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



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
MSC 03 250 60670

Office: BALTIMORE, MD

Date:

JUL 17 2009

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been forwarded to the U.S. Citizenship and Immigration Services National Records Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained, or if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for permanent resident status under the Legal Immigration Family Equity (LIFE) Act was denied by the director, Baltimore, Maryland. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director found that the record indicates that the applicant was in the United States in lawful status for at least part of the statutory period. He also found that the applicant failed to establish that he resided continuously in the United States in unlawful status which was known to the government from a date prior to January 1, 1982 and throughout the statutory period. For these reasons, the director denied the application.

On appeal, the applicant indicated through counsel that the record establishes that he entered unlawfully during 1981 and that he resided continuously in the United States throughout the statutory period. The applicant also indicated through counsel that the record establishes that he is otherwise eligible to adjust under the LIFE Act.

Counsel indicated on the Form I-290B, Notice of Appeal to the Administrative Appeals Office (AAO), filed on August 25, 2005 that he would submit a brief or additional evidence to the AAO within 60 days. Nearly four years have passed since the submission of the Form I-290B, and counsel has not provided further information. The AAO will consider the record complete.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

As a preliminary matter, the AAO notes that the director found the applicant eligible for class membership under the LIFE Act. Also, on September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al. vs. USCIS, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP).² Class members are defined, in relevant part, as:

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).

² All appeals filed with this office which turn, at least in part, on the question of whether an applicant’s unlawful status was known to the government throughout the statutory period and related issues were held for an extended period until the final terms of the NWIRP settlement were handed down. After that, this office began adjudicating these appeals in the order received. As a consequence, this appeal was not completed within the processing time that LIFE legalization appeals are usually completed.

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 –

(A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as ‘Subclass A members’); or

(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

(C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and whose application

- i. has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as ‘Sub-class C.i. members’),
- ii. was denied or whose temporary resident status was terminated, where the INS or 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.

On appeal, the applicant indicated that he did not enter the United States as a nonimmigrant prior to January 1, 1982. Rather, he asserted through counsel that he made an unlawful entry into the United States during 1981. Thus, the AAO finds that the applicant is not a member of the NWIRP class as enumerated above. However, the record does establish that the applicant procured entry into the United States on January 18, 1984 by presenting himself as a F-1 nonimmigrant student. The AAO will use as guidance the standards set forth in the NWIRP settlement agreement when analyzing the implications of that January 1984 entry.

NWIRP provides that LIFE legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudication standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that prior to January 1, 1982, 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.

Transcripts in the record establish that the applicant completed coursework in the United States during summer term 1982 through fall term 1983. The applicant indicated on appeal that he completed these studies after entering the United States unlawfully prior to July 6, 1982. A copy of an airline ticket in the record establishes that the applicant flew from New York City to Port Harcourt, Nigeria on December 23/24, 1983. The applicant obtained an F-1 nonimmigrant visa on January 17, 1984 in Lagos, Nigeria and he re-entered the United States at New York City as an F-1 student on January 18, 1984. There is no indication in the record that the applicant acknowledged to U.S. officials in Lagos that he had studied in the United States during 1982 through 1983 without

first gaining lawful admission and that he had requested that those officials allow him to gain lawful F-1 status despite his prior violations of U.S. immigration laws. The record taken as a whole indicates that the applicant obtained his 1984 F-1 nonimmigrant visa and his subsequent January 18, 1984 entry so that he might return to his unrelinquished, unlawful residence in the United States. Thus, the AAO finds that the applicant has established that this F-1 visa and the January 18, 1984 entry which followed were obtained through fraud or mistake. *See* NWIRP settlement agreement, paragraph 8B. Therefore, the January 18, 1984 F-1 entry shall not be viewed as evidence that the applicant was lawfully present in the United States for part of the statutory period.

