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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**

L2

[REDACTED]

FILE:

[REDACTED]

Office: ALBUQUERQUE

Date:

AUG 23 2010

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:

[REDACTED]

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.

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, Albuquerque, New Mexico 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 in F-1 status in 1983 and maintained his legal student status through his enrollment at the University of Florida in fall of 1988. Thus, the director concluded that the applicant was not eligible for the benefit sought.

On appeal, the applicant indicates that he first entered the United States in student status in 1976 and that he violated his student status by working without authorization. He further indicates that he remained in F-1 status until dropping out of the University of Florida in 1979. The applicant asserts that he remained in the United States in unlawful status after leaving the University of Florida until reentering the United States on April 28, 1983 and resuming his studies. He also asserts that he failed to maintain 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 in 1976 and December 31, 1981 as required.

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. 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
 - 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 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.

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 February 1, 1976 as an F-1 nonimmigrant student to attend ELS Language Institute in Washington D.C.. The record of proceedings contains a copy of the entry stamp indicating the applicant's February 1, 1976 arrival. The applicant's transcripts indicate that he enrolled at Washington University in fall 1976 and remained there until transferring to West Virginia Institute of Technology in fall 1977 and finally to University of Florida in spring 1978.

The applicant asserts 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 throughout his period of authorized F-1 student status. The applicant submits transcripts from the University of Florida 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 the University of Florida indicating that the applicant was enrolled from spring 1978 until dropping out following the fall 1979 semester. Transcripts do reflect that 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 during any semester that he was enrolled at the University of Florida in F-1 status prior to leaving the school in fall 1979. 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). For these reasons, the AAO finds that the applicant 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 beginning in 1984. He also submits pay-check stubs and W-2 forms indicating that he was employed in 1986, 1987 and 1988. 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. He also fails to indicate whether he was working without authorization prior to January 1, 1982 as required by the NWIRP agreement. Thus, this ground 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 the Immigration and Naturalization Service (now known as the 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 a 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 February 1, 1976 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 February 1, 1976 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 29, 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 as well.

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 from the date of his second entry to the United States in F-1 status, April 28, 1983. In addition to his university transcripts, the applicant submits W-2's and a Social Security Administration Record of Taxable Wages indicating that the applicant earned taxable wages in the United States from 1984 through the end of the relevant period.

The applicant does not submit sufficient evidence or explanation which accounts for the time period after he left the University of Florida following his fall 1979 semester and April 28, 1983 when he reentered the United States in F-1 status. On appeal, the applicant asserts that he remained in the United States and earned taxable wages, however, his is not supported by his SSA wage report which indicates that he began earning taxable wages in 1984. The only evidence which pertains to this time period consists of one affidavit, from Khosrow Farhadtooski. [REDACTED] indicates that he has known the applicant since he was attending the University of Florida in summer 1982. This is inconsistent with both the applicant's transcripts and his testimony which indicates that he left the University of Florida in fall 1979 and did not return until spring 1983.

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 applicant was ordered to appear before an Immigration judge on November 29, 1979 as he was subject to deportation for remaining in the United States beyond his period of authorized admission. The applicant failed to appear. It is not clear whether the applicant was actually ordered removed, however, he has admitted that he reentered the United States in April 1983. During that entry, the applicant failed to indicate either that he had previously violated his F-1 student status or that he was ordered to appear before an immigration judge regarding his overstay and that he failed to comply.

The record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. He submitted a statement indicating in April 1983, he told a

Consular Officer in Bonn, Germany that he did not intend to reside in the United States permanently. He made a material misrepresentation to obtain a nonimmigrant visa to enter the United States.

An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that the applicant has filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation. As the waiver application has not been adjudicated, the applicant is not admissible and is ineligible for legalization benefits under the LIFE Act. Furthermore, even if the waiver were approved, the application would not be approvable since the applicant failed to establish his continuous residence for the duration of the relevant period. Finally, the applicant failed to indicate on the Form I-690 the basis for such a waiver.

Finally, it is noted that the applicant was arrested on May 25, 1986 by the Gainesville, Florida Police Department for *Shoplifting*, a misdemeanor. The applicant pled *nolo contendere* and was sentenced to probation. A single misdemeanor conviction does not render an applicant ineligible for benefits under the LIFE Act.

Given these deficiencies, the absence of sufficient evidence of the applicant's continuous residence for the period prior to April 1983, his reliance on affidavits which do not meet basic standards of probative value, and his failure to prove that he is admissible to the United States, 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.