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

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[redacted]

RE: [redacted] Office: LOS ANGELES, CA Date: DEC 07 2009

MSC 06 091 15225

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 forwarded to the 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 Director, Los Angeles, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed pursuant to the terms of the settlement agreements reached in *Catholic Social Services, Inc., et al., v. Ridge, et al.,* CIV. NO. S-86-1343-LKK (E.D. Cal.) January 23, 2004, or *Felicity Mary Newman, et al., v. United States Immigration and Citizenship Services, et al.,* CIV. NO. 87-4757-WDK (C.D. Cal.) February 17, 2004, (CSS/Newman Settlement Agreements). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.[1]

The record indicates that the applicant entered the United States as a nonimmigrant F-1 student on October 2, 1980 and on August 21, 1982. Evidence in the record also establishes that he attended college in the United States beginning in fall term 1981 and for several terms which followed. The applicant stated that he fell out of lawful status prior to January 1, 1982 by working without authorization. The director found that he had not established that his unlawful status was known to the government prior to January 1, 1982, and denied the application.

As a preliminary matter, the AAO points to the following: 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 –
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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 Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Entity (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

[1] 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).

(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

a. 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.

. . . .

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 or her lawful entry and prior to January 1, 1982, the applicant violated the terms of his or her 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, 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, when an NWIRP class member demonstrates that he was present in the United States in nonimmigrant status prior to 1982, the absence from his record of a required address update or

notice of change of address due prior to January 1, 1982 is sufficient to demonstrate that he had violated his nonimmigrant status and was in unlawful status in a manner that was known to the government prior to January 1, 1982. *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 report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

In the notice of intent to dismiss which the AAO issued on October 5, 2009, this office stated that the applicant is an NWIRP class member as enumerated above. He entered as a nonimmigrant on October 2, 1980 and August 21, 1982. As a nonimmigrant, he was required to file quarterly address reports with the INS prior to January 1, 1982. No address reports are in the record. Therefore, the record indicates that the applicant was in the United States in unlawful status in a manner that was known to the government prior to 1982.

Also there is no indication in the record: that the applicant ever acknowledged to U.S. officials that he had committed immigration violations; that he had his lawful status properly reinstated; or that he was granted permission to obtain the F-1 nonimmigrant visa issued to him on July 31, 1982, despite his previous violations. Thus, the AAO also stated in the notice of intent to dismiss that the applicant's nonimmigrant entry made subsequent to January 1, 1982 on August 21, 1982 was made through fraud or mistake.

The applicant has established that, under the terms of the NWIRP settlement agreement, his presence in the United States during the requisite period was unlawful.

On appeal, the applicant indicated that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the INS, now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

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 245(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 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:
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> . . .
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> (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.
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> (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.

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).

Failure to provide evidence other than affidavits shall not be USCIS' sole basis for finding that an applicant failed to meet the continuous residence requirement. *See* CSS/Newman Settlement Agreements. In evaluating the sufficiency of the applicant's proof of residence, [USCIS] shall take into account the passage of time and other related difficulties in obtaining documents that corroborate unlawful residence during the requisite periods. *See id.*

The regulation at 8 C.F.R. § 245a.1(c) read in conjunction with the CSS/Newman Settlement Agreements provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

> (i) 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 through the date the application for temporary resident status is filed [during the original filing period or the date that the alien was discouraged from filing], 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.

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.*

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 such 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.

At issue in this proceeding is whether the applicant has established that he is admissible and whether he has submitted consistent evidence to meet his burden of establishing continuous unlawful residence in the United States throughout the requisite period.

On December 30, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated December 26, 2005 and was submitted with the Form I-687 received on December 30, 2005, that he is a CSS or Newman (LULAC) class member.

The director issued a notice of decision in which she denied the application because she determined that the applicant had not established by a preponderance of the evidence that his unlawful status was known to the government prior to January 1, 1982. As discussed previously, the AAO finds that, in keeping with the terms of the NWIRP settlement agreement, the applicant's unlawful status was known to the government prior to January 1, 1982 and his nonimmigrant entry in August 1982 was obtained through fraud or mistake. Thus, the applicant has established that his presence in the United States during the relevant period was unlawful.

