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Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE: 
MSC 01 296 60713

Office: LOS ANGELES

Date: **MAR 01 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. The file has been returned to the National Benefits Center. If your appeal was sustained, or if the matter 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, Los Angeles, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director denied the application for permanent resident status 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), based on the determination that the applicant was ineligible to adjust to permanent resident status under the provisions of the LIFE Act because he had not established that he continuously resided in the United States throughout the requisite period. *See Section 1104(c)(2)(D)(ii) of the LIFE Act.* Specifically, the director noted that the applicant had submitted inconsistent identity documents showing several variations of his name and different social security numbers. The director also found that the applicant's school records did not indicate that he was enrolled in school during the spring and fall semesters of 1983.

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.

On appeal, the applicant states that the various names of record all belong to him, that he has consistently used one social security number and the numbers of record that are off by one number are typographical errors by the employer. He states that he attended school throughout the requisite period, except for the fall semester of 1983. He states that the record shows that he was present in the United States twice during the last 6 months of 1983, in July, 1983 when he picked up his school transcripts, and in November, 1983, when he took a TOEFL exam. He states that he worked without authorization as a nonimmigrant student, and was present in the United States in unlawful status in a manner known to the government prior to January 1, 1982. He states that he resided

As a preliminary matter, the AAO notes that on September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, 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 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

....

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 further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after his lawful entry and prior to January 1, 1982, the applicant

violated the terms of his nonimmigrant status in a manner known to the government in that, for example, documents and/or the absence of required documents (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) within the records of one or more government agencies, when taken as a whole, warrant a finding that the applicant was in an unlawful status prior to January 1, 1982 in a manner known to the government. Once the applicant makes such a showing, United States Citizenship and Immigration Services (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 applicant's unlawful status was known to the government as of January 1, 1982.

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.

Thus, if the applicant was present in the United States in nonimmigrant status prior to 1982, the absence from his record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that he violated his nonimmigrant status and was in unlawful status in a manner that was known to the government. *See* NWIRP settlement agreement, paragraph 8B. *See also*: section 265(a) of the Act as in place through December 29, 1981 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the address change and must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

The record establishes that the applicant first entered the United States on a nonimmigrant F-1 student visa on October 24, 1978, and attended school at Redlands Community College and then Rose State College. He attended the University of Central Oklahoma from spring 1981 through May, 1983, and graduated with a B.S. degree on May 6, 1983. He did not attend school in the summer or fall of 1983. The applicant's official transcript indicates that he attended Oklahoma City College for one semester in spring, 1984, and that he attended the University of Central Oklahoma from fall, 1984 through spring, 1987, and received an M.S. on May 8, 1987. He attended the University of Missouri-Rolla in the fall of 1987 and the spring of 1988. The applicant's social security records indicate that he earned income in 1979, 1980, 1982, 1983, 1985 and 1986. There are no required address updates of record. The evidence establishes that the applicant entered the United States as a nonimmigrant and was in unlawful status in a manner known to the government prior to January 1, 1982. The application will be adjudicated in accordance with the standards set forth in the NWIRP Stipulation of Settlement.

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.

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 stated 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 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 applicant 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 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).

To establish that he continuously resided in the United States during the requisite period, the applicant submitted an official transcript from the University of Central Oklahoma, a copy of a certificate of enrollment from the University of Missouri-Rolla indicating his enrollment at the university in the fall, 1987, a copy of the applicant's I-94 card indicating his transfer to the University of Missouri dated August, 1987, receipts from the University of Missouri dated in January and February, 1988, a TOEFL record indicating a test date of November 1983, copies of passport pages indicating that the applicant's passport was renewed in Washington, DC in 1982 and

1984, 1987 bank records, social security wage records indicating that the applicant earned income in the United States in 1979, 1980, 1982, 1983, 1985 and 1986, pay stubs dated in 1982 and the beginning of 1983, an affidavit from [REDACTED] and a copy of a judicial decree changing the applicant's name. Evidence of residence outside the requisite period is not relevant and will not be considered.

The evidence of record establishes that the applicant probably resided in the United States during the requisite period in the months he was in attendance at the various universities. The evidence, however, does not establish that the applicant resided in the United States continuously throughout the requisite period.

The university transcripts indicate that the applicant attended the spring and fall semesters in 1982, 1984, 1985, 1986 and 1987. The only summer session he attended was in 1982. The record contains no probative evidence that the applicant resided continuously in the United States throughout the summer terms from 1983 through 1987. The record contains no lease agreements, utility bills, or other contemporaneous evidence of the applicant's residence, or testamentary evidence from any of his landlords. None of the submitted pay stubs from any of his employers are dated in the summer months. The applicant's employment record indicates that he earned no money in 1981, 1984, 1987 and 1988. In 1983, the year that the applicant did not attend school during the fall semester, he earned a total of \$45.00. There is evidence that the applicant was present in the United States on July 11, 1983 after his graduation with a B.S. in May, 1983 and on an unspecified date in November, 1983 when he took a TOEFL examination. There is no evidence, however, that the applicant continuously resided in the United States during the summer and fall of 1983. The applicant has not submitted probative evidence to verify his attestations of continuous residence.

The affidavit from [REDACTED] states that he has known the applicant since 1979, and that the applicant lived continuously in Oklahoma from 1978 until late 1987, when the applicant moved to Missouri. The record does not establish that the affiant resided in Oklahoma during the time period attested to. Further, the affidavit is not sufficiently detailed to establish the truth of its assertions. The affiant does not provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavit. To be considered probative and credible, a witness affidavit must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Its content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that the witness statement of [REDACTED] has little probative value.

Beyond the decision of the director, the applicant has not established that he is admissible to the United States. 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 Immigration and Nationality Act (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.

The record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant student of the University of Science and Arts of Oklahoma in Chickasha, Oklahoma at the consular office in Matamoros, Mexico on April 7, 1983 and upon entry in April, 1983. There is no evidence of record that the applicant attended this university in 1983. Further, by his own admission the applicant had already worked without authorization in violation of his student status and obtained the nonimmigrant visa by misrepresenting that he had never worked. Finally, both in April, 1983 and in August, 1984, the applicant returned to the United States with the intention of resuming an unrelinquished domicile, which is contrary to the nonimmigrant intention he expressed to obtain entry to the United States upon inspection. Thus, he is inadmissible under section 212(a)(6)(C)(i) of the Act. 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 this ground of inadmissibility. The director has not ruled on the waiver application. As the record now stands, the applicant has not established that he is admissible to the United States. For this additional reason, the application will be denied.

The absence of sufficiently detailed documentation to corroborate the applicant's claim of continuous residence for the entire requisite period detracts from the credibility of his claim. Pursuant to 8 C.F.R. § 245a.2(d)(5), the inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. Given the applicant's reliance upon insufficient evidence and documents with minimal probative value, it is concluded that he failed to establish continuous residence in an unlawful status in the United States from prior to January 1, 1982, through the end of the requisite period.

The applicant failed to submit sufficient credible documentation to meet his burden of establishing by a preponderance of the evidence that he resided in the United States for the requisite period, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M-*, 20 I&N Dec. 77 (Comm. 1989). The applicant is, therefore, ineligible for temporary resident status under section Section 1104 of the LIFE Act.

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