

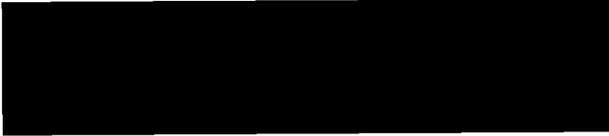


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FILE:



Office: SALT LAKE CITY, UTAH

Date:

FEB 26 2010

MSC 02 044 62535

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.

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, Salt Lake City, Utah, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further consideration in accordance with the following.

The director denied the application because he found that the applicant had not shown that his immigration status in the United States was unlawful from a date prior to January 1, 1982 and through May 4, 1988.

On appeal, the applicant asserted through counsel that he has established continuous, unlawful residence throughout the statutory period and that he is otherwise eligible to adjust to permanent resident status 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.

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, she violated the terms of 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 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 record establishes that the applicant entered at New York City on March 11, 1981 as a nonimmigrant F-1 student. As a nonimmigrant, the applicant was required to submit a quarterly address report prior to January 1, 1982. There is no quarterly address report in the record. Thus, the applicant has established that he violated his nonimmigrant status in a manner that was known to the government prior to January 1, 1981. Further, there is no indication in the record that he ever acknowledged to U.S. officials that he had violated his status and that he had his status properly reinstated prior to the nonimmigrant entries which he made after March 1981 in 1983 and 1985; moreover, the record indicates that he made those subsequent entries with the intent to reside indefinitely in the United States. Thus, the applicant has established that he violated his nonimmigrant status in a manner that was known to the government prior to January 1, 1982 and that his subsequent nonimmigrant entries were obtained through fraud or mistake. Therefore, the applicant has established that his presence in the United States during the relevant period was unlawful.

On appeal, the applicant indicated through counsel that the record establishes that he is otherwise eligible to adjust under the LIFE Act.

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:<sup>2</sup>

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

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<sup>2</sup> As alluded to earlier, the legal requirements of legalization as in place at the time of the enactment of LIFE legalization provisions apply to LIFE late legalization cases except where specifically superseded by a LIFE provision such as the provision that the requisite period end on May 4, 1988, rather than at the time of filing for legalization.

(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.

Under section 1104(c)(2)(E)(i) of the LIFE Act, regarding basic citizenship skills, an applicant for permanent resident status must demonstrate that he or she:

- (I) meets the requirements of section 312(a) of the Immigration and Nationality Act (8 U.S.C. 1423(a))(relating to minimal understanding of ordinary English and a knowledge and understanding of the history and government of the United States); or
- (II) is satisfactorily pursuing a course of study (recognized by the [Secretary of Homeland Security]) to achieve such an understanding of English and such a knowledge and understanding of the history and government of the United States.

Under section 1104(c)(2)(E)(ii) of the LIFE Act, the Secretary of Homeland Security may waive all or part of the above requirements for aliens who are at least 65 years of age or who are developmentally disabled.

An applicant may establish that he or she has met the requirements of section 312(a) of the Immigration and Nationality Act (Act) by demonstrating an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language and by demonstrating a knowledge and understanding of the fundamentals of the history and of the principles and form of government of the United States. *See* 8 C.F.R. § 245a.17(a)(1) and 8 C.F.R. §§ 312.1 and 312.2.

An applicant may also establish that he or she has met the requirements of section 1104(c)(2)(E)(i) of the LIFE Act by providing a high school diploma or general educational development diploma (GED) from a school in the United States. *See* 8 C.F.R. § 245a.17(a)(2). The GED or high school diploma

may be submitted either at the time of filing the Form I-485 LIFE Act application, subsequent to filing the application but prior to the interview, or at the time of the interview. *Id.*

On or near July 26, 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 November 13, 2001, he 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 he denied the application because he found that the applicant had not established that he was present in the United States in an unlawful status prior to January 1, 1982 and that his unlawful status was known to the government as of January 1, 1982.

As previously stated, the applicant has established that he was never in lawful status during the statutory period and that his unlawful status was known to the government as of January 1, 1982.

The record indicates that the applicant passed the civics portion of the basic citizenship skills examination on March 29, 2006. The record does not indicate that the applicant was ever provided an opportunity to take the portions of this examination that relate to his ability to read and write in English. Thus, the applicant remains entitled to an interview regarding his English language skills. In response to the AAO's request for evidence, the applicant submitted a certified transcript from [REDACTED] which indicates that he graduated from this high school on May 26, 1983. Thus, the AAO finds that the applicant has demonstrated basic citizenship skills as required under 1104(c)(2)(E)(i) of the LIFE Act by submitting evidence, prior to the required final interview in this matter, that he graduated from a high school in the United States. *See* 8 C.F.R. § 245a.17(a)(2).

The remaining issues in this proceeding are 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 AAO finds that the evidence in the record establishes the applicant's continuous residence in the United States from a date prior to January 1, 1982 through May 4, 1988.

The record indicates that the applicant represented himself as a lawful nonimmigrant upon admission to the United States on July 24, 1983 and January 15, 1985. The regulations at 8 C.F.R. §§ 245a.2(b)(9) and (b)(10) state that a legalization applicant who is otherwise eligible for legalization and who entered as a nonimmigrant during the requisite period in order to return to his unrelinquished, unlawful residence, [as is the case here, as the applicant had fallen out of lawful status by failing to file an address report three months after his March 1981 entry and was residing in the United States unlawfully prior to his brief June 1983/July 1983 and December 1984/January 1985 absences followed by his nonimmigrant entries in 1983 and 1985], "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. An 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, Application for Waiver of Grounds of Excludability, 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, the applicant was instructed to state reasons why, based on family unity considerations or humanitarian or public interest reasons, his request should be granted. He did not provide such information. Also, he did not submit 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 matter is being remanded to permit the director to adjudicate the Form I-690 and to otherwise complete the adjudication of the Form I-485. The AAO hereby provides the applicant an opportunity to file with the director documentation or statements that might support the request made on the Form I-690 and to provide reasons why that request should be granted. The director will take into consideration, when adjudicating the Form I-690, the additional information regarding that request which the applicant provides in response to this decision.

The applicant has not yet established that he is admissible to the United States or that he qualifies for a waiver to the ground of inadmissibility to which he is subject.

The AAO remands the matter to the director that he might adjudicate the Form I-690, and that he might otherwise complete the adjudication of this application.

**ORDER:** The application is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the applicant, is to be certified to the AAO for review.