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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

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 22 2009

XSD-88-073-4042

IN RE: Applicant: [redacted]

APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status was denied by the Director, California Service Center. The decision is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act) on March 14, 1988. 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. The director also noted that the applicant did not demonstrate that his authorized stay had expired as of January 1, 1982 or that he was otherwise in an unlawful status which was known to the government as of January 1, 1982. Thus, the director denied the application.

On appeal, the applicant asserts that United States Citizenship & Immigration Services (USCIS) erred in finding that the applicant failed to prove that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government. He asserts that he violated his student status by dropping out of school after winter quarter in 1980 and failing to submit required address reports.

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
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> (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
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> (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-687 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.

An applicant for temporary resident status 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 and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the CSS/Newman Settlement Agreements, the term "until the date of filing" in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 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.2(d)(5).

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).

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 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, 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, deny the application or petition.

On appeal, the applicant asserts that United States Citizenship & Immigration Services (USCIS) erred in finding that the applicant failed to prove that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government. He alleges that he violated his status prior to January 1, 1982 and that these violations were known to the government.

The record reveals that the applicant was granted F-1 student status on March 12, 1978 with stay authorized until December 6, 1978. In January 1979 he was granted an extension of stay for duration of status, which means that his stay was authorized for the period of time during which he was pursuing a full course of study in one or more educational programs. He ceased attending his authorized school in April 1980. The director noted that the applicant had failed to establish that he had violated his student status and, therefore, that he had not met his burden of proving that he was present in the United States in unlawful status in a manner known to the government from a date prior to January 1, 1982. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status.

On appeal, through counsel, the applicant asserts that he violated his F-1 status prior to January 1, 1982 in a manner known to the government in two different ways.

First, the applicant asserts that he violated the terms of his F-1 status by failing to continue in his authorized academic program at the Alliant International University following the winter quarter 1980. The applicant submits transcripts from the Alliant International University along with a letter from the school's registrar 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). Transcripts from the Alliant International University indicate that the applicant did not take any classes during any academic period following winter 1980. 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 status by failing to submit quarterly address reports pursuant to Section 265 of the INA. The applicant asserts that he did not submit any address reports to the former INS as he was required to do. 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 31, 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 overcome the grounds for denial cited by the director.

Applying the adjudicatory standards set forth in the settlement agreement, the AAO finds that the applicant violated the terms of his nonimmigrant status in a manner known to the government prior to January 1, 1982. The applicant was granted F-1 student status on March 12, 1978 with stay authorized until December 6, 1978. In January 1979 he was granted an extension of stay for duration of status, which means that his stay was authorized for the period of time during which he was pursuing a full course of study in one or more educational programs. He ceased attending his authorized school in April 1980. During that time the applicant filed no quarterly or annual address reports as required on or before December 31, 1982. Further, affidavits from Alliant International University indicate that the applicant also violated his status by working dropping out of the education program in winter 1980. This 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.

Furthermore, 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). In this case, the AAO has conducted a *de novo* review of the record of proceeding to determine if the applicant meets all of the requirements of eligibility. Specifically, whether the applicant has established his/her entry prior to January 1,

1982, his/her continuous residency for the duration of the relevant period, and his/her admissibility.

The application may not be approved, however, as the record does not establish that the applicant was continuously physically present in the United States throughout the requisite period, or that he maintained continuous, unlawful residence status from a date prior to January 1, 1982 through May 4, 1988, as required for eligibility for legalization. The record reveals that the applicant has submitted credible evidence of his continuous residence in the United States from October 1983 until the end of the relevant period. This evidence consists of checking account registers from San Diego Trust and Savings Bank, electric bills, rental agreements, Bank of America accounts, and, Pacific Bell utility bills.

However, the evidence that the applicant has submitted for the period between the time he left his academic program in winter 1980 and December 1984 is insufficient to establish his eligibility for the benefit sought. As stated above, applicants for temporary resident status 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 and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The evidence that the applicant has submitted which concerns the period consists of affidavits from [redacted] and [redacted], San Diego Federal Savings account documents that do not contain the applicant's name, and two checks issued to the applicant in 1982.

submitted two affidavits. The first, dated June 7, 2004, indicates that the affiant met the applicant in 1979 and that they worked and went to school together. In the second affidavit, dated November 14, 1988, the affiant indicates that the applicant worked for European Imports from January 1981 until November 1985. Although the statement is on company letterhead, it is not notarized. It also fails to meet certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether CIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The statement by [redacted]h does not include much of the required information and can be afforded minimal weight as evidence of the applicant's residence in the United States for the duration of the requisite period.

In the affidavit from dated June 7, 2004, the affiant indicates that he has known the applicant since 1981 and that they worked together. He provides no additional relevant details and his testimony fails to indicate how he dates his initial meeting with the applicant, how frequently he had contact with the applicant, or how he has personal knowledge of the applicant's presence in the United States. Further, the affiant does not provide information regarding where the applicant lived during the requisite period. Given these deficiencies, this

affidavit has minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982.

Finally, in an affidavit dated June 3, 2004, [redacted] indicates that he has known the applicant since 1980. His testimony is identical to that of [redacted]. He indicates that he worked with the applicant. He does not indicate where they worked, how frequently he saw the applicant, or how he dates their acquaintance.

The remaining evidence, consisting of San Diego Federal Savings account documents that do not contain the applicant's name, and two checks issued to the applicant in 1982 is insufficient to establish the applicant's eligibility for the benefit sought.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States until December 1984 as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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