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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEW ORLEANS, LOUISIANA Date: JAN 30 2009

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Resident Status under 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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: On April 10, 1990, the Director, Southern Regional Processing Facility, Dallas, Texas, terminated the applicant's temporary resident status. On May 9, 1990, the applicant appealed that decision and sent the appeal to the Southern Regional Processing Facility, as required. That appeal was forwarded to the Administrative Appeals Office (AAO) on November 28, 2005. On July 14, 2006, the AAO remanded the decision to terminate temporary resident status to the Southern Regional Processing Facility Director. The Southern Regional Processing Facility Director transferred the matter to the Field Office Director (director), New Orleans, Louisiana, as the applicant had moved out of Texas and into Louisiana. The director, New Orleans, Louisiana, issued a decision terminating the applicant's temporary resident status on November 15, 2007. That decision is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

On May 5, 2008, the AAO notified the applicant of derogatory information in the record and provided him the opportunity to respond and rebut this information. On May 30, 2008, this office received the applicant's rebuttal. On June 5, 2008, this office issued a request for additional evidence. On June 20, 2008, the applicant submitted the requested evidence. On November 24, 2008, the AAO notified the applicant of additional derogatory information in the record and provided him the opportunity to respond and rebut this information. On December 11, 2008, the AAO received the applicant's rebuttal to this notice. This rebuttal included derogatory information. On December 31, 2008, the AAO notified the applicant of this derogatory information and provided him the opportunity to respond and rebut this information. On January 14, 2009, the AAO received the applicant's rebuttal to this notice.

The director, New Orleans, Louisiana, determined that according to sections 245A(a)(2)(A) and (B) of the Immigration and Nationality Act (the Act), the applicant was not eligible for temporary resident status because he had been in the United States in lawful status during all or a portion of the statutory period which began on a date prior to January 1, 1982 and continued through the date that he filed for temporary resident status. Thus, the director terminated the applicant's temporary resident status. *See* § 245A(b)(2)(A) of the Act and 8 C.F.R. § 245a.2(u)(1)(i).[1]

On appeal, counsel asserted that the applicant was not lawfully present in the United States during the statutory period, and that his unlawful status was known to the government prior to January 1, 1982. Counsel also indicated that the Immigration and Naturalization Service, INS (now U.S. Citizenship and Immigration Services, USCIS) granted the applicant the status of lawful *permanent*

[1] The director terminated the applicant's status after rejecting his assertions that he was in the United States unlawfully throughout the statutory period and that the unlawful status was known to the government as of January 1, 1982. Thus, the applicant qualifies as a class member in the class action lawsuit *Northwest Immigrant Rights Project v. United States Citizenship and Immigration Services* (NWIRP), Subclass C(i). *See* Exhibit 1, NWIRP Class Member Notice. The AAO has included the applicant's name in the list of pending NWIRP cases. However, in this decision, the AAO finds that the applicant has successfully demonstrated that he was not lawfully present in the United States at any time during the statutory period and that this unlawful status was known to the government. As such, the NWIRP settlement agreement no longer applies to him and this office may go forward with the issuance of this decision because it is dismissing this matter on other grounds.

resident in this legalization proceeding. Thus, counsel suggested that any termination of the applicant's temporary resident status is not relevant. This analysis will address this point first.

At the outset, this office notes that 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.[2]

INS, now USCIS, granted the applicant temporary resident status on October 28, 1989. Counsel indicated that after that date, and before INS terminated the applicant's temporary resident status on April 10, 1990, the applicant filed the Form I-698, Application to Adjust Status from Temporary to Permanent Resident (Under Section 245A of Public Law 99-603). Counsel also indicated that on June 30, 1995 the INS stamped, on the applicant's behalf, a Form I-94, Departure Record, with temporary evidence of lawful admission for permanent residence.

There is no original adjustment application in the record. The record also does not include a Form I-181, Creation of Record of Lawful Permanent Residence, which, until 2006, was the official record of approval of an adjustment application, required in all adjustment cases which had been adjudicated and approved. The record does not include the Form I-698 approval notice of which the INS would have been required to generate two copies, one to provide to the applicant and one to retain in the file, if the Form I-698 had been adjudicated and approved. However, counsel did submit a copy of the applicant's Form I-698 stamped and notated as properly received by the INS during January 1990.[3] Regarding counsel's assertion that INS issued the applicant a Form I-94 stamped "Temporary Evidence of Lawful Admission for Permanent Residence,"[4] the record does show that such a form was evidently issued on June 30, 1995 at the Dallas District Office. This form showed a period of validity from June 30, 1995 through June 30, 1996. The portion of this form that must be retained in the file is in the record.

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[2] 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). The AAO also notes that in the brief dated May 28, 2008, counsel suggested that this office does not have *de novo* review authority and that the AAO presented a basis for dismissing this appeal in the Notice of Derogatory Information which must necessarily be the same as the basis for terminating the applicant's status laid out in the April 10, 1990 decision to terminate. Counsel is not correct. The Notice of Derogatory Information served to put the applicant on notice of a basis for terminating the applicant's temporary resident status and for dismissing his appeal which USCIS had not raised previously.

[3] Counsel apparently obtained a copy of this application notated as received by the INS as the result of a Freedom of Information Act (FOIA) request filed during mid-1990.

[4] This may also be referred to as the temporary Form I-551 stamp.

This office would underscore that INS, now USCIS, does not have the authority, nor has it ever had the authority, to approve or even to begin the approval process of an application for adjustment from temporary resident status to permanent resident status for an alien whose temporary resident status is terminated. *See* Section 245A(b)(1) of the Act (which indicates that the [Secretary of Homeland Security] has the authority to adjust an alien to the status of alien lawfully admitted for permanent residence under this section only if the alien is in lawful temporary resident status provided under section 245A(a) of the Act, and provided that the alien meets certain other criteria.) *See also* 8 C.F.R. §§ 245a.3(c)(5) and 245a.3(b).

