

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

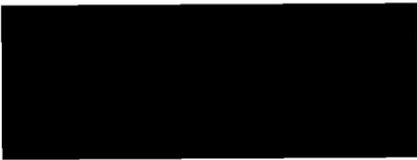
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

L2



FILE: [REDACTED]
MSC-01-353-61682

Office: LOS ANGELES

Date: SEP 11 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. 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, Los Angeles, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

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 the applicant's transcripts and other correspondence from the El Paso Community College and New Mexico State University indicate that he was a full-time student in lawful F-1 student status on January 1, 1982. Thus, the director concluded that the applicant was not eligible for the benefit sought.

On appeal, the applicant indicates that he violated his lawful student status prior to January 1, 1982 by working without authorization and by failing to submit required address reports to United States Citizenship and Immigration Services (USCIS) for the time period between his entry on January 28, 1978 and December 31, 1981 as required.

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.

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 August 30, 1978 as an F-1 nonimmigrant student to attend Chamberlain Junior College in Boston, Massachusetts. The record of proceedings contains a copy of the entry stamp indicating the applicant's August 30, 1978 arrival. The applicant indicates that he did enroll at Chamberlain but that he transferred out to another Boston college to undertake language studies. There is no evidence contained in the record, however, that the applicant ever enrolled in Chamberlain Junior College or any other college in Massachusetts. Thus, it is not clear from the record of proceedings that the applicant was present in the United States in lawful F-1 status prior to or on January 1, 1982. The applicant asserts that he did enter the United States on August 30, 1978 and commenced his studies, however, that he violated his F-1 student status in three ways: 1). by failing to maintain a full-time course of study; 2). working without authorization; and, 3). **failing** to submit required address updates.

First, the applicant asserts that he violated the terms of his F-1 status by carrying less than a full course load during the fall 1983 academic term. The applicant submits transcripts from the New Mexico State University in support of this assertion. The applicant asserts that government knowledge of his violation of the "full time status" requirement can be presumed from the regulatory requirement that schools immediately report students with such violations to USCIS (former INS). The record of proceedings does contain transcripts from El Paso Community College in El Paso, Texas indicating that the applicant was enrolled there from summer 1979 until summer 1981. The record also contains transcripts from New Mexico State University indicating that the applicant was enrolled from Fall 1981 until his graduation in Spring 1986. However, the applicant did not enroll in a full time course of study as required by F-1 student status. His transcripts indicate that he did not maintain at least twelve semester hour credits in the fall 1983 semester when he only enrolled in eight credit hours. The applicant's failure to maintain a full course of study is a violation of nonimmigrant student status. 8 C.F.R. § 214.2(f)(6)(i)(B). However, he has not shown that he violated his nonimmigrant status in a manner known to the government prior to January 1, 1982.

Next, the applicant asserts that he violated his F-1 student status by working without authorization. In support of his assertion, the applicant submits a copy of his Social Security Earnings Statement which indicates that earned taxable wages in the United States in 1979, in the amount of \$58. However, the applicant fails to submit any explanation of where he was working or whether his employment was authorized in accordance with his student status. Thus, this grounds of appeal is not support by the evidence contained in the record.

Finally, the applicant asserts that he violated his F-1 student status by failing to submit the required address reports to United States Citizenship and Immigration Services (USCIS). 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 August 30, 1978 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 August 30, 1978 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 basis.

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 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 period beginning before January 1, 1982 and through his graduation from New Mexico State University in spring 1986. In addition to his university transcripts, the applicant submits two affidavits supporting his claim of residence for the entire relevant period. The first affiant, [REDACTED] indicates that he has known the applicant since the 1980's and that to his knowledge, the applicant did not leave the United States from 1982 until 1988. The second affiant [REDACTED] indicates that he met the applicant in 1980 and that the applicant was enrolled at New Mexico State University from 1982 until 1988. Neither affiant indicates how they met the applicant, how they date their acquaintance with him or where he lived during the relevant period. Furthermore, Mr.

indicates that the applicant was enrolled at New Mexico State University until 1988, however, his graduation was in spring 1986.

The applicant does not submit any evidence or explanation which accounts for the time period between his graduation in 1986 and the end of the relevant period. The record does contain an I-20A Application for Eligibility as a Nonimmigrant Student which indicates that the applicant changed his course of study on June 5, 1986 from Engineering to Business Administration. However, this appears to be following his graduation and his transcripts do not reflect that he ever attended following the spring 1986 semester. Thus, the applicant has not proven, by a preponderance of the evidence, that he continuously resided in the United States for the duration of the relevant period.

Furthermore, the evidence establishes that the applicant has not met his burden of proving that he is admissible 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 has been arrested on at least three separate occasions. A transcript from the Las Cruces, New Mexico Police Department indicates that the applicant was arrested on September 22, 1983 for *Driving under Revocation and Disorderly Conduct/Resisting Arrest*; on October 12, 1984 for *Shoplifting*; and on May 16, 1985 for *DWI/Reckless Driving*. The transcript indicates that the applicant was convicted on all these charges. The applicant was interviewed by USCIS on October 30, 2003 in connection with his Form I-485 application. During the course of the interview, the applicant indicated that he was convicted on the *Shoplifting* charge and that he was convicted of *DUI* in 1986.

An applicant is ineligible to adjust to permanent resident if he or she has been convicted of any felony or of three or more misdemeanors committed in the United States. Section 1104(c)(2)(D)(ii) of the LIFE Act and 8 C.F.R. § 245a.18(a).

Following the interview, the applicant was given a Form I-72 asking him to provide final court dispositions for all of his arrests. In response, the applicant submitted two letters. The first, from the District Clerk in El Paso County, Texas indicates that no indictment was filed for the applicant between 1981 and the date of the letter July 7, 2004. However, the District Clerk indicates that only felony records were checked. Thus, this letter is not sufficient evidence regarding the applicant's arrest.

The second letter that he submitted, from the Municipal Court in Las Cruces, New Mexico, indicated that the applicant had "no record." In cases where the record indicates that the applicant has been arrested, however, the applicant asserts that the final court dispositions are unavailable, the applicant must show that the evidence is unavailable and then submit relevant "secondary

evidence.” If the applicant can’t submit secondary evidence, he or she must establish that secondary evidence is unavailable and then submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances, such as the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest.

Any letter that is submitted to show that a criminal record is unavailable must be: (1) an original (i.e. no copies), (2) on letterhead, and (3) from the relevant government authority that serves as the custodian of records. 8 C.F.R. § 103.2(b)(2)(ii). The government letter must indicate the reason the record does not exist and also indicate whether similar records for the time and place are available.

In this case, the applicant has not submitted final court dispositions, nor has he submitted sufficient secondary evidence which establishes his eligibility. Thus, the applicant is not eligible for adjustment to permanent resident status under the LIFE Act for this additional reason.

Given these deficiencies, the absence of sufficient evidence of the applicant’s continuous residence for the period following 1986, and the reliance on affidavits which do not meet basic standards of probative value, it is concluded that the applicant has failed to establish, by a preponderance of evidence, that he continuously resided in the United States in an unlawful status from January 1, 1982 through 1988. Therefore, the applicant is ineligible for permanent resident status under section 1104 of the LIFE Act.

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