



U.S. Citizenship
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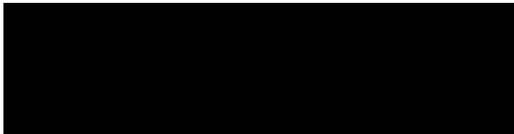
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IN RE:

Applicant: [Redacted]

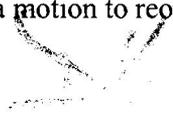
PETITION: Application for Status as a Permanent Resident pursuant to Section 1104 of the Legal Immigration Family Equity (LIFE) Act of 2000, Pub. L. 106-553, 114 Stat. 2762 (2000), amended by LIFE Act Amendments, Pub. L. 106-554, 114 Stat. 2763 (2000).

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.


Perry Rhew
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. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The director found that the applicant failed to establish that he that he was unlawfully present in the United States prior January 1, 1982 and that he continuously resided in the United States unlawfully throughout the requisite period. The director also noted that the applicant broke his continuous physical presence in the United States when he departed this country for 40 days during 1987 in order to be with his mother who was ill.

On appeal, the applicant states that he entered the United States on a nonimmigrant visa on October 19, 1981, and that he was unlawfully present in the United States prior to January 1, 1982. He states that he resided continuously in the United States throughout the requisite period.

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.

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). 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 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.

The record does not contain a copy of the applicant's passport indicating his initial entry into the United States on a nonimmigrant visa. In accordance with the terms of the NWIRP Stipulation of Settlement, the AAO accepts the applicant's testimony in lieu of a copy of the nonimmigrant visa. The evidence establishes that the applicant entered the United States on October 19, 1981 on a visitor's visa; that such status expired on November 18, 1981; and that the applicant was unlawfully in the United States prior to January 1, 1982 in a manner known to the government. 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 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. 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.

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).

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 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).

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.* Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See 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, and that he is otherwise eligible to adjust under the LIFE Act. Here, the applicant has met that burden.

The record establishes that the applicant resided in Guyana from 1977 through August or September 1981. He married in Guyana on November 7, 1977 and his son was born there on March 29, 1980. In November 1980, he returned to India for two weeks to attend his cousin's wedding, and then he returned to Guyana. In August or September 1981, he traveled to India. On October 19, 1981, he entered the United States at John F. Kennedy Airport/New York City.

The applicant provided throughout these proceedings a consistent, detailed account of his employers, his addresses of employment, and his home addresses during the relevant period, and detailed affidavits from three friends attesting to the applicant's residence and employment in Chicago during the requisite period. The applicant also provided a copy of his son's 1987-1988 first grade report card from a public school in New York. Evidence of record establishes that the applicant set up bank accounts that he and his wife could use in the New York City area shortly after his wife moved there, and he conducted other business there for his family before he moved there in 1990. Also in the record is the Form I-697A, Change of Address Card for Legalization, Special Agricultural Workers (SAW), and Replenishment Agricultural Workers (RAW) which indicates that the applicant moved from metro-Chicago to metro-New York City in 1990. He also provided a copy of his 1990 Illinois Identity Card. The AAO finds the evidence sufficient to establish that the applicant probably resided in the United States throughout the requisite period.

The record also indicated that the applicant may not be admissible to the United States, in that the applicant may have provided a material misrepresentation to gain a benefit under the Act, and may be likely to become a public charge.

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.

The regulation at 8 C.F.R. § 245a.18(c)(2) lists grounds of inadmissibility contained at section 212(a) of the Immigration and Nationality Act (Act) that may not be waived. This includes section 212(a)(4) of the Act (likely to become a public charge) which may only be waived for an applicant who is or was an aged, blind, or disabled individual as defined in section 1614(a)(1) of the Social Security Act. If a LIFE Act applicant is found to be inadmissible under section 212(a)(4) of the Act, he may still be admissible under the Special Rule described under paragraph (d)(3) of this section. *See* 8 C.F.R. § 245a.18(c)(2)(iv).

The AAO issued a Notice of Intent to Dismiss (NOID) indicating that the record suggested that the applicant willfully misrepresented to a U.S. Consular Officer that his intention was to briefly visit the United States as a B-2 visitor for pleasure when his actual intent was to reside indefinitely in the United States. In response, the applicant submitted a sworn statement. The AAO finds that the evidence is sufficient to support the applicant's claim that at the time of the consular interview and the October 1981 entry the applicant did not make a willful material misrepresentation to U.S. officials in order to gain a benefit under the Act.