According to USCIS records, the applicant's temporary resident status was terminated during 1990, and a Form I-94 was stamped with temporary evidence of permanent residence on the applicant's behalf during 1995. USCIS records also indicate that the decision to terminate the applicant's temporary resident status was not withdrawn at any time after issuance in 1990 and before the Form I-94 was stamped with temporary evidence of permanent residence in 1995.

It was in part based on this point that the AAO first remanded this case to the Texas Service Center Director on July 14, 2006. The Texas Service Center Director and the Dallas District Director did not enter explanatory memos into the record regarding exactly what had transpired, regarding why certain forms were missing from the record, etc. as requested by the AAO in its July 14, 2006 remand. However, the Dallas District Office Director did investigate these issues. The district director determined that the district adjudications officer (DAO) who had reviewed the relevant Form I-698 in 1995 was no longer with USCIS and that it was not possible to discern: why the DAO had apparently attempted to begin the process of adjusting an applicant's status more than five years after that applicant's temporary resident status had been terminated, in direct contradiction of the laws which govern adjustment of status in legalization proceedings, and why the Form I-698 which had been reviewed by the DAO was missing from the record. The record also indicates that the district director concluded that the decision to terminate the applicant's temporary resident status made in 1990 had not been withdrawn prior to the date in 1995 when the DAO stamped a Form I-94, bearing the applicant's name, his date of birth and other identifying information, with temporary proof of permanent residence.

In the May 5, 2008 Notice of Derogatory Information, the AAO set forth for the record that during 1995 the INS, now USCIS, did not have the legal authority to take any initial steps in the process of adjusting the applicant's status in this legalization proceeding, as the applicant's temporary resident status had been terminated during 1990 and was never reinstated. *See* Section 245A(b)(1) of the Act. *See also* 8 C.F.R. § 245a.3(c)(5) and 8 C.F.R. § 245a.3(b). Thus, the applicant did not acquire lawful status when in 1995 the DAO took what is normally an initial step in the process of adjusting an applicant's status and erroneously created temporary proof of permanent residence by placing the temporary Form I-551 stamp on the Form I-94 which bore the applicant's name and date of birth.

The AAO notes further that in [redacted] *v. INS*, No. C01-4035 SI, 2002 WL 31298854 (N.D. Cal. Oct. 10, 2002) the court held that even though INS had stamped [redacted]'s passport with temporary proof of lawful permanent residence and had issued him notice that his application for lawful permanent resident status had been approved, INS had never adjusted [redacted]'s status because federal statute mandated that his application for lawful permanent residence be denied as

[redacted] had previously entered a fraudulent marriage for the purpose of securing immigration benefits and the relative petition underlying his application for lawful permanent residence had been denied. Consequently, according to the [redacted] court, INS lacked the authority to adjust Mr. [redacted]s status to that of lawful permanent resident and the temporary proof of lawful resident status stamped in [redacted]s passport had no legal effect. *See* [redacted] at *5-6. *See also* [redacted] *v. Gonzales*, No. C-06-07872 JCS, 2007 WL 2141270 (N.D. Cal. July 25, 2007)(which affirms those aspects of *Bassey* set forth here and distinguishes [redacted] on other grounds.) *See also* [redacted] *v. Reno*, 204 F. Supp. 2d 1355 (S.D. Fla. 2002) at 1359-60 (where the court held that despite the Form I-551 stamp in [redacted]'s passport, INS had not adjusted his status as the Form I-130 filed on his behalf was never approved and thus the INS had no authority to adjust his status.) In keeping with these precedents, the AAO finds that even though INS stamped a Form I-94 with temporary proof of lawful permanent resident status on the applicant's behalf, INS never adjusted his status because federal statute mandated that his application for lawful permanent resident status be denied as his temporary resident status had been terminated prior to the adjudication of the Form I-698 and that status was never reinstated.

The AAO also notes that the New Orleans Field Office Director issued a denial of the applicant's Form I-698 on November 3, 2008. That denial letter specifies that federal statute mandates that the Form I-698 be denied. In addition, the letter states that the Form I-94 completed on the applicant's behalf and stamped with temporary proof of lawful permanent residency was stamped in error and has no legal effect. Thus, the New Orleans Field Office Director's November 3, 2008 denial letter provides further evidence that the temporary Form I-551 stamp on the Form I-94 in the record has no legal effect. *See* 8 C.F.R. § 103.2(b)(17)(which indicates that official records such as the temporary Form I-551 stamp will be regarded as establishing lawful permanent resident status except where countervailing evidence exists that demonstrates otherwise.)

See also 5 U.S.C. § 706 (2007) (which indicates that, upon review in federal court, U.S. federal agency action shall be set aside when it exceeds statutory authority and/or fails to observe procedure required by law.)

By 2006, the applicant was no longer living in Texas. He was residing in Louisiana. Therefore, the Texas Service Center Director transferred the AAO's July 14, 2006 remand to the New Orleans Field Office Director (director), as the applicant's address at that time caused the matter to fall under the jurisdiction of the New Orleans Field Office. The applicant appealed the decision of the director to this office.

An applicant for temporary residence 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. In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the government as of such date. Section 245A(a)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2).

The word "government" as used here means the United States government. Where an alien establishes that, prior to January 1, 1982, documents existed in one or more government agencies which when taken as a whole demonstrate that the alien's status in the United States was unlawful, USCIS will find that his unlawful status was known to the government as of January 1, 1982. *See Matter of P-*, 19 I&N Dec. 823 (Comm. 1988).

