

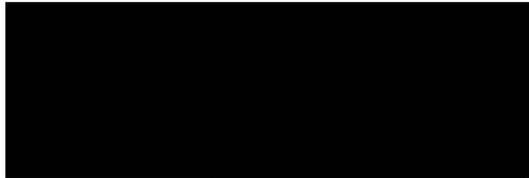
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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LA

FILE: MSC 03 255 60132

Office: Miami, FL

Date:

**SEP 16 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, Miami, Florida. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director found that the applicant was present in the United States lawfully for at least a portion of the statutory period because he made entries as a B1/B2 nonimmigrant on September 9, 1981, February 14, 1982 and April 23, 1982. Therefore, the director denied the application.

On appeal, the applicant asserted through counsel that the record did establish that he had resided continuously in the United States in an unlawful status throughout the statutory period, and that he was 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>

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

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<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).

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 USCIS action or inaction was because INS or USCIS 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 record demonstrates 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 NWIRP settlement agreement.

In specific, the applicant indicated in statements submitted into the record that he failed to file the required quarterly address report by December 9, 1981, three months after his September 9, 1981 entry. There is no record of this address report in the A-file. Thus, the AAO finds that the applicant violated his lawful status in a manner that was known to the government prior to January 1, 1982. He applied for extensions of his nonimmigrant status on or about July 21, 1982 and December 15, 1982. However, there is no indication in the record that he ever admitted to the INS that he had violated his status and asked that his lawful status be properly reinstated despite any previous violations. Thus, the AAO finds that any extension of nonimmigrant status that he may have received during the statutory period was obtained through fraud or mistake. Similarly, the record indicates that he obtained entry into the United States during February 1982 and April 1982 through fraud or mistake as he was not in lawful nonimmigrant status in 1982 and his actual intent upon entry was to return to an unrelinquished domicile and to reside indefinitely in the United States.

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 a school or employer report in government records is not sufficient on its own to rebut this presumption. Once the applicant makes a *prima facie* showing of having violated nonimmigrant status in a manner known to the government, USCIS then must rebut the evidence that the applicant violated his or her status. If USCIS fails to rebut the evidence, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982. Where an individual claims to have obtained his or her nonimmigrant status by fraud or mistake, the applicant bears the burden of establishing this.

The settlement agreement states further that once USCIS finds that the applicant is a class member, USCIS shall follow the general adjudicatory standards set forth at 8 C.F.R. § 245a.18(d)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Legal Immigration Family Equity (LIFE) Act of 2000] or at 8 C.F.R. § 245a.2(k)(4)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Immigration Reform and Control Act (IRCA) of 1986], whichever is more favorable to the applicant.

The AAO finds that the record indicates that any entries which the applicant made into the United States during the statutory period using the B-1/B-2 visa issued to him in December 1980 did not break his unlawful status in the United States.

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).

The regulation at 8 C.F.R. § 245a.15(c) provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

(1) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, and May 4, 1988, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

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 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 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.

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.

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 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 the regulatory 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 1, 1991, 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 June 12, 2003, the applicant 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 found that the record indicates that the applicant was in the United States in lawful status for at least part of the statutory period. As previously stated, the AAO finds that under the terms of the NWIRP settlement agreement, the record indicates that during the statutory period he was never in lawful nonimmigrant status.

Thus, the applicant has overcome the basis of denial set forth by the director

On June 17, 2009, this office issued the applicant a notice of intent to dismiss which stated that 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 applicant represented himself as a lawful nonimmigrant upon admission to the United States twice during the statutory period. Yet, according to the claims which he made in this proceeding, his actual intent upon returning each time was to return to an unrelinquished domicile to reside indefinitely in the United States. Thus, twice during the statutory period, the applicant procured entry into the United States by willfully misrepresenting a material fact. The applicant is inadmissible under section 212(a)(6)(C)(i) of the Act based on these misrepresentations.

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 applicant has 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. On this form, he was instructed to state reasons why his request should be granted. The applicant did not provide a reason. Also, the applicant did not submit any documentation with that form to support his request that any grounds of inadmissibility to which he is subject be waived. The Form I-690 has not yet been adjudicated. As such, the applicant currently remains inadmissible under section 212(a)(6)(C)(i) of the Act.

This office stated in the notice of intent to dismiss that as the director had been provided the Form I-690 but had not yet made a decision on the matter, the AAO would allow the applicant to file, in response to that notice, documentation which might support the request made on that form and develop reasons why that request should be granted.

The applicant did not provide in his response to the notice of intent to dismiss any documentation to support the Form I-690 or any developed reasons why that request should be granted. He indicated that before he could provide such information and documentation he needed additional time to locate previous counsel so that he could obtain a copy of the Form I-690 which he submitted in 1991. The applicant did not explain why he needed to see a copy of that completed form before he could respond to the requests for additional information made in the notice of intent to dismiss. The AAO finds that the applicant has failed to show that he is admissible and he has failed to properly complete his request that the director waive any ground of inadmissibility to which he is subject. The appeal must be dismissed on this basis.