The record further did not establish that the applicant is not likely to become a public charge. The Social Security statement in the record indicates that from 1990 until 2000, the applicant earned less than \$3000 annually. The regulations at 8 C.F.R. § 245a.18(d)(1), (d)(2), and (d)(3) provide the factors to be considered in determining whether an applicant is likely to become a public charge and whether the Special Rule applies; these regulations provide:

(1) In determining whether an alien is “likely to become a public charge”, financial responsibility of the alien is to be established by examining the totality of the alien’s circumstance at the time of his or her application for adjustment. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien’s age, health, family status, assets, resources, education and skills.

(2) An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable under paragraph (c)(2)(vi) of this section. The alien’s employment history need not be continuous in that it is uninterrupted. In applying the Special Rule, [USCIS] will take into account an alien’s employment history in the United States to include, but not be limited to, employment prior to and immediately following the enactment of IRCA on November 6, 1986. However, [USCIS] will take into account that an alien may not have consistent employment history due to the fact that an eligible alien was in an unlawful status and was not authorized to work. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for determination of public charge.

(3) In order to establish that an alien is not inadmissible under paragraph (c)(2)(vi) of this section, an alien may file as much evidence available to him or her establishing that the alien is not likely to become a public charge. An alien may have filed on his or her behalf a Form I-134, Affidavit of Support. The failure to submit Form I-134 shall not constitute an adverse factor.

In response to a series of NOIDs, the applicant provided account transcripts from the Internal Revenue Service indicating that he and his wife earned \$21,702 in 2007, \$21,598 in 2006 and \$21,535 in 2005. The applicant’s tax returns indicate that the applicant’s son is financially dependent. The applicant stated that he and his family have always managed to live on the money that they have earned and have not needed to request public assistance. Based on this, the applicant claimed that he is not likely to become a public charge in the future. The AAO concurs, noting that an applicant who has a consistent employment history which shows that he is able to support himself even though his income may be below the poverty level is not inadmissible for being likely to become a public charge.¹ See 8 C.F.R. § 245a.18(d)(2).

¹ The 2009 poverty guidelines and USCIS regulations establish the minimum income requirement for a family of three at \$22,887.

On appeal, the applicant also indicated that the director erred when she determined that his 40 day absence from the United States during 1987 represents a break in his continuous physical presence. The AAO concurs. A LIFE legalization applicant must show continuous physical presence in the United States from November 6, 1986 through May 4, 1988. *See* Section 1104(c)(2)(B) of the LIFE Act. An absence during this period which is found to be brief, casual and innocent shall not break a LIFE legalization applicant's continuous physical presence. A brief, casual and innocent absence means a temporary, occasional trip abroad as long as the purpose of the absence from the United States was consistent with the policies reflected in the immigration laws of the United States. 8 C.F.R. § 245a.16(b). The AAO finds that the applicant's absence from the United States in this case was temporary in that the record indicates that he was absent from the United States for approximately 40 days,² and occasional in that it was his sole trip outside the United States during the requisite period.

On December 28, 1996, the New York City Police Department arrested the applicant and charged him with driving while intoxicated. On February 10, 1997, in the Criminal Court of the City of New York, County of Queens, [REDACTED] the applicant pled guilty to the charge of operating a motor vehicle while one's ability is impaired by alcohol under New York Vehicle and Traffic Law (NY VTL) § 1192.1. The judge ordered the applicant to either pay a \$500 fine or serve 15 days in jail. The applicant paid the \$500 fine. He was granted a conditional discharge for one year and had his license suspended for 90 days. The maximum, possible jail sentence for driving while ability is impaired under NY VTL § 1192.1 is 15 days. *See* NY VTL § 1193. The AAO finds that this one misdemeanor conviction is not a conviction for a crime involving moral turpitude, and it does not impact the applicant's eligibility for the benefit sought in this matter.

The AAO finds that the applicant has demonstrated that he resided continuously in the United States during the statutory period, that he did not make a willful, material misrepresentation to U.S. officials in order to gain entry into the United States, and that he is not likely to become a public charge. The applicant has overcome the decision of the director, and the appeal will be sustained.

ORDER: The appeal is sustained. The director shall continue the adjudication of the application pursuant to the discussion above and shall enter a new decision which, if adverse to the applicant, is to be certified to the AAO for review.

² The regulation implementing the statutory requirement of "continuous unlawful residence" in the United States defines that term as no single absence from the United States exceeding 45 days and absences in the aggregate not exceeding 180 days. *See*, 8 C.F.R. § 245a.15(c)(1). The term "continuous physical presence" suggests that a shorter time frame should be applied to determine the permissible length of single and aggregate absences from the United States during the period from November 6, 1986 to May 4, 1988.