Regarding the director's statement that the applicant was lawfully present in the United States during the statutory period, the AAO finds the following: The applicant violated his F-1 nonimmigrant student status when he began working off-campus in 1980 without gaining prior authorization to do such work from the designated school official (DSO) at Southeastern Oklahoma State University.[5] *See* 8 C.F.R. § 214.2(f)(9)(ii)(which indicates that an F-1 student shall only work off-campus after completing one full academic year and after receiving authorization to do so from the DSO.) *See also* 8 C.F.R. § 214.1(e)(which indicates that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.)[6] Evidence in the record such as the applicant's U.S. Social Security Administration records which list his Federal Insurance Contributions Act (FICA) payments made during 1981, 1982 and 1983 confirm that his unauthorized employment and in turn his unlawful status was known to the government prior to January 1, 1982. *See Matter of P-*, 19 I&N Dec. 823 (Comm. 1988). Thus, the record establishes that the applicant was residing unlawfully in the United States from a date prior to January 1, 1982.

During Spring Semester 1983, the applicant completed his undergraduate degree at Southeastern Oklahoma State University. In Fall Semester 1983, he did not enroll in classes. However, during Spring Semester 1984, the applicant did complete the Form I-20 A-B, Certificate of Eligibility for Nonimmigrant (F-1) Student Status – For Academic and Language Students, as a transfer student, and made a request for reinstatement of his F-1 student status to the Dallas District Director in order to pursue graduate studies at the University of Texas – Dallas (UTD), Richardson, Texas, and in order to be restored to lawful nonimmigrant status. The Dallas District Office then issued documents which indicated that the applicant's F-1 status was reinstated on November 2, 1984.

First, the record includes the following evidence that while at UTD the applicant completed the Form I-20 A-B to be submitted to INS, that he made a request for reinstatement of his F-1 status, etc.: a copy of a letter dated August 1, 1984 that the applicant acknowledges, and that the language of the letter indicates, is a response to the Dallas District Office's request for further information to support his request for reinstatement of F-1 status. In the letter, the applicant provides an explanation as to why he did not enroll in classes during Fall Semester 1983, a violation of his F-1 status. The record also includes a document that the applicant acknowledges

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[5] There is no evidence in the record that the applicant ever received authorization to work from the DSO. The applicant also admitted through counsel in the briefs submitted September 10, 2007 and December 14, 2007 that he never applied for, nor received authorization to work while enrolled as a student. The applicant also admitted that he violated his F-1 status in that he was enrolled less than full time from Fall Semester 1985 forward. He also acknowledged dropping below full time status without prior permission from the DSO beginning Fall Semester 1980.

[6] This same regulation was in place when the applicant first began working in the United States.

is a copy of his Form I-20 ID annotated by a Dallas District Office Immigration Officer to indicate that the applicant's F-1 status was reinstated on November 2, 1984. *See* Exhibit 2, copies of the Form I-20 ID, annotated to show that INS granted the applicant's request for reinstatement, and of the replacement Form I-94 issued to the applicant on the same date by the same INS officer. Further, the regulation at 8 C.F.R. § 214.2(f)(12)(1)(B)(1984) specifies that the director may only accept the request for reinstatement of F-1 status if it is accompanied by a properly completed Form I-20 A-B from the school that the alien is attending or intends to attend. For the applicant, in Spring Semester 1984, the relevant school would have been the UTD. Thus, the preponderance of the evidence indicates that the applicant presented himself on the Form I-20 A-B to INS and to UTD as an F-1 student in lawful status, eligible for a certificate of eligibility for nonimmigrant F-1 student status, and that this Form I-20 A-B was filed at the Dallas District Office in conjunction with his request for reinstatement of his F-1 status.

However, according to regulations in place in 1984, an INS district director did not have the authority to reinstate an alien's F-1 nonimmigrant status, unless the director first confirmed that the alien had never worked off-campus without authorization. *See* 8 C.F.R. § 214.2(f)(12)(1)(D)(1984). The applicant had worked off-campus without authorization throughout his years as an undergraduate student and during the period that followed.[7] Thus, the INS' annotation reinstating F-1 status on the applicant's Form I-20 ID had no legal effect and the applicant's F-1 nonimmigrant status was not reinstated in 1984. *See also* [redacted] *v. INS*, No. C01-4035 SI, 2002 WL 31298854 (N.D. Cal. Oct. 10, 2002)(even though INS had stamped Mr. [redacted] passport with temporary proof of lawful permanent residence and had issued him notice that his application for lawful permanent resident status had been approved, the court held that INS had never adjusted [redacted] status because federal statute mandated that his application for lawful permanent residence be denied and the court held that the temporary proof of lawful resident status stamped in [redacted] passport had no legal effect.)

The applicant presented an additional, completed Form I-20 A-B to Texas Woman's University (TWU), Denton, Texas, and to INS as an F-1 transfer student in lawful status to continue his graduate studies at TWU.[8]

The evidence in the record that the applicant completed the Form I-20 A-B for submission to INS while at TWU in 1986 includes the following: copies of pages 3, 4 and 8 of this form, completed and signed by the applicant and by the DSO at TWU on February 4, 1986 and February 5, 1986, respectively. *See* Exhibits 3 and 4, copies of pages of the Form I-20 A-B; note

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[7] When making his request for reinstatement of F-1 status, the applicant must have stated to the Dallas District Director, or the INS officer acting on the director's behalf, that he had never worked off-campus without authorization.

