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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
MSC 01 350 61136

Office: BALTIMORE

Date: JUL 31 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 returned to the National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained or remanded for further action, you will be contacted.

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, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO previously dismissed the appeal. The AAO will now reopen the case, sua sponte, and remand the matter for further action and consideration.

The director denied the application because the applicant failed to demonstrate that she continuously resided in the United States in an unlawful status from before January 1, 1982, through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. Specifically, the director determined that the applicant failed to establish that she violated her F-1 status by attending school for three weeks instead of three months or by working without authorization.

On appeal, counsel, on behalf of the applicant, asserts that the applicant was unlawfully present in the United States as a result of working without authorization and failing to report her addresses. Counsel also contends that the applicant was in unlawful status despite the fact that she briefly departed and returned to her unlawful residence in the United States by presenting a facially valid entry document. No additional evidence was submitted. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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.

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). The applicant 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

¹ 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).

section 1104 of the LIFE Act. 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.12(f). 8 C.F.R. § 245a.2(d)(6).

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 stated 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 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 (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.

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

A LIFE Legalization applicant must also provide evidence establishing that, before October 1, 2000, he or she was a class member applicant in a legalization class-action lawsuit. *See* 8 C.F.R. § 245a.14. In this case the applicant applied for such class membership by submitting an Affidavit of Determination of Class Membership, accompanied by a Form I-687 "Application for Status as a Temporary Resident (Under Section 245A of the Immigration and Nationality Act)," filed on March 12, 1991. On September 15, 2001, the applicant filed a Form I-485, Application to Register Permanent Resident or Adjust Status pursuant to section 1104 of the Life Act (I-485 LIFE Legalization Application). The applicant must also qualify as a subclass member pursuant to the terms of the *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration, et al. Stipulation of Settlement* (Case No. 88-379R) (*NWIRP Settlement Agreement*), as stated below.

All persons who entered the United States in a non-immigrant status prior to January 1, 1982, who are otherwise prima facie eligible for legalization under section § 245A of the INA, 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below, and who . . . 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 government” requirement or the requirement that s/he demonstrate that his/her unlawful residence was continuous.

Pursuant to the *NWIRP Settlement Agreement*, a person who violated the terms of their nonimmigrant status prior to January 1, 1982, in a manner known to the government includes those for whom documentation or the absence thereof 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.

The applicant claims to have continuously resided in an unlawful status in the United States from before January 1, 1982, through May 4, 1988. The documentation that the applicant submits in support of her claim consists of the applicant’s social security statement, attestations from individuals claiming to know the applicant during the requisite period, and school transcripts. The record also contains a copy of her passport, which contains her F-1 visa issued to the applicant in 1981 and a U.S. admittance stamp dated October 1981. The applicant’s social security statement reflects that the applicant earned income from 1982 through 2001. Based on the evidence in the record, the applicant’s entry into the United States and continuous residence during the requisite period is not in dispute. The issue in this proceeding is whether the applicant violated her status and, if so, whether her unlawful status was known to the Government.

Counsel asserts four reasons to explain how the applicant violated her lawful status. First, counsel contends that the applicant violated her status by attending college only for the month of October 1981. Counsel asserts that the applicant attended school in October 1981 and thereafter abandoned school. The record indicates that the applicant entered the United States on October 5, 1981, with an I-20 from ELS Language Center in Norman, Oklahoma. While counsel asserts that the applicant was enrolled in school for only three weeks, the record lacks sufficient evidence to support this assertion. Neither counsel nor the applicant has submitted any independent, objective evidence in support of this claim. As previously stated, an applicant must provide evidence of eligibility apart from the applicant’s own testimony to meet his or her burden of proof. 8 C.F.R. § 245a.12(f). 8 C.F.R. § 245a.2(d)(6). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the applicant’s burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Second, counsel asserts that the applicant failed to obtain permission from immigration officials to transfer schools from ELS Language Center to Claremore College. However, the record contains a Form I-20B, Notice and Report Concerning Nonimmigrant “F-1” Student, in the

applicant's name. In her Form I-29B, the applicant was granted permission to transfer to Claremore College until December 31, 1985, by the Dallas Director, Immigration and Naturalization Service (currently U.S. Citizenship and Immigration Services (U.S.C.I.S.)). Given this, the applicant did not violate her lawful status in this manner.