To be eligible for adjustment to permanent resident status under the LIFE Act, the applicant must establish his or her continuous, unlawful residence in the United States from before January 1, 1982 through May 4, 1988, as well as continuous physical presence in the United States from November 6, 1986 through May 4, 1988. Section 1104(c)(2)(B) of the LIFE Act states in relevant part:

(i) In General – The alien must establish that he or she entered the United States before January 1, 1982, and has resided continuously in the United States in an unlawful status since such date and through May 4, 1988. In determining whether an alien maintained continuous unlawful residence in the United States for purposes of this subparagraph, the regulations prescribed by the Attorney General under section 245A(g) of the Immigration and Nationality Act (INA) that were most recently in effect before the date of the enactment of this Act shall apply.

See also 8 C.F.R. § 245a.11(b).

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

(1) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, and May 4, 1988, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

An applicant for permanent resident status under the LIFE Act must establish that before October 1, 2000, he or she filed a written claim with the Attorney General for class membership in any of the following legalization class-action lawsuits: *Catholic Social Services, Inc. v. Meese, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993)(CSS), *League of United Latin American Citizens v. INS, vacated sub nom. Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993)(LULAC), or *Zambrano v. INS, vacated sub nom. Immigration and Naturalization Service v. Zambrano*, 509 U.S. 918 (1993)(Zambrano). *See* 8 C.F.R. § 245a.10.

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States and is otherwise eligible for adjustment of status

under this section. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

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

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

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

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

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

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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

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

Documentary evidence may be in the format prescribed by 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 the regulatory requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a “relevant document” under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant’s claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence, or if that doubt leads the director to believe that the claim is probably not true, to deny the application or petition.

At issue in this proceeding is whether the applicant is able to establish: that he resided continuously in the United States from some date prior to January 1, 1982 through May 4, 1988; that he is admissible to the United States; and that he is otherwise eligible to adjust under the LIFE Act.

On or near December 11, 1990, the applicant applied for class membership in a legalization class-action lawsuit and filed Form I-687, Application for Status as a Temporary Resident. On June 7, 2003, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status, under section 1104 of the LIFE Act.

The director issued a notice of intent to deny (NOID) in which he stated that the applicant’s entry into the United States as an F-1 student during the statutory period on January 18, 1984 indicates that the applicant was in the United States in lawful status for at least part of the statutory period. The director found that the U.S. Social Security statement in the record indicates that the applicant’s unlawful status was not known to the government until sometime after the January 18, 1984 entry, as

the applicant did not begin paying into Social Security until 1984. Thus, the director intended to deny the application because this F-1 entry led him to find that the applicant had failed to establish unlawful status throughout the statutory period. This point in the NOID is withdrawn. As noted earlier, the AAO finds that the record establishes that the applicant's F-1 visa and the entry which he made using that visa on January 18, 1984 were obtained by fraud or mistake. Thus, the January 18, 1984 F-1 entry does not establish that the applicant was present in the United States in lawful status for part of the statutory period. See NWIRP Settlement Agreement.

The director also correctly pointed out in the NOID and noted again in the notice of decision that certain evidence in the record indicates that the applicant entered the United States during August 1981 in lawful F-1 status and other evidence indicates that when the applicant entered the United States in 1981, he entered using a passport and visa that had not been issued to him. The AAO notes that in keeping with this, the Affidavit for Determination of Class Membership in *League of United Latin American Citizens v. INS* (LULAC) which the applicant signed under penalty of perjury on December 5, 1990 indicates that the applicant entered the United States in lawful student status during August 1981 and that he violated that status by working unlawfully. Yet, the applicant's brother [REDACTED] submitted a statement in which he asserted that the applicant arrived in the United States using "someone else's passport and without the proper papers." Moreover, he stated that the applicant arrived at the end of November 1981, together with his uncle [REDACTED] and that the applicant lived in his uncle's home in Rosedale, New York until May 1982 in order to give his brother [REDACTED] sufficient time to make arrangements for the applicant to begin studying in the Maryland area, near where his brother [REDACTED] lived. Within the affidavit of [REDACTED], Mr. [REDACTED] also attested that the applicant and [REDACTED] arrived in the United States at the end of November 1981. [REDACTED] attested that he is certain that the two arrived after Thanksgiving and prior to Christmas as [REDACTED] this time to visit his house in Rosedale, New York in order to shop for Christmas gifts in the United States. Also, the director noted in the NOID that on the Form I-687 the applicant stated that he worked unlawfully from September 1981 through April 1983 at Wellers Ice Cream Parlor in Maryland. However, the director stated that the Social Security statement in the record indicates that the applicant did not begin paying into Social Security until 1984 and that the applicant failed to produce any evidence that he worked unlawfully during 1981 through 1983. The applicant did not address these points in the rebuttal to the NOID or on appeal other than to assert through counsel that the evidence of record establishes that he entered the United States unlawfully during 1981 and continued to reside in this country unlawfully through the end of the statutory period.