[8] On the Form I-20 A-B, in which the applicant requests a certificate of eligibility as an F-1 student, INS instructs the applicant at page 2 and page 8 that INS officials will use the applicant's statements and all information as presented on that form to determine his eligibility for the benefits sought on this form. The record indicates that on the form, the applicant presented himself to INS as an F-1 transfer graduate student in lawful status. This form and the claims which the applicant made on the form are discussed at greater length in the pages that follow.

that some pages were completed during February 1986, and others are blank samples of remaining pages of that form, having a revision date of May 1, 1983. Also, the record contains a printout from the INS Student/School System electronic database which indicates that while enrolled in a master's degree program at TWU the applicant completed the student sections of the Form I-20 A-B, he had the DSO at TWU complete the school sections of this form on his behalf indicating that his expected graduation date would be May 1987, and he had the completed form submitted to INS on his behalf.

The AAO notes that INS created entries in the Student/School System database only after the foreign student and his or her college or university submitted the fully completed Form I-20 A-B Certificate of Eligibility for Nonimmigrant (F-1) Status presenting the student as an F-1 nonimmigrant student in lawful status to INS. In 2003, this database was replaced with a new electronic database for tracking nonimmigrant students in lawful status in the United States. The applicant has suggested through counsel that there is no evidence in the record: that the Form I-20 A-B completed by him and by TWU in 1986 was ever submitted to INS; and that he signed and completed the entire form. Thus, this office would note again that the printout in the record from the Student/School System database confirms that the INS received the completed Form I-20 A-B on which the applicant represented to INS that he was an F-1 transfer student in lawful status. Further, the form itself instructs the student and the school that the completed form was to be submitted to INS, except for pages 3, 4 and 8. The student was to retain these pages in his own records to use, among other things, as a form of documentation that he was an F-1 transfer student in lawful status. In his brief dated December 11, 2008, the applicant indicated that he had only pages 3, 4 and 8 of that completed form in his records. This also corroborates indirectly that the TWU DSO followed the instructions on that form and, after the applicant had certified that all the representations on the form were correct, the appropriate pages of that form were submitted to INS, and the applicant retained on pages 3, 4 and 8 as his own record of most of the information submitted to INS on that form. The DSO submitted the other pages of the form that INS officials might use them to determine, for instance, whether INS should interview the applicant concerning the certifications that he made to INS on that form such as those relating to a request to transfer as an F-1 student in lawful status, or whether INS should accept the form and allow the applicant to receive any benefits which flow from that form without further questioning of the applicant. *See* 48 Fed. Reg. 14,575 (April 5, 1983)(which confirms that INS reviewed the Form I-20 A-B to determine if the student needed to be questioned regarding the accuracy of representations made on the form such as any representations that he was entitled to transfer as a lawful F-1 student, and which makes clear that if the foreign student had not signed the student certification on the Form I-20 A-B, which includes the student's certification that **all** information on the form is correct, not just the information listed by the student, INS officials would not have accepted the form.)

To summarize, the applicant presented himself to INS, to UTD and to TWU as an F-1 student in lawful status on the Forms I-20 A-B which he filed with INS during the statutory period. The applicant also requested reinstatement of his F-1 status during the statutory period. However, even though the record demonstrates: that INS annotated his Form I-20 ID to indicate that on November 2, 1984 his F-1 status was reinstated; and that INS accepted the applicant's Forms I-20 A-B, the preponderance of the evidence demonstrates that the applicant had no lawful status throughout the statutory period. That is, INS had no authority to reinstate the applicant's F-1

status after, for example, he had worked off-campus without authorization during his undergraduate career. Thus, the AAO finds that any INS action taken during the statutory period to reinstate the applicant's F-1 status or to confirm that status, such as by accepting the Forms I-20 A-B, had no legal effect. Also, the record demonstrates that the applicant's unlawful status was known to the government prior to January 1, 1982.

Thus, the applicant has overcome the director's basis of terminating his temporary resident status as set forth in the November 15, 2007 notice to terminate.

In the notice to terminate, the director addressed what appeared to him to be a sufficient basis for terminating the applicant's temporary resident status. As such, the director did not go on to address whether classified evidence in the record also warranted a finding of inadmissibility as the Texas Service Center Director had indicated in his April 10, 1990 decision to terminate the applicant's temporary resident status.[9] This office will not address this issue here either as other evidence in the record demonstrates that the applicant is not eligible for temporary resident status. On appeal, counsel has suggested that any decision by USCIS to forego an analysis of whether classified evidence in the record warrants a finding of ineligibility and/or inadmissibility is an indication that USCIS has determined that this classified information is not sufficient to form the basis of such a finding. Counsel is not correct. In this matter, grounds for dismissal exist which do not entail relying upon any classified information. Thus, the AAO has chosen to resolve this matter based on these grounds that it might avoid infringing upon the confidentiality of the classified information in the record.

An application or petition that fails to comply with the requirements of the law may be denied and temporary status based on that application may be terminated by the AAO even where the director has not identified such basis for denial in the decision of denial or notice to terminate. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(which notes that the AAO reviews decisions on a *de novo* basis).

The regulation at 8 C.F.R. § 103.2(b)(16)(i)(2001), formerly 8 C.F.R. § 103.2(b)(3)(i)(1989), states:

> If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section.

Section 212(a)(6)(C) of the Act provides in pertinent part:

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[9] In issuing that decision, the service center director did not inform the applicant of the derogatory information that formed the basis of his decision, as that information remains classified.

> 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.

According to 8 C.F.R. § 245a.2(u)(1), the temporary resident status of an alien may be terminated upon the occurrence of any of the following:

(i) It is determined that the alien was ineligible for temporary residence under section 245A of this Act;
(ii) The alien commits an act which renders him or her inadmissible as an immigrant, unless a waiver is secured pursuant to § 245a.2(k)(2).