On appeal, the applicant stated through counsel that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

The notice of intent to dismiss stated that the record includes the following inconsistent evidence regarding the applicant's claim that he resided continuously in the United States throughout the requisite period, that he is admissible to the United States and that he is otherwise eligible to adjust to temporary resident status:

1. The Form I-687 which the applicant signed under penalty of perjury on July 26, 2001 on which he stated at item 35 that he had only been absent from the United States on one occasion between his first entry in 1980 and the date that he signed that form in 2001. He stated that this absence occurred between July 15, 1982 and August 21, 1982.

2. The Form I-687 which he signed on April 18, 1990 on which he stated that his only absence from the United States between the date of his entry in 1980 and the date in 1990 when he signed that form occurred between July 15, 1982 and August 21, 1982.

3. The Form I-687 which the applicant signed on December 26, 2005 on which he stated that he was absent from the United States from July 15, 1982 through August 21, 1982 and absent again during September 1987.

4. The November 16, 2006 CSS/Newman legalization interview at which the applicant testified that during September 1987 he spent five hours in Tijuana, Mexico visiting a friend and that after this he re-entered the United States without inspection.

5. The notes from his February 12, 1992 legalization class membership interview at which the applicant testified that subsequent to his entry in 1980 and before his interview in 1992, he had only one absence from the United States in which he exited during June 1982 and returned during August 1982.

6. The entry stamp on page 16 of the applicant's passport, which bears number [redacted] which establishes that he presented himself to U.S. officials as a nonimmigrant F-1 student on August 21, 1982.

The record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant upon entry during August 1982 in order to gain a benefit under the Act. Namely, he sought to gain entrance into the United States. Thus, he is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant has submitted to the director 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. However, the AAO stated in the notice of intent to dismiss that, on this form, the applicant indicated that he is not subject to any ground of exclusion/inadmissibility. Also, he failed to submit documentation which supports this request.

The AAO provided the applicant an opportunity to file, in response to the notice of intent to dismiss, information regarding why he is excludable/inadmissible and why his request for a waiver should be granted, including any documentation that might support that request.

In response to the notice of intent to dismiss, the applicant stated through counsel that he is not inadmissible. He indicated that he did not make any material misrepresentations to U.S. officials when he re-entered the United States in August 1982. The applicant is not correct. When he presented himself for entry in August 1982, he willfully misrepresented himself to U.S. officials as a lawful nonimmigrant F-1 student entering the United States with the intent to remain in this country temporarily and to abide by the terms of his F-1 status. Yet, according to representations made in this proceeding, the applicant returned in 1982 with the intent to reside indefinitely in the United States and to continue working without authorization.

Thus, the applicant has not demonstrated that he is admissible to the United States and he has not submitted for the director a properly completed request that the ground of inadmissibility to which he is subject be waived. Therefore, the applicant is not eligible to adjust to temporary resident status. The application must be denied and his appeal dismissed on this basis.

In addition, the notice of intent to dismiss stated that the evidence in the record is not consistent regarding when and for what lengths of time the applicant was absent from the United States during the relevant period. The 1990 and 2001 Forms I-687 in the record state that the applicant had only one absence during the relevant period: July 15, 1982 through August 21, 1982. The 2005 Form I-687 states that the applicant was absent from the United States during September 1987, in addition to the July 15, 1982 through August 21, 1982 absence. At the legalization class membership interview, the applicant indicated that he was absent from June 1982 through August 1982.

An absence from June 1982 through August 21, 1982 would be an absence of more than 45 days in one single absence. There is no assertion in the record that the applicant remained outside the United States for over 45 days due to emergent reasons during 1982. An absence from June 1982 through August 21, 1982 contradicts any claim made by the applicant in this proceeding that he resided continuously in the United States throughout the requisite period. Also, the applicant's failure to provide a consistent account of whether he had one absence or two absences during the relevant period calls further into question his claim that he resided continuously in the United States during the requisite period.

This office stated in the notice of intent to dismiss that these discrepancies cast doubt on the authenticity of the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through the end of the requisite period.

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. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States throughout the statutory period.