In keeping with the NOID and the director's notice of decision, the AAO finds that the conflicting accounts in the record regarding: the applicant having entered the United States in August 1981 in lawful nonimmigrant, student status and the applicant having entered the United States at the end of November 1981 using documents which had not been issued to him cast doubt on the applicant's claim that he entered and began residing in the United States prior to January 1, 1982. This in turn casts doubt on the applicant's claim that he resided continuously in the United States throughout the statutory period. This claim is placed in further doubt by the conflicting claims that the applicant worked unlawfully in Maryland at Wellers Ice Cream Parlor from September 1981 through April

1983 and that he resided at his uncle's house in Rosedale, New York from November 1981 through May 1982.

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

Such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 and throughout the statutory period. However, the record includes only independent evidence regarding the applicant's residence in the United States from July 6, 1982 forward, the date that the applicant began attending classes in the United States.

As already noted, the various statements and affidavits currently in the record which attempt to substantiate the applicant's residence and employment in the United States prior to July 6, 1982 are inconsistent and these are not objective, independent evidence of the applicant's claim that he maintained continuous residence in the United States from a date prior to January 1, 1982. These statements and affidavits are not probative.

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.

The appeal is dismissed on this basis.

This office also notes that the record establishes that on January 18, 1984 the applicant presented himself as a lawful, nonimmigrant, F-1 student upon admission to the United States. Yet, according to the claims made in this proceeding, the applicant's intent upon returning in 1984 was to return to an unlawful, unrelinquished domicile in the United States. Thus, in 1984, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he is admissible to the United States. *See* 8 C.F.R. § 245a.12(e).

The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The applicant must make such request for a waiver on the Form I-690, Application for Waiver of Grounds of Excludability. The applicant has filed the Form I-690, but has not provided reasons why that request should be granted and has not provided documentation to support the request. The director has not yet adjudicated that form. The AAO does not have jurisdiction over the initial filing of the

Form I-690. Thus, this office is not providing an analysis of that request and does not consider the ground of inadmissibility set forth here as an additional basis for this dismissal. Rather, this office merely notes that the record is unsettled as to whether the applicant qualifies for a waiver of the ground of inadmissibility at issue in this matter.

Finally, the record shows that the applicant was ordered removed in *absentia* on December 27, 1996. The record also indicates that the applicant has never departed the United States and then re-entered since the Immigration Judge entered this removal order. Section 212(a)(9)(A) of the Act (relating to grounds of inadmissibility for aliens previously removed) applies only where the applicant has departed the United States or been removed subsequent to a removal order; it does not apply to an applicant who has been ordered removed in *absentia* and never departed the United States. See Memo, Crocetti, Assoc. Comm. INS, HQ 5015.12, 96 Act .034 (May 1, 1997), reprinted in 74 No. 18 *Interpreter Releases* 781, 791-94, 792 (May 12, 1997). Section 212(a)(6)(B) of the Act, regarding the inadmissibility ground applicable to aliens who fail to attend removal hearings who seek admission within five years of a departure made after the failure to appear, also only applies where an individual has been physically removed or departs the United States after failing to appear and then seeks re-entry. See Memo, Virtue, Acting Exec. Assoc. Comm., HQ IRT 50/50.2, 96 Act 043 (June 17, 1997), posted on AILA InfoNet at Doc. No. 97061790. Moreover, section 212(a)(6)(B) of the Act applies only to those placed in removal proceedings subsequent to April 1, 1997. See *id.* This office also notes that legalization and LIFE legalization applicants are not subject to reinstatement of removal orders under section 241(a)(5) of the Act. See § 245a(d)(2) of the Act. The AAO finds that the applicant is not rendered inadmissible by this December 27, 1996 removal order.

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