Third, counsel asserts that the applicant was unlawfully present in the United States as a result of her employment without authorization. The record contains the applicant's social security statement, which indicates an income of \$3044 in 1982. Her employment is corroborated by an affidavit from [REDACTED] Ms. [REDACTED] stated that the applicant was employed from October 1982 to 1984. There is no independent, objective evidence in the record to indicate that the applicant was employed prior to January 1, 1982, thereby violating her lawful status before the requisite period. Thus, the AAO finds that the applicant did not violate her lawful status in this manner.

Finally, counsel asserts that the applicant was unlawfully present in the United States because she failed to report her change of address annually. Pursuant to the regulations at 8 C.F.R. § 265.1, the applicant was required to report each change of address and new address within 10 days. Here, the evidence in the record reflects that the applicant attended school in Norman, Oklahoma from October 1981 to December 1981 and then transferred to a school in Claremore, Oklahoma from December 1981 to 1982. The record contains the applicant's Form-I-687, Application for Status as a Temporary Resident, which indicates that she moved from Norman to Claremore in December 1981.

Here, there is no evidence in the record that the applicant complied with the statutory reporting requirement when she moved places of residence in December 1981. The AAO finds that, taken as a whole, the absence of such documentation warrants a finding that the applicant was in unlawful status before January 1, 1982, and her unlawful status was known to the government as USCIS had approved her transfer of schools. Therefore, the director's decision is withdrawn as the applicant has established that she has continuously resided in an unlawful status in the United States from before January 1, 1982, through May 4, 1988.

It is also noted that counsel contends that the applicant was in unlawful status despite the fact that she briefly departed and returned to her unlawful residence in the United States by presenting a facially valid entry document. Counsel asserts that the applicant received the visa to return to her unrelinquished residency in the United States. The record reflects that the applicant was issued an F-1 visa in January 1988; however, it did not interrupt the applicant's unlawful status during the requisite period. An applicant who was present 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 is eligible to apply for legalization and may file for adjustment to temporary residence status. See 8 C.F.R. § 245a.2(b)(9). Therefore, the AAO finds that the F-1 visa did not confer lawful status upon the applicant and the applicant remained in an unlawful status.

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 finds that the applicant is not eligible for temporary resident status pursuant to the terms of the agreements reached in the CSS/Newman Settlement Agreements because the record indicates that she is inadmissible under section 212(a)(6)(C)(i) of the Act.

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 received 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.

On appeal, counsel asserts that the applicant received the visa to return to her unrelinquished residency in the United States and continued to engage in employment in violation of the terms of her student visa. The applicant presented herself as a lawful nonimmigrant upon admission. Thus, in January 1988, the applicant procured entry into the United States by willfully misrepresenting a material fact, specifically the circumstances of her prior residence in the United States. As such, she is inadmissible under section 212(a)(6)(C)(i) of the Act.

An applicant for adjustment of status under section 245A of the Act has the burden to establish by a preponderance of the evidence that he is inadmissible to the United States. *See* 8 C.F.R. § 245a.2(d)(5). The applicant might only overcome this particular ground of inadmissibility if she 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 record indicates that the applicant submitted the Form I-690, Application for Waiver of Grounds of Excludability, which is the form an applicant

must file to request a waiver of the grounds of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. However, no decision has been rendered at this time. Accordingly, the case will be remanded for the purpose of adjudicating the applicant's Form I-690.

ORDER: The director's decision is withdrawn. This matter is remanded for further action and consideration pursuant to the above.