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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 02 179 60359

Office: FAIRFAX

Date:

FEB 26 2010

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 returned to the National Benefits 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 remanded for further action, you will be contacted.

Elizabeth McCormack

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, Fairfax, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application because the applicant failed to demonstrate that he resided in the United States in a continuous, unlawful status from before January 1, 1982, through May 4, 1988, as required by section 1104(c)(2)(B) of the LIFE Act. Specifically, the director determined that the applicant was in lawful student status with an F-1 visa during portions of the requisite period and that the applicant's absences from the United States interrupted his continuous residence during the requisite period.

On appeal, counsel asserted that the director erred in denying the application based on a finding that the applicant reentered on a student status and was, therefore, in lawful status during the requisite period. In response to the Notice of Intent to Deny, the applicant also asserted that he was unlawfully present in the United States during the requisite period due to unauthorized employment. The applicant asserted that his unauthorized employment was known to the government through filed income tax returns and social security statements. Counsel requested a copy of the Record of Proceedings (ROP) under the Freedom of Information Act (FOIA). Counsel stated that a brief or additional evidence would be submitted to the AAO within 30 days upon receipt of the ROP. The record reflects that the request was completed on February 9, 2009.¹ No brief and/or additional evidence was received; therefore, the record will be considered complete. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.²

Section 1104(c)(2)(B) of the LIFE Act states:

(i) In General – The alien must establish that the alien entered the United States before January 1, 1982, and that he or she 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.

¹ NRC2008041513.

² The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

“Continuous unlawful residence” is defined at 8 C.F.R. § 245a.15(c)(1), as follows: An alien shall be regarded as having resided continuously in the United States if 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 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). The applicant 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 section 1104 of the LIFE Act. 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant’s own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.12(f). 8 C.F.R. § 245a.2(d)(6).

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 stated 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 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 (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.

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

A LIFE Legalization applicant must also provide evidence establishing that, before October 1, 2000, he or she was a class member applicant in a legalization class-action lawsuit. *See* 8 C.F.R. § 245a.14. In this case the applicant applied for such class membership by submitting an Affidavit of Support, accompanied by a Form I-687 “Application for Status as a Temporary Resident (Under Section 245A of the Immigration and Nationality Act),” dated November 4, 1992. On March 28, 2002, the applicant filed Form I-485, Application to Register Permanent Resident or Adjust Status pursuant to section 1104 of the Life Act (I-485 LIFE Legalization Application). The applicant also qualifies as a subclass member pursuant to the terms of the *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration, et al.* Stipulation of Settlement (Case No. 88-379R) (*NWIRP Settlement Agreement*), as stated below.

All persons who entered the United States in a non-immigrant status prior to January 1, 1982, who are otherwise prima facie eligible for legalization under section § 245A of the INA, 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below, and who . . . 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 government” requirement or the requirement that s/he demonstrate that his/her unlawful residence was continuous.

Pursuant to the *NWIRP Settlement Agreement*, a person who violated the terms of their nonimmigrant status prior to January 1, 1982, in a manner known to the government includes those for whom documentation or the absence therefore 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.

During his interview, the applicant stated that he entered the United States in January 1981. The applicant claims to have continuously resided in an unlawful status in the United States from before January 1, 1982, through May 4, 1988. The documentation that the applicant submits in support of his claim consists of the applicant’s social security statement, receipts, college transcripts, master’s degree diploma and W2s all dated during portions of the requisite period.

The record reflects that the applicant entered the United States on an F-1 student visa. The applicant’s social security statement reflects that he worked and earned income from 1981 through 2001. Based on this evidence, the applicant’s entry into the United States before January 1, 1982, is not in dispute. The AAO finds that the applicant violated his lawful student status due to his unauthorized employment prior to January 1, 1982. As his earnings were documented by the Social Security Administration throughout the requisite period, his unlawful status was known to the Government.

The issue in this proceeding is whether the applicant’s unlawful residence in the United States was continuous. Although the applicant has established that he resided in the United States during portions of the requisite period, the record reflects that the applicant was absent from the United States during the statutory period. The record contains a Supplement to Form OF-156

signed by the applicant. The applicant stated that he resided in Turkey for military service from October 1983 through May 1984, a period of at least 183 days. Pursuant to 8 C.F.R. § 245a.15(c)(1), the applicant's absence exceeded the 45 days in a single absence and the 180 days aggregate of all absences from the United States during the requisite period. The only exception to a prolonged absence from the United States would be due to emergent circumstances. Although this term is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) holds that *emergent* means "coming unexpectedly into being." In this instance, the applicant departed the United States with the intention of reporting for military service in Turkey. His military service did not come unexpectedly into being. Thus, the applicant's absence from the United States interrupted his claim of continuous residence in the United States during the statutory period.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he maintained continuous residence in the United States from before January 1, 1982, through May 4, 1988, as required for eligibility for adjustment to permanent resident status under section 1104(c)(2)(B)(i) of the LIFE Act. The applicant is, therefore, ineligible for permanent resident status under section 1104 of the LIFE Act.

It is noted that the record reflects that the applicant reentered the United States in May 1985 on an F-1 visa to pursue a master's degree, which he completed in 1986. This did not interrupt the applicant's unlawful status during the requisite period. An applicant who was present in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant in order to return to an unrelinquished unlawful residence is eligible to apply for legalization and may file for adjustment to temporary residence status. *See* 8 C.F.R. § 245a.2(b)(9). Therefore, the AAO finds that the F-1 visa did not confer lawful status upon the applicant and the applicant remained in an unlawful status.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Beyond the decision of the director, the AAO finds that the applicant is not eligible for temporary resident status pursuant to the terms of the agreements reached in the CSS/Newman Settlement Agreements because the record indicates that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

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.

Upon reentry in May 1985, the applicant he presented himself as a lawful nonimmigrant upon admission. Yet, according to the claims which the applicant made in this proceeding, his intent was to continue residing unlawfully in the United States. Thus, in May 1985, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

An applicant for adjustment of status under section 245A of the 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.2(d)(5). 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 record indicates that the applicant submitted the Form I-690, Application for Waiver of Grounds of Excludability, which is the form an applicant must file to request a waiver of the grounds of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. However, a decision has not been rendered on whether the applicant qualifies for a waiver of this ground of inadmissibility.³

The applicant is not eligible for adjustment to temporary residence status 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.

³ On the Form I-690, the applicant failed to list any reasons of excludability or reasons why he should be granted a waiver.