Section 245A(a)(4)(A) of the Act requires an alien to establish that he is admissible as an immigrant to the United States.

Under section 245A of the Act, the director's determination of the applicant's eligibility is not a discretionary determination. It is a determination of statutory eligibility.[10] The applicant's eligibility shall be determined based on information contained in the record of proceeding which is disclosed to the applicant. *See* 8 C.F.R. § 103.2(b)(16)(ii). An exception to this requirement is that a director may base a determination of statutory ineligibility in whole or in part on classified information that is not disclosed to the applicant; however, the director may only do so in accordance with 8 C.F.R. § 103.2(b)(16)(iv).

This office informed the applicant in the May 5, 2008 Notice of Derogatory Information that according to an unclassified FBI report dated April 30, 2008 in the record, FBI Agents from the Dallas, Texas office interviewed the applicant on June 16, 1989. During that interview, the applicant volunteered to the FBI Agents that his father had died in 1987 and that he left the United States at that time to return to Iran for his father's funeral. However, on the applicant's Form I-687, Application for Status as a Temporary Resident (Under Section 245A of the Immigration and Nationality Act), which the applicant signed under penalty of perjury on May 2, 1988, the applicant stated at item 16 that, at the time that he completed that form, August 18, 1979 was the date of his most recent entry into the United States. At item 35, the applicant stated that he had never exited the United States since January 1, 1982.

Further, on November 4, 1988, when an immigration officer interviewed the applicant regarding his responses on the Form I-687, the applicant specified under oath that August 18, 1979 was the date of his most recent entry into the United States. He also testified that he had never departed the United States between January 1, 1982 and the date of his November 4, 1988 interview.

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[10] The applicant suggested through counsel in his January 13, 2009 brief that USCIS might grant an applicant temporary resident status based on public policy considerations and various other discretionary grounds. As his authority, he referred to guidance for U.S. consular officers set forth in the U.S. State Department *Foreign Affairs Manual*, a manual that is not binding on USCIS. The applicant's suggestion is misplaced. As stated here, USCIS shall only grant temporary resident status to those who meet all the statutory requirements of that benefit.

On the Form I-687, the applicant confirmed at item 21 that his father died during 1987. Also, the record contains a certified copy of the applicant's father's death certificate with certified translation into English which confirms that the applicant's father died on May 30, 1987.

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).

The regulation at 8 C.F.R. § 245a.2(h) provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if at the time of filing the application:

> (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 through the date the application for temporary resident status is filed, 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.

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

> 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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> . . .
>
> (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.

The preponderance of the evidence indicates that the applicant presented fabricated testimony and fabricated written statements to the INS, now USCIS, regarding when he was in the United States for the sake of convincing INS, now USCIS, that he resided continuously in the United

States and that he was continuously physically present in the United States during the relevant periods. The preponderance of the evidence indicates that the applicant willfully misrepresented material facts in an effort to procure the status of temporary resident in the United States when he testified that he did not exit the United States during the statutory periods.

When the applicant presented fabricated written statements and fabricated testimony that he had not exited the United States during the statutory periods, he cut off material lines of inquiry regarding whether he met the regulatory requirements of continuous unlawful residence and continuous physical presence in the United States, and regarding whether he provided material misrepresentations to U.S. officials in order to reenter the United States as a nonimmigrant after he exited in 1987.

Any attempt to misrepresent the period of time during which he was present or absent from the United States and to misrepresent when he made entries into the United States and the manner by which he entered and reentered this country cast doubt not only on the reliability of the applicant's testimony and written statements regarding when he was present in the United States during the statutory periods, but also cast doubt on all other evidence in the record and on the truth of all factual assertions made by the applicant and by counsel.

In *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), the Board states:

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.
>
> It is incumbent upon the petitioner 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 Id.*

On May 5, 2008, this office notified the applicant of the derogatory information in the April 30, 2008 FBI report and provided him with an opportunity to respond and to resolve any inconsistencies or defects in the record by providing independent, objective evidence as outlined above before rendering a final decision.

In response to the Notice of Derogatory Information, the applicant asserted through counsel that he did not tell FBI Agents that he had exited the United States during 1987, when they interviewed him in June 1989. He also indicated through counsel that if he did tell FBI Agents that he departed the United States in 1987, it was only because he was not completely awake when speaking to the FBI Agents; because of this, he may have misunderstood a question posed by the agents and given a response that indicated that he departed the United States during 1987, even though he had not.[11]

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[11] The applicant asserted through counsel that the FBI indicated in its report that he was sleeping when the agents arrived at his home on June 16, 1989 at 9:50 a.m. This office would note that the FBI report does not in fact make any reference to whether the applicant was awake or asleep when the agents arrived.

The applicant also indicated through counsel that Muslims bury their dead one day after the death, and as such it would not have been possible for him to travel from Texas to Iran in time for his father's funeral. In addition, he indicated through counsel that his passports and his graduate school records for the 1986-1987 and the 1987-1988 school years help to establish that he had not exited and re-entered the United States during 1987. The applicant also attested in an affidavit dated May 20, 2008 that his family did not inform him of his father's death until approximately two months after he died. In keeping with this point, he indicated through counsel that he could not have attended his father's funeral because so much time had passed before he learned of the death. Finally, the applicant indicated through counsel that the FBI report dated April 30, 2008 should not be admitted into evidence because it is unreliable hearsay and because it is not relevant in that even if the applicant did tell FBI Agents that he exited the United States during 1987, that statement is not relevant as long as he did not in fact exit during 1987.

