such attendance. The course of study at such learning

institution must be for a period of one academic year (or the equivalent thereof according to the standards of the learning institution) and the curriculum must include at least 40 hours of instruction in English and United States history and government. The applicant may submit certification on letterhead stationery from a state recognized, accredited learning institution either at the time of filing Form I-485, subsequent to filing the application but prior to the interview, or at the time of the interview (the applicant's name and A-number must appear on any such evidence submitted).

8 C.F.R. § 245a.17(a)(3).

An 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 (or earlier at the request of the applicant) to pass the required tests or to submit the evidence described above. *See* 8 C.F.R. § 245a.17(b).

On or near December 5, 1989, 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 June 6, 2003, he filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

On August 23, 2005, the director issued a notice of intent to deny (NOID) in which he indicated that he intended to deny the application because the applicant failed to appear for more than one scheduled interview and thus the application must be denied for lack of prosecution. He also stated that he intended to deny the application because the applicant had not demonstrated basic citizenship skills at his May 6, 2004 LIFE legalization interview and he failed to appear for his subsequent scheduled interviews such that his basic citizenship skills might be tested again.

In the NOID, the director also explained that [REDACTED], the person who prepared the application and notarized the affidavits in the record had admitted to preparing applications using fraudulent information in order to make unqualified LIFE applicants appear qualified. Also, [REDACTED] the person who had approved the class membership application in the record had been convicted of taking bribes in order to approve class membership applications. The director indicated that he found the applicant's evidence of continuous residence and of class membership unreliable because [REDACTED] and [REDACTED] involvement in the matter. This point in the NOID is withdrawn. Each application is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The record of proceeding in this instance consists of the material in the applicant's A-file. *See* 8 C.F.R. § 103.8(d). Further, if the decision will be adverse to the applicant and is based on derogatory information considered by USCIS of which the applicant is unaware, he shall be advised of this and offered an opportunity to rebut the information and present evidence in his own behalf before the decision is rendered. *See* 8 C.F.R. § 103.2(b)(16)(i). The applicant's A-file does not contain specific information or evidence relating to other questionable or fraudulent documents notarized or prepared by [REDACTED] and/or relating to a questionable analysis made by [REDACTED] in adjudicating the class membership application, nor does it include evidence that the applicant was ever provided notice of any such derogatory information.

The applicant did not respond to the NOID. On December 23, 2005, the director denied the application based on the reasons set forth in the NOID.

On appeal, counsel indicated, as to the fact that the person who notarized the applicant's affidavits has admitted to preparing fraudulent immigration applications and as to the fact that the immigration officer who approved the applicant's class membership application has been convicted of taking bribes to approve such applications, that these things in and of themselves have no bearing on the credibility of the evidence of record. The AAO concurs.

On appeal, counsel also stated that a psychologist is currently evaluating the applicant to determine if he is learning disabled. Counsel asserted that the applicant may have a learning disability and this disability may be preventing him from learning English. Counsel indicated that he would like to supplement the record with the results of the psychologist's final evaluation. Counsel suggested that the psychologist's evaluation may demonstrate that the applicant qualifies for an exception to the LIFE legalization basic citizenship skills requirement.

This office notes that on April 30, 2007, the Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), in this matter was received by the District Office, Denver, Colorado. On the Form I-290B, counsel failed to indicate whether he would file a brief or additional evidence within 30 days or whether he would not be submitting a brief or other evidence. However, as stated above, in the letter attached to the Form I-290B, counsel indicated that he would submit a final psychological evaluation to help demonstrate that the applicant qualifies for an exception to the LIFE legalization basic citizenship skills requirement. The record indicates that USCIS never received such a submission. On December 11, 2008, this office sent counsel a facsimile transmission inquiring whether counsel had sent a psychological evaluation or additional evidence, and requesting that a copy of such evidence be sent by facsimile or mail to the AAO within five business days. Counsel responded by requesting more time to retrieve the psychological evaluation that it might be submitted into the record. However, as stated in the facsimile transmission sent to counsel, this office shall not allow an applicant "an open-ended or indefinite period in which to supplement the record." Counsel indicated that he would be forwarding the relevant psychological evaluation nearly three years ago. The AAO will not grant counsel additional time to retrieve and submit this evaluation. The AAO will analyze this matter based on the evidence in the record.

The record indicates that the applicant failed to attend his February 3, 2005 scheduled LIFE legalization interview because "a last minute conflict" prevented him from appearing for that interview. The applicant failed to attend his April 27, 2005 LIFE legalization interview because he was "unavailable" to appear on that date. The applicant did not attend his July 14, 2005 scheduled interview because he wanted more time to be well-prepared. The AAO concurs with the finding put forth in the NOID and the letter of denial that based on the applicant's failure to appear for more than one scheduled interview without good cause, the application must be denied for lack of prosecution. *See* 8 C.F.R. § 245a.19(a). For this reason, the appeal must be dismissed.

The applicant failed to establish that he had satisfied the basic citizenship skills requirement described at section 1104(c)(2)(E) of the LIFE Act. The appeal must be dismissed for this reason as well.

The director also indicated that the applicant had failed to establish continuous residence in the United States throughout the statutory period. However, the director did not identify specific deficiencies in the evidence of continuous residence submitted into the record.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Thus, beyond the decision of the director, the AAO would note that the applicant submitted two employment letters that referenced his employment throughout the statutory period. The first employment letter is written on letterhead stationery and indicates that the applicant worked at [REDACTED] at [REDACTED] Las Vegas, Nevada from October 1981 through "January" 1988, and that he worked for this company on a "cash basics." This letter is dated "January" 10, 1988 and is signed by [REDACTED]. The second employment letter is not on letterhead stationery. This letter indicates that the applicant worked at [REDACTED] at "[REDACTED], Las Vegas, Nevada", and that he worked for this company on a "cash basics." This letter is not dated but was signed and sworn to by [REDACTED] "Vice/President" on December 13, 1989.

The employment letters purport to have been written by two separate individuals representing two separate companies. Yet, the letters contain the same unusual spelling mistake in that in each letter the phrase "on a cash basis" is written incorrectly as "on a cash basics." This creates the appearance that the two letters were written by the same individual. Also, the two addresses on the letters appear to indicate that [REDACTED] and [REDACTED] operated at the same address: [REDACTED] Las Vegas. However, the "Vice/President" of [REDACTED] who did not use letterhead stationery but who instead filled in the address himself, did not seem to be aware of the full, correct address for this company. That is, he listed the address as "[REDACTED], Las Vegas, Nevada," leaving out the "West" of West Spring Mountain Road and misspelling "Nevada."

These discrepancies cast doubt on the authenticity of the employment letters as well as on the authenticity of the rest of the evidence of record. This in turn casts doubt on 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).

This office also finds that the various statements and affidavits in the record which purport to substantiate the applicant's residence in the United States throughout the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that

he maintained continuous residence in the United States during the statutory period, and that these documents are not probative in this matter.

The applicant has failed to establish continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and through May 4, 1988. Thus, he is not eligible for adjustment to permanent resident status under section 1104 of the LIFE Act on this basis as well.

The applicant is not eligible for adjustment 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.

Finally, this office would add that on page 3 of the Form I-485 the immigration officer noted that the applicant was stopped in 1993 and charged with driving under the influence of alcohol (DUI). The record is not clear as to whether this charge led to a conviction. The AAO notes that a single DUI misdemeanor conviction would not impact the outcome in the above analysis of the applicant's request for temporary resident status.

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