The AAO pointed out in the notice of intent to dismiss that the record includes the following adverse or inconsistent evidence regarding the applicant's claim that he resided continuously in the United States throughout the statutory period and that he is otherwise eligible to adjust under the LIFE Act:

1. The applicant's sworn statement dated January 23, 2006 on which he attested that he resided in New York from September 1981 through February or March 1982.
2. A copy of an envelope addressed to the applicant at an address in Flushing, New York postmarked January 4, 1982.
3. The Form I-687 that the applicant signed under penalty of perjury on which he indicated at item 33 that he resided on [REDACTED] from

1981 through 1982; and that he resided on [REDACTED] from 1982 through 1985.

4. A copy of the applicant's lease for an apartment at [REDACTED] Houston, Texas which indicates that the lease ran from April 30, 1982 through September 30, 1982, and that he paid \$335 per month in rent for that apartment.
5. A copy of a letter dated July 20, 1982 which indicates that the applicant's rent for his apartment at [REDACTED] at [REDACTED] would be *raised* to \$335 per month beginning September 1, 1982 due to rising costs in Houston. The letter is from [REDACTED], [REDACTED].
6. A copy of the applicant's agreement made with [REDACTED] for energy metering beginning October 28, 1982 for his apartment at [REDACTED].
7. Copies of utility bills for apartment number [REDACTED] dated January 1983, March 1983, April 1983, May 1983 and June 1983.
8. A copy of an August 30, 1983 utility bill for [REDACTED] [REDACTED].
9. A copy of the applicant's check made out to [REDACTED] on December 30, 1983 for \$275 which lists his address as [REDACTED] Houston, Texas. The memo on the check indicates that the payment is rent for apartment number [REDACTED].
10. A copy of the applicant's September 15, 1983 Houston Lighting and Power Co. bill for his apartment at [REDACTED].
11. A letter addressed to the applicant at [REDACTED] from the Accounts Receivable Department at Foley's of Houston dated February 15, 1985 on Foley's letterhead stationary.

This office stated in the notice of intent to dismiss that the record includes inconsistent information regarding: the applicant's various addresses during the requisite period; whether the applicant lived in Texas or New York in 1981 through the initial portion of 1982; the names of the applicant's various apartment complexes during the relevant period; the rent which the applicant paid at various apartments; and when he moved from one address to a different address during the statutory period.

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<sup>2</sup> Each utility billing form is filled out in longhand, and the applicant's apartment number is listed alternatively as [REDACTED] and [REDACTED] on the various forms.

For example, on the Form I-687, the applicant stated that he resided in Houston, Texas from 1981 through 1985. However, in his January 23, 2006 sworn statement, he attested that he resided continuously in New York from September 1981 through February or March 1982. The applicant also submitted a copy of an envelope addressed to him in Flushing, New York which is postmarked January 4, 1982, and thus suggests that he was still residing in New York during 1982. On the Form I-687, the applicant stated that his address from 1981 through 1982 was [REDACTED] Texas, and that from 1982 through 1985, he resided on [REDACTED]. However, one lease in the record places the applicant at [REDACTED] from April 1982 through September 1982. Utility bills in the record indicate that he continued to reside in apartment # [REDACTED] at [REDACTED] through at least August 1983, but the Form I-687 indicates that during 1982 he moved to [REDACTED]. The lease for [REDACTED], indicates that the applicant paid \$335 in rent beginning in April 1982. Yet, a letter from his apartment manager indicates that the rent at [REDACTED] would be *raised* to \$335 beginning September 1, 1982. This letter indicates that it was the applicant's apartment manager who had an address on [REDACTED], not the applicant, as he indicated on the Form I-687. The letter indicates that the applicant's apartment complex at [REDACTED] was named [REDACTED]. The energy metering agreement and the August 23, 1983 utility bill in the record indicate that his [REDACTED] apartment was in an apartment complex named [REDACTED] or [REDACTED]. The evidence indicates that during September 1983 the applicant lived at [REDACTED] at [REDACTED], not on [REDACTED], as he indicated on the Form I-687. These discrepancies cast doubt on the authenticity of all the evidence of record, including his claim that he resided continuously in the United States throughout the statutory period.

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 be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

This office stated in the notice of intent to dismiss: that the applicant had not demonstrated that he resided continuously in the United States; and that to overcome this finding, he must present independent evidence from credible sources which overcomes any discrepancy related to his claim that he was continuously residing in the United States throughout the statutory period.

In response to the notice of intent to dismiss, the applicant did not provide any independent, objective evidence to overcome the discrepancies in the record. The applicant offered only explanations for the discrepancies such as the claim that he did live in New York through early 1982, but that he made one trip to Houston before moving to Texas and that may be why previous counsel incorrectly listed him as having moved to Texas in 1981 on the Form I-687. This explanation is not sufficient to overcome the

discrepancies in the record related to whether the applicant resided in New York or Texas during the initial portion of the statutory period. Moreover, the applicant's January 23, 2006 sworn statement indicates that it was not until after the applicant returned to his home in New York on February 14, 1982, after a visit to Taiwan, that he began to consider opportunities that might be available to him in Texas.

Thus, the AAO finds that the applicant has failed to establish that he resided continuously in the United States from some date prior to January 1, 1982 and through May 4, 1988. The applicant has also failed to demonstrate that he is admissible to the United States and he has failed to properly complete his request for a waiver of the ground of inadmissibility to which he is subject.

The applicant is not eligible to adjust to permanent resident status under section 1104 of the LIFE Act for the reasons stated above, with each considered as an independent and alternative basis for denial.

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