The applicant also indicated that his graduate school transcripts help to demonstrate that he did not exit the United States at the time of his father's death because these transcripts indicate that he was enrolled in graduate school and that he was obligated to work as a teaching assistant who instructed graduate students, during the 1986-1987 and the 1987-1988 school years. First, the AAO notes that, as a general rule, a graduate student is able to leave his or her studies and teaching obligations to attend to family emergencies and then return to complete the term. More importantly, the applicant's suggestion that he was tied down by graduate studies and teaching obligations at his university at the time of his father's death such that he was not free to return to Iran to be with his family contradicts the information on his Graduate Assistantship Appointment contracts and their corresponding cover letters in the record. These contracts and letters specify that the applicant had been released or was within one day of being released of any academic or teaching obligations by the time of his father's May 30, 1987 death.

The Graduate Assistantship Appointment contract dated August 20, 1986 states that the applicant was obligated to work as a teaching assistant providing instruction to graduate students from September 1, 1986 through May 31, 1987. The applicant signed this contract. The cover letter dated August 28, 1986 attached to this contract on TWU, Graduate School, letterhead stationery and signed by [redacted], Provost, states that the applicant's teaching assistant contract "will commence on the first day of classes and will continue through the last day of final examinations. [The applicant's] holiday and break schedule will be the same as that of the faculty." The Graduate Assistantship Appointment contract dated August 28, 1987 states that the applicant was obligated to work as a teaching assistant providing instruction to graduate students from September 1, 1987 through May 31, 1988. The applicant signed this contract. The cover letter dated September 1, 1987 attached to this contract on TWU, Graduate School, letterhead stationery and signed by Leslie [redacted], Provost, states that the applicant's contract "will commence on the first day of classes and will continue through the last day of final examinations. [The applicant's] holiday and break schedule will be the same as that of the faculty."

Thus, evidence in the record contradicts any assertion that the applicant's transcripts and work contracts with TWU help to demonstrate that the applicant did not exit or could not have exited the United States at the time of his father's death in 1987. The TWU transcripts, work contracts and cover letters make clear that the applicant was not constrained by ongoing work obligations as a teaching assistant, by his graduate level classes and by research assignments at the time of his

father's death on May 30, 1987. Rather, his obligations to the university had either completely finished or he had at most one more day of work to be followed by three months of vacation at the time his father died.[12] These inconsistencies in the applicant's efforts to establish that he did not or could not have returned to Iran at the time of his father's death cast further doubt on the applicant's claim that he did not exit the United States in 1987 when his father died, as he had told FBI Agents in 1989.

The applicant stated through counsel that the FBI report in the record is not reliable and that he did not tell the FBI Agents that he returned to Iran in 1987 at the time of his father's death. Yet, he also indicated that he may have told the FBI Agents that he returned to Iran in 1987; and, if he did so, it was only because he had only just awakened when the FBI Agents were questioning him, and as a consequence, he had misunderstood a question posed by the FBI.[13] Thus, the applicant has made inconsistent claims, first, that he never told the FBI that he exited the United States during 1987, and, second, that he may have told the FBI that he exited the United States during 1987.

This contradiction in the applicant's explanations regarding why on all his written statements and oral testimony provided to immigration officials he claimed to have never left the United States during the statutory period, when he had volunteered to FBI Agents that he left the United States in 1987 to return to Iran casts doubt on his claim that it is the statements made to immigration officials that are accurate and the statement made to the FBI that is not accurate. This in turn casts doubt on his claims that he resided continuously and was continuously physically present in the United States throughout the statutory periods.

As to any suggestion that the FBI report is not reliable, the AAO would underscore that the FBI did not raise the issue of whether the applicant had exited and re-entered the United States during

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[12] It is noted incidentally that the start date for the contracts are September 1, 1986 and September 1, 1987; yet, the cover letters for both contracts inform the applicant that he has until September 11, 1986 and September 15, 1987, respectively, to accept, sign and submit the contracts. The second cover letter was not even written until September 1, 1987. Thus, it appears that the Provost used September 1 and May 31 each year as the theoretical outlying parameters of the contract obligations, rather than as precise start and end dates. It is also noted that at the graduate level, classroom instruction and in turn teaching obligations, other than grading, tend to finish well before exams begin. Also, professors tend to avoid placing exams on the final day of an exam period which at this university would have been May 31, at the latest. Thus, the record suggests that the applicant may well have been finished with his studies and teaching obligations before May 30, 1987. In any event, the record indicates that the applicant had at most one day of work remaining when his father died and that this was followed by three months of summer vacation.

[13] It is noted incidentally that the FBI report specifies that the FBI Agents arrived at the applicant's home on June 16, 1989 at 9:50 a.m. The agents did not arrive during the middle of the night. Further, the applicant worked selling ice cream from a truck during that summer vacation. He did not have a job at which he needed to work during the night or during late hours. In any case, it is not reasonable to suggest that being tired would prompt an individual to volunteer that he had exited the United States, if he had not.

the statutory period when interviewing him in June 1989. The FBI Agents conducted an interview to ask the applicant questions about his pro-Iranian government/anti-U.S. government activities and related concerns. The comment made to the FBI that he exited the United States to return to Iran in 1987 was the applicant's own spontaneous statement, which he volunteered while being asked to discuss other matters. The spontaneous, voluntary nature of the statement serves to reinforce the finding that it is a reliable statement.

