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U.S. Citizenship  
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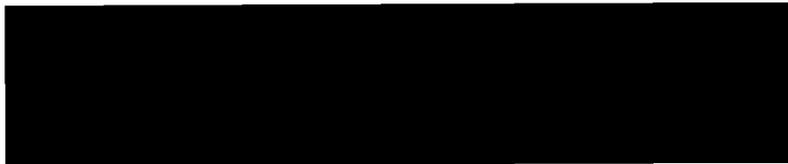
Applicant:



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.

*Elizabeth M. 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, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.<sup>1</sup>

The director denied the application because she 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, and because he was absent from the United States from December 6, 1983 through April 28, 1984 and he had not indicated that he was unable to return to the United States in 45 days or less due to emergent reasons.

On appeal, the applicant re-submitted the affidavit provided in response to the notice of intent to deny in which he attested that he began working without authorization during 1981 and that he remained outside the United States for more than 45 days during the statutory period due to a medical emergency. The applicant also re-submitted evidence meant to establish that he was present unlawfully during the statutory period. In addition, the applicant indicated through counsel that the record establishes that he is otherwise eligible to adjust status under the LIFE Act.

The record establishes: that the applicant entered the United States as a nonimmigrant F-1 student on July 12, 1981 and January 3, 1982; that he entered the United States as an M-1 student on April 28, 1984 and January 12, 1985; and that he entered Colombia on December 17, 1981 and December 6, 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.<sup>2</sup>

The AAO issued a notice of intent to dismiss in this matter on October 9, 2009. In that notice this office stated as a preliminary matter, that the director had 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:

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<sup>1</sup> The AAO issued a decision dismissing this appeal on November 4, 2009. On November 13, 2009, the applicant submitted a letter which stated that he had submitted a timely reply to the AAO’s notice of intent to dismiss in this matter and that the AAO had not considered that submission in its dismissal. The applicant is correct. This decision takes into account the applicant’s reply to the notice of intent to dismiss and supersedes the AAO’s earlier dismissal.

<sup>2</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).

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

(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.

In the notice of intent to dismiss, the AAO found that the record demonstrates that the applicant is a member of the NWIRP class as enumerated above and stated that it would adjudicate the application in accordance with the standards set forth in the NWIRP settlement agreement.

For example, the record indicates that the applicant failed to file the required quarterly address report by October 12, 1981, three months after his July 12, 1981 nonimmigrant entry. There is no record of this address report in the record. Thus, the applicant violated his lawful status in a manner that was known to the government prior to January 1, 1982. There is no indication in the record that the applicant 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 record indicates that any change of nonimmigrant status from F-1 to M-1 that the applicant may have received during the statutory period was obtained through fraud or mistake. Similarly, the record supports the finding that the applicant obtained entry into the United States during January 1982, April 1984 and January 1985 through fraud or mistake as he was not in lawful nonimmigrant status in 1982, 1984 and 1985 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, he violated the terms of his 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 notice of intent to dismiss stated, in keeping with the NWIRP settlement agreement, that any entries which the applicant made into the United States during the statutory period using the F-1 visa issued to him in June 1981 and using the M-1 visa issued to him in April 1984 were made by fraud or mistake, and as such were not lawful. Consequently, these entries do not establish that the applicant was lawfully present in the United States during the statutory period.

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 March 20, 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 May 13, 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 not in unlawful status prior to January 1, 1982; that he was in the United States in lawful status for at least part of the statutory period; and that he was absent for more than 45 days in one absence during the statutory period but he had not established that he was unable to return sooner due to emergent reasons.

As previously stated, the AAO finds that under the terms of the NWIRP settlement agreement, the record indicates that during the statutory period the applicant was never in lawful nonimmigrant status.

In the notice of decision, the director failed to explain what she found lacking in the affidavit that the applicant submitted in response to the notice of intent to deny (NOID). He submitted this affidavit in response to the director’s statements in the NOID which indicate: that he had not shown that he was in unlawful status prior to 1982; and that he was absent from the United States from December 6, 1983 through April 28, 1984 but he had not shown that any emergent reasons had caused him to be absent more than 45 days. In the affidavit, the applicant attested that he began working without authorization after he entered in July 1981 and that he remained in Colombia from December 6, 1983 through April 28, 1984 due to a medical emergency.

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 record indicates that the applicant represented himself as a lawful nonimmigrant upon admission to the United States at least three times during the statutory period. Yet, according to the claims which he made in this proceeding, his actual intent upon returning each time was to reside indefinitely in the United States and to continue working without authorization. Thus, three times 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, 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 on what basis he is excludable/inadmissible and to state reasons why his request should be granted. He did not provide this information. He also 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 notice of intent to dismiss stated that the Form I-690 had not yet been adjudicated. The AAO provided the applicant an opportunity to file, in response to that notice, a statement regarding on what basis he is inadmissible, as well as documentation to support the request made on that form and to submit reasons why that request should be granted. In his reply to the notice of intent to dismiss, the applicant did not provide any statements or documentation to properly complete the Form I-690.

The notice of intent to dismiss also stated 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 affidavit submitted in response to the NOID on which the applicant attested that he departed the United States for Colombia on December 6, 1983 in order to seek medical attention for kidney stones. Then, in Colombia, his doctor informed him that in addition to kidney stones, he had problems with his urethra. The doctor ordered bed rest for several months. Therefore, the applicant was not able to return to the United States until April 28, 1984 due to an emergent medical problem.
2. The Form I-687 that the applicant signed under penalty of perjury on March 20, 1991 on which he indicated at item 35 that he was absent from the United States from December 6, 1983 through January 5, 1984 in order to vacation in Colombia. The applicant did not acknowledge any absence through April

1984, nor did he acknowledge his entry into the United States on April 28, 1984, as documented in his passport.

The record includes inconsistent information regarding, for example: when and for how long the applicant was absent from the United States during 1984; and whether he exited in December 1983 to vacation in Colombia or to seek urgent medical attention.

These discrepancies cast doubt on the authenticity of all the evidence of record, including the applicant's claim that he resided continuously in the United States throughout the statutory period and that he was absent for more than 45 days in 1984 due to an emergent medical condition.

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. The various statements and affidavits in the record are not sufficient to overcome these discrepancies.

The AAO provided the applicant the opportunity to provide, in response to the notice of intent to dismiss, independent, objective evidence to support his claim that he was absent from the United States for more than 45 days during the statutory period due to emergent medical reasons. The applicant did not provide such evidence in his reply to the notice of intent to dismiss. Rather, the applicant submitted what purports to be a urological report addressed "to the doctor" which is not dated. The report indicates, among other things, that the applicant's x-ray taken on an unspecified date at Del Valle University Hospital in Cali, Colombia revealed a gallstone. The AAO notes that the applicant's earlier statement indicated that his medical emergency during the requisite period involved a problem with kidney stones, not gallstones. Moreover, there is nothing in this report to place it in the requisite period.

The applicant has not established continuous, unlawful residence in the United States from a date prior to January 1, 1982 through May 4, 1988. He has not established that he is admissible to the United States or that he has filed with the director a properly completed request for a waiver of the grounds 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 these reasons, with each considered as an independent and alternative basis for denial.

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