The AAO stated in the notice of intent to dismiss that the affidavits and statements which the applicant has submitted into the record are not independent, objective evidence. They are not sufficient to overcome the discrepancies in the evidence which have been summarized here and they are not probative in this matter. The notice of intent to dismiss also pointed out that the applicant has not provided any contemporaneous evidence regarding when he departed the United States prior to his August 21, 1982 F-1 entry or regarding the length of his absence during 1987.

The AAO provided the applicant the opportunity to provide, in response to that notice, any objective, independent evidence that is available to him which supports the claim that he resided continuously in the United States throughout the statutory period and was not absent for over 45 days during either 1982 or 1987.

In response, the applicant asserted through counsel that he was absent from the United States from July 31, 1982[2] through August 21, 1982, and that he was absent for less than thirty days during September 1987. He also submitted two friends' statements which each indicate that he was absent from the United States from July 31, 1982 through August 21, 1982 and was absent less than a month in his subsequent absences. The applicant did not submit independent evidence relating to the length of each of his absences in 1982 and 1987. He did not offer an explanation as to why, on appeal, he is stating that he was absent from July 31, 1982 through August 21, 1982 and for "less than 30 days" in September 1987, even though: he stated under oath in February 1992 that he was

[2] July 31, 1982 is also the day that the applicant received an F-1 student visa in his passport at the U.S. Consulate in Cairo, Egypt.

absent from the United States from June 1982 through August 1982; he stated under penalty of perjury on his 1990, 2001 and 2005 Forms I-687 that he was absent from July 15, 1982 through August 21, 1982; and he stated under oath in 2006 that he was absent for less than one full day in September 1987. Instead, he asserted through counsel that any inconsistencies in the record regarding his absences from the United States are not material and that the statements and affidavits in the record are sufficient to establish that he resided continuously in the United States throughout the relevant period.

As indicated in the notice of intent to dismiss, the applicant's inconsistencies are material. For example, if the applicant was absent from June 1982 through August 21, 1982 as he indicated at his legalization class member interview in February 1992, then the applicant did not reside continuously in the United States throughout the relevant period and is not eligible for temporary resident status. Further, the many inconsistencies in the record regarding when and for what lengths of time the applicant was absent from the United States cast doubt on all the evidence in the record, including the claim that the applicant resided continuously in the United States throughout the relevant period.

The applicant was not able to provide independent, objective evidence to overcome the inconsistencies in the record regarding whether he did or did not reside continuously in the United States throughout the relevant period. Therefore, the applicant has not established that he resided continuously in the United States throughout the relevant period. The appeal must also be dismissed on this basis.

In addition, the notice of intent to dismiss stated that the record indicates that on February 25, 1995, the applicant was arrested and charged with burglary. The Glendale Police Department record of the arrest indicates that the District Attorney's Office rejected the matter/declined to prosecute. The applicant requested that the Superior Court of California County of Los Angeles conduct a search using his name and date of birth. The result of that search in the record indicates that the incorrect date of birth, September 2, 1962, was used in this search.

This office informed the applicant in the notice of intent to dismiss that to complete the record, he must request a search from the relevant court using his correct date of birth, September 20, 1962, as listed in his arrest record. The AAO stated that if the relevant court does conduct a search using his full name and date of birth, and that search leads to a finding that there are no records of charges or convictions against him, he must then request a record of his arrests and convictions from the California Department of Justice, Sacramento, California.

In response, the applicant submitted a photocopy of the results of a search conducted on June 29, 2009 within the records of the Superior Court of California, County of Los Angeles, using his name and date of birth: September 20, 1962. The search indicates that this court system has no records of any infraction, misdemeanor or felony case(s) which references the applicant's name and date of birth. To properly complete the record, however, the applicant must submit the original of this document. The applicant also submitted a California Department of Justice computer printout of the results of a search of arrest records conducted using the applicant's fingerprints. The document indicates that there is no record within the California Department of Justice Bureau of Criminal Identification and Information which relates to the applicant.

The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period, and he has not established that he is admissible to the United States or that he filed with the director a properly completed request for a waiver of the ground of inadmissibility to which he is subject.

The appeal is dismissed for these reasons with each considered an independent and alternative basis of dismissal.

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