Specifically, an FBI Agent asked the applicant why he had not left the United States [and moved back to his own country] in 1987, as he had told the FBI that he would, when FBI Agents spoke to him in 1985. In response, the applicant explained that he had run out of money and that is what forced him to change plans. The applicant then began spontaneously volunteering the expenses that he had. He indicated that he had to cover subsequent schooling costs and the cost of returning to Iran after his father's death in 1987. He further explained that he had not received financial aid from his family since 1984 and that the government of Iran did not provide him with financial assistance. This office notes that the applicant's suggestion made through counsel that he may have volunteered that he left the United States in 1987 because he misunderstood a question posed by the FBI contradicts the record. The applicant had responded to the FBI question by explaining that he had to change plans because he ran out of money. It was after this, without being prompted by any additional question, that the applicant volunteered that he had exited the United States during 1987. The contradictions between the record and the applicant's various explanations meant to show that the statement made to the FBI about exiting in 1987 is not accurate cast further doubt on the applicant's claim that he resided continuously in the United States during the statutory period.

This office would also note that the applicant had an incentive to withhold from immigration officials that he departed the United States during the statutory period because if, for example, he chose to remain in Iran with his family from May 31, 1987 until late August 1987, when his studies and teaching obligations were about to re-commence, he is not eligible for temporary resident status.[14] *See* 8 C.F.R. § 245a.15(c)(i). Yet, the applicant did not have any clear incentive to withhold information relating to his 1987 exit and re-entry from the FBI Agents because they presented themselves as being interested only in his political activities carried out on behalf of Khomeini/Iran.

The applicant also indicated through counsel that he could not have departed Texas and attended his father's funeral in Iran because Muslim tradition requires that a Muslim be buried one day after the death. This office finds the applicant's attempt to use Muslim tradition regarding burials to support the claim that he did not exit the United States during 1987, as he stated to the FBI, further undermines the credibility of his claim for the following reason. While it is part of Muslim tradition to endeavor to bury a person as soon as possible after death because Muslims do not approve of embalming a corpse, it is also true that Islamic funeral rites call on family members to gather and observe a three-day mourning period after a Muslim dies. *See* "Islamic

[14] The AAO notes that on the Form I-687 the applicant specified that from September 1986 through May 2, 1988, the date that he signed that form, he had only one job, that of teaching assistant at TWU. This serves to further corroborate that the applicant had no obligations to tie him down in Texas from the end of May 1987 through the beginning of September 1987.

Funeral Rites; care for the dying, funeral prayers, burial and mourning," an article written by [redacted], author of [redacted] (2003), and posted at http://islam.about.com/cs/elderly/a/funerals.htm, accessed January 26, 2009. *See also* page 3 of the Muslim Funeral Guide posted at the Islamic Information Organization website, a website developed by the Muslim Association of Hawaii, http://www.iio.org /janazah/bur_1299.pdf, accessed January 26, 2009. Likewise, according to [redacted], a senior lecturer and Islamic scholar at the Islamic Institute of Toronto, Muslims who have lost a family member are called upon to observe a bereavement period of three days following the person's death. *See* http://www.islamonline.net/servlet/Satellite?page name=IslamOnline-English-Ask_Scholar/[redacted], accessed January 26, 2009. This point is further developed in the article, "Muslim customs surrounding death, bereavement, postmortem examinations and organ transplants" by [redacted] as published in the *British Medical Journal* (BMJ), a subsidiary of the British Medical Association, which states that within Muslim families, the initial bereavement period lasts three days following the death of the loved one, during which prayers are recited, almost continuously in the home. *See* http://www.bmj.com/cgi/content /full/309/6953/521 (which requires the completion of the free registration form for non-subscribers to view the complete article), accessed January 26, 2009. Thus, an aspect of the Muslim funeral rite which appears inseparable from the Muslim family's effort to bury the deceased as soon as possible following the death is the family's obligation to gather for three days of mourning and prayer. The applicant appears to have artificially separated the Muslim family's obligation to make every effort to bury the deceased within twenty-four hours of the death from the obligation of having the family gather in mourning for three days following the death in order to support the claim that he could not have returned to Iran in 1987 for his father's funeral, even though he volunteered to the FBI that he did.[15]

The applicant also indicated that he could not have attended his father's funeral because his family did not inform him of his father's death until two months after he died. The applicant did not provide any evidence to support this claim, such as an affidavit from a family member confirming and explaining the decision to not contact the applicant regarding the death. The applicant also did not provide an explanation of his own as to why his family would have waited two months to inform him of the death even though it was his father who had died, and even though he was a 30 year-old man and a graduate student beginning his summer vacation at the time of the death. The AAO finds that the applicant's unsupported assertion that his family waited two months before informing him of his father's death is not independent, objective evidence such that it might overcome the evidence in the record that he returned to Iran at the time of his father's death, and that it is not probative.

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[15] The AAO also notes that the applicant was living in the Dallas/Fort Worth area at the time of his father's death and his family was in the Esfahan area of Iran. The average flight time between Dallas/Fort Worth and Tehran, Iran is 14 hours and 35 minutes, and Esfahan is less than 300 miles drive from Tehran. *See* http://www.convertunits.com/time/from/tehran/to/dallas and http://www.state.gov/r/pa/ei/bgn/5314.htm, accessed January 26, 2009. Thus, it seems that it would have been possible to travel to his family's home in under twenty-four hours. Also, it certainly would have been possible to join the family for the traditional three-day grieving period which forms a part of the Muslim funeral rite.

The applicant also suggested through counsel that if he had re-entered the United States in 1987, after exiting to be with his family after his father died, there would be a stamp in his passport to indicate this. This office finds that the absence of a 1987 U.S. entry stamp in a passport which the applicant provided is not probative evidence that the applicant did not make an entry in 1987.[16] The absence of such a stamp in the passport submitted into the record is not independent, objective evidence sufficient to overcome the evidence in the record that the applicant returned to Iran during 1987 and sufficient to overcome the inconsistencies in the applicant's various attempts to reconcile his statement that he returned to Iran in 1987 with the rest of the evidence in the record, and it is not probative evidence.

