

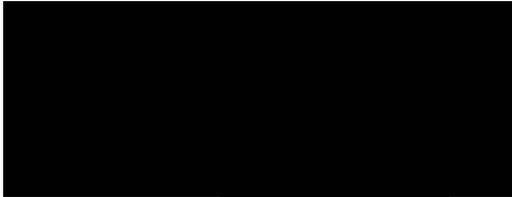
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



62

FILE:

MSC 01 303 61205

Office: NEW YORK, NY Date:

**JUN 23 2009**

IN RE:

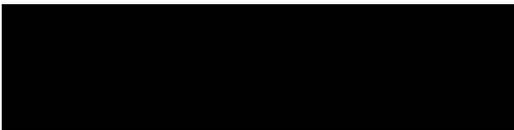
Applicant:



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 director, New York, New York. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director indicated in the notice of decision that, even though the applicant had filed a timely application for class membership in a legalization class action lawsuit, he was not eligible to adjust under the LIFE Act because the record indicates that he was not actually discouraged from filing for temporary resident status during the initial filing period, and as such he is not a class member. Based on this, the director denied the application.

On appeal, the applicant stated through counsel that because he filed a timely application for class membership, he is eligible to apply to adjust under the late legalization provisions of the LIFE Act, regardless of whether it is found that he qualifies as a class member. The applicant also indicated that he is otherwise eligible to adjust 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.<sup>1</sup>

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 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).

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

---

<sup>1</sup> 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).

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.

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.

On or near November 15, 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 July 31, 2001, he 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 decision in which she denied the application because she determined that the applicant had not established by a preponderance of the evidence that he qualified as a class member in a legalization class action lawsuit.

On appeal, the applicant stated through counsel that the record establishes that during 1989 he filed a timely application for class membership in a legalization class action lawsuit. He indicated that based on this timely filing, he is eligible to apply to adjust under the late legalization provisions of the LIFE Act, regardless of whether it is found that he qualifies as a class member. The AAO concurs. *See* 8 C.F.R. § 245a.10.

On appeal, the applicant also indicated that the evidence of record establishes that he is otherwise eligible to adjust under the late legalization provisions of the LIFE Act.

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.

The AAO set forth in the notice of intent to dismiss issued on May 4, 2009 that the record includes the following adverse or inconsistent evidence regarding these points:

1. The Form I-687 that the applicant signed under penalty of perjury on which he indicates at item 33 that he resided continuously in the United States from December 1981 through the date that he signed that form in November 1989.
2. The *LULAC* late legalization application on which the applicant states that he resided continuously in the United States from a date prior to January 1, 1982 through the date that he signed that form on November 9, 1989.
3. The Form G-325A, Biographic Information, dated November 14, 1986, which the applicant submitted in connection with the filing of the Form I-130, Petition for Alien Relative, filed by his U.S. citizen wife, and the accompanying Form I-485, on which the applicant states that he resided in Ecuador from birth until December 1984.
4. The Form I-687 on which at item 36, where the applicant was to list his employment in the United States since his initial entry, he indicated that he worked as a dishwasher from December 1981 through November 1987 at the Hole in the Wall Delicatessen in New York City.
5. The undated statement of the applicant's former co-workers, [REDACTED] and [REDACTED], which indicates that the applicant worked at Hole in the [REDACTED], New York, New York from 1981 through 1987. These former co-workers also indicated that the manager at this delicatessen, [REDACTED], refuses to cooperate with employees regarding employee records. This statement includes Social Security numbers for the applicant's former co-workers, but no other information for them. As such, this statement is not amenable to verification.
6. The statement of [REDACTED], written on a preprinted Hole in the Wall Delicatessen, [REDACTED], New York, New York receipt form, on which [REDACTED] indicated that the applicant worked at this delicatessen from December 1986 through the date that he wrote this statement on January 29, 1987.
7. The Form G-325A dated November 14, 1986 on which the applicant stated that he began working at Hole in the Wall Delicatessen in New York City during March 1986.

---

On this statement, the name [REDACTED]” is written in penmanship that is difficult to read. The name may, for example, be “[REDACTED]”. The AAO notes that the conclusions in this analysis remain the same regardless of the name of this co-worker.

8. The Form I-130 on which the applicant's U.S. citizen wife, [REDACTED] stated under penalty of perjury that the applicant began working at Hole in the Wall Delicatessen in New York City during March 1986.
9. The copy of the Form I-94 and the copy of page 28 of the applicant's cancelled passport in the record which establish that the applicant entered the United States as a B2, visitor for pleasure, at New York City, on December 15, 1984.
10. The Form I-690, Application for Waiver of Grounds of Excludability, on which the applicant requests that the director waive the ground of inadmissibility to which he is subject based on having made an entry in 1984 utilizing a nonimmigrant visa, while having immigrant intent. The Form I-690 has not been adjudicated.

The AAO explained in the notice of intent to dismiss that the applicant stated on the *LULAC* late legalization application that he resided continuously in the United States from a date prior to January 1, 1982 through November 1989. On the Form I-687, he makes this same assertion. Yet, on the Form G-325A dated November 14, 1986, the applicant stated that he resided in Ecuador from the time of his birth through December 1984. In addition, on the Form I-687, the applicant stated that he worked at Hole in the Wall Delicatessen in New York City from December 1981 through November 1987. The statement of the applicant's former co-workers in the record makes the same assertion. However, the applicant stated on the Form G-325A dated November 14, 1986 that he began his employment at this delicatessen during March 1986. The statement of Stanley Wahl in the record, which is written on a preprinted Hole in the Wall Delicatessen receipt, indicates that the applicant began working at this delicatessen during December 1986.

The AAO pointed out in the notice of intent to dismiss that these discrepancies cast doubt on the authenticity of all the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

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 throughout the statutory period.

The AAO determined, as stated in the notice of intent to dismiss, that the statements and affidavits which the applicant has submitted into the record are not independent, objective evidence, and as

such are not sufficient to overcome the discrepancies in the evidence which have been summarized here.

The applicant had failed to provide contemporaneous evidence that might be considered credible, independent, objective evidence of having resided in the United States from a date prior to January 1, 1982 and through May 4, 1988.

Thus, the applicant failed to establish continuous residence in an unlawful status in the United States throughout the statutory period. Based on this, the AAO notified the applicant that this office intended to dismiss his appeal if he did not overcome these findings with additional evidence submitted in response to the notice of intent to dismiss.

The AAO noted further that the record establishes that on December 15, 1984, the applicant presented himself as a lawful, nonimmigrant, B-2 visitor for pleasure upon admission at New York City. Yet, according to the claims which he made in this proceeding, his intent upon returning in 1984 was to continue residing unlawfully in the United States. Thus, in December 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 AAO noted in the notice of intent to dismiss that the applicant had submitted the Form I-690 which is the form he must file to request a waiver of the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. That request has not yet been adjudicated. As such, the applicant remains inadmissible under section 212(a)(6)(C)(i) of the Act.

In the notice of intent to dismiss, the AAO indicated that the applicant must offer independent and objective evidence from credible sources which thoroughly rebut the discrepancies described above, and he must demonstrate either that he is admissible or that his request for a waiver of the ground of admissibility to which he is subject should be granted. The AAO allowed the applicant 15 days from the date of the notice of intent to dismiss during which to respond. It was explained to the applicant that if he chose not to respond, the appeal would be dismissed based on the reasons set forth above.

As of the current date, the applicant has not responded to the notice of intent to dismiss. Therefore, the appeal will be dismissed.

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