



U.S. Citizenship
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JUL 24 2009

FILE: [REDACTED] Office: PHOENIX Date:
MSC-02-092-63302

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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case 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.

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, Phoenix, and is now before the Administrative Appeals Office on appeal. The appeal will be remanded.

The director determined that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director found that the applicant entered the United States using an F-1 nonimmigrant student visa and was authorized to remain for the duration of his stay, while he was enrolled in school. The director noted that since the applicant was present in the United States as a full-time student in lawful F-1 student status during the relevant period, he was not eligible for the benefit sought.

Through counsel, on appeal, the applicant indicates that he violated his lawful student status prior to January 1, 1982 by working without authorization.

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. 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). Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who
 - (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an INS officer or agent acting on behalf of the INS, including a Qualified Designated Agency (“QDE”), and whose applications were rejected for filing (hereinafter referred to as ‘Subclass A members’); or
 - (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

1. 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.

The AAO finds that the applicant is a member of the NWIRP class as enumerated above and will adjudicate the application in accordance with the standards set forth in the settlement agreement.

NWIRP provides that I-485 applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudication standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that prior to January 1, 1982, the applicant violated the terms of his or her nonimmigrant status in

a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.

It is presumed that the school or employer complied with the law and reported violations of status to the INS; the absence of such report in government records is not alone sufficient to rebut this presumption. Once the applicant makes such a showing, USCIS then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the alien's unlawful status was known to the government as of January 1, 1982. With respect to individuals who obtained their status by fraud or mistake, the applicant bears the burden of establishing that he or she obtained lawful status by fraud or mistake. The settlement agreement further stipulates that the general adjudicatory standards set forth in 8 C.F.R. § 245a.18(d) or 8 C.F.R. § 245a.2(k)(4), whichever is more favorable to the applicant, shall be followed to adjudicate the merits of the application once class membership is favorably determined.

It is presumed that the school or employer complied with the law and reported violations of status to the INS; the absence of such report in government records is not alone sufficient to rebut this presumption. Once the applicant makes such a showing, USCIS then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the alien's unlawful status was known to the government as of January 1, 1982. With respect to individuals who obtained their status by fraud or mistake, the applicant bears the burden of establishing that he or she obtained lawful status by fraud or mistake. The settlement agreement further stipulates that the general adjudicatory standards set forth in 8 C.F.R. § 245a.18(d) or 8 C.F.R. § 245a.2(k)(4), whichever is more favorable to the applicant, shall be followed to adjudicate the merits of the application once class membership is favorably determined.

An applicant for permanent resident status under section 1104 of the LIFE Act must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date through May 4, 1988. *See* § 1104(c)(2)(B) of the LIFE Act and 8 C.F.R. § 245a.11(b).

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States and is otherwise eligible for adjustment of status under this section. The inference to be drawn from the documentation provided shall

depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.12(e).

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

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

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

In support of his claim of continuous unlawful residence in the United States, the applicant asserts that he entered the United States for the first time on January 13, 1979 as an F-1 nonimmigrant student to attend Southwest Missouri State University. The record contains a copy of the applicant's subsequent I-94 card and the date stamp which contains a note indicating his entry to the United States on January 13, 1979. The applicant then asserts that he violated his lawful student status prior to January 1, 1982 by working without authorization. In support of his assertion, the applicant submits a copy of his Social Security Earnings Statement which indicates that he began earning taxable wages in the United States in 1979. The applicant asserts that he was not issued an employment authorization card until 1984. Additionally, there is no evidence in the record that the applicant was authorized to work while in student status prior to 1984.

The applicant also submits copies of an evaluation of his service from Red Lobster restaurant dated 1980 and indicating that he began working for the company in 1979 and a letter from Webster Companies dated June 24, 1991. In this letter, the declarant indicates that the applicant was employed by the firm from May of 1980 until September 1982. The letter does not comply with all of the regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and

where records are located and whether CIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. However, the letter is on company letterhead, it provides the dates and location of the applicant's employment, it is notarized and appears credible. Furthermore, this letter is consistent with both the applicant's statements and his Social Security Earnings Statement. Thus, based on the foregoing, the AAO finds that the applicant did in fact violate his lawful student status in a manner known to the government, prior to January 1, 1982, by working without authorization.

Additionally, the AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In this case, the AAO finds that the applicant violated his status by failing to submit quarterly address reports pursuant to Section 265 of the INA.

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

The applicant entered the United States on January 13, 1979 as an F-1 student. He would have been required to provide written updates of his address at the expiration of each three-month period during which he remained in the United States, regardless of whether there was any change in address, for the period January 13, 1979 until December 29, 1981. The record of proceedings is void of any address updates.

Following *de novo* review by the AAO, USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 31, 1981. In accordance with the terms of NWIRP, the AAO finds that the evidence establishes by a preponderance of the evidence that the applicant was unlawfully present in a manner known to the government prior to January 1, 1982. Consequently, the applicant has established that his unlawful status was known to the government prior to January 1, 1982 on this grounds as well.

Once the applicant has established that he violated his student status prior to January 1, 1982 in a manner known to the government, he then must prove, by a preponderance of the evidence, that he resided continuously in the United States for the duration of the relevant period. In this case, the

applicant has submitted sufficient evidence of his residence in the United States for the relevant period. The applicant has submitted evidence including his Social Security Earning Statement which indicates that he earned taxable wages in the United States from 1979 until 1988 with the exception of 1984. The record also contains school transcripts indicating that he was a student at Southwest Missouri State University, Drury College, and the American Graduate School of International Management from 1979 until 1987. He also submits copies of his driver's license, certificates of title for a vehicle, bank records, and numerous contemporaneous documents which appear to be credible.

Furthermore, the director has not established: that the information on the applicant's supporting documents was inconsistent with the claims made on the present application or previous applications filed with the Service; that any inconsistencies exist *within* the claims made on the supporting documents; or that the documents contain false information. As stated in *Matter of E-M-*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true.

That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. The documents that have been furnished may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period. Thus, the AAO finds sufficient credible evidence that the applicant violated his status prior to January 1, 1982 in a manner known to the government, and that he resided continuously in that unlawful status for the duration of the relevant period.

The application will be remanded for further action by the director, however, as the evidence establishes that the applicant is inadmissible to the United States. Section 245A(a)(4)(A) of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for adjustment to permanent resident status under the LIFE Act.

The record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. As noted above, the applicant left the United States in February 1983 and reentered the United States using his F-1 student visa without disclosing that he had violated the terms of his initial student visa by working without authorization and failing to provide USCIS with required address updates. The United States Department of State will not renew an application for student visa if the applicant discloses previous violations of status in the United States. *See*, Section 101(a)(15)(F) of the Act, 8 U.S.C. § 101(a)(15)(F); 9 Foreign Affairs Manual (FAM) 41.61.

An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that the applicant has not filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation. As the grounds of inadmissibility have not been waived, the application is hereby remanded to allow the applicant to properly file the Form I-690 and to allow the director to adjudicate the Form I-690 in accordance with this decision.

ORDER: The director's decision is withdrawn and the case is remanded for further action consistent with the decision and pending the adjudication of a Form I-690 Application for Waiver of Grounds of Excludability. Should the director's decision be adverse to the applicant, the decision should be certified to the AAO for review.