Finally, the applicant indicated through counsel that even if he did tell FBI Agents in 1989 that he exited the United States during 1987, such a statement would not be relevant. The applicant suggested through counsel that the only issue that is relevant is whether he did in fact exit in 1987. The applicant further indicated through counsel that the FBI report should not be considered probative evidence, but should be rejected as unreliable hearsay. Such suggestions are without merit.

First, the AAO would underscore that the Board accepted into evidence *In Re Glendi Gomez-Gomez*, 23 I&N Dec. 522 (BIA 2002), a document completed by a government official who did not appear at hearing and who did not otherwise take steps to authenticate the document. The Board held that the document on its own was sufficient to demonstrate *prima facie*, rebuttable evidence of the truthfulness of the information on the document. *Id.* The Board based its holding in part on the following: there was no independent evidence in the record which contradicted the information on the document; there was no evidence in the record that the

[16] There are several possible scenarios in which the applicant would have no entry stamp in his passport, even though he had made an entry in 1987. For example, if he had exited and then re-entered the United States without inspection, he would have no entry stamp. Also, Iran currently issues and in past years, including 1987, issued more than one type of passport. For example, Iranians may obtain service (or official) passports in addition to ordinary passports such that they have more than one passport on which to travel. *See* e.g., http://www.fmprc.gov.cn/chn/lsfw/qzjj/zlbg/P020061027486385475323.pdf, accessed January 26, 2009 (which specifies that during the 1980s China entered into an agreement with Iran to allow those with Iranian service and diplomatic passports the right to enter China without visas.) *See also* http://www.state.gov/r/pa/ei/bgn/5314.htm (where the government of Indonesia states that those holding Iranian service or diplomatic passports do not require visas to enter Indonesia, and that those holding ordinary Iranian passports may apply for a visa upon entry), accessed January 26, 2009. *See also* www.iranair.se/english/Travel-Information-Manual.php; http://www.mfa.gov.ua/iran/en/publication/content/41.htm, accessed January 26, 2009. (Electronic screens at these web addresses also make reference to holders of service and diplomatic passports issued by Iran.) (The FBI report dated April 30, 2008 indicates that the FBI has evidence that the applicant was involved in pro-Khomeini/pro-Iran activities at a national level. The AAO would note incidentally that Iran may have issued service passports to those who carry out such work.) In sum, the lack of an entry stamp in an ordinary passport is not probative evidence that the applicant remained in the United States throughout 1987. The applicant may, for example, have a service passport or another alternate passport on which to travel, he may have entered in 1987 without inspection, etc.

information on the document was obtained by coercion or duress; and that the document, (completed by a government official in the course of carrying out his official duties), although it is hearsay, is inherently trustworthy and admissible as evidence. *Id.* The Board found that the admission of the document into evidence would not be fundamentally unfair. *Id.* The Board specifically held that the testimony of the official who completed the document was not needed to make the document and the information listed in the document probative. *Id.* In sum, the Board held that the document could be submitted into evidence and that on its own was sufficient to shift the burden of proof to the respondent to demonstrate that the information on the document was not accurate. *Id.*

Further, in that matter, the Board found that such documentary, hearsay evidence was sufficient to find the respondent deportable, a finding that requires the government to meet a much higher burden of proof than is required in the instant matter. *See id.* That is, to find an individual deportable the government must provide clear, unequivocal and convincing evidence of deportability. *Id.* In the instant matter, when the evidence demonstrates that it is *more likely than not* that an applicant, for instance, willfully misrepresented a material fact such as when he was or was not in the United States during the statutory periods in order to gain a benefit under the Act, the applicant will be found inadmissible and ineligible for temporary resident status.

In the present matter, there is no evidence or even an assertion that the information in the FBI report was obtained by coercion or duress. The FBI report is detailed. There is no independent evidence in the record which contradicts the information in this report. Indeed, the previous discussion demonstrates that the applicant's attempts to rebut the truthfulness of the information in this report themselves proved to be filled with inconsistencies and only serve to cast doubt on any assertion that the information in the FBI report regarding the applicant's 1987 exit from the United States is not accurate. The FBI report in the record was completed by a government official at the FBI in the course of carrying out his official duties and is inherently trustworthy. It is sufficient to support a rebuttable finding that the applicant exited the United States during 1987 after his father died. The applicant was provided the opportunity to overcome this finding but has failed to do so.

This office also notes that where a law enforcement agency, such as the FBI, a municipal police department or similar agency redacts certain information from one of its reports including the names of any officers involved in the matter in order that the report might be suitable for public use, these measures amount to necessary procedures for a law enforcement agency and in no sense undermine the reliability of the resultant reports, contrary to counsel's assertions.

Regarding the applicant's credibility as to his claims made in relation to immigration matters, taken as a whole, the AAO notes that the applicant has made many contradictory and each in turn, self-serving claims to the INS since filing for F-1 status, since filing for reinstatement of that status, since filing the Form I-687 and even since filing the instant appeal. For instance, the applicant has claimed throughout this appeal process: that he never requested that his F-1 status be reinstated; that, as such, USCIS must find that he had no lawful status throughout the statutory period; and that therefore he is eligible for temporary resident status. Yet, on December 11, 2008, the applicant submitted into the record documentary evidence from his own records that he had requested reinstatement of his F-1 status from the Dallas District Office, that he responded to

a request for further evidence in support of that reinstatement request with a letter dated August 1, 1984 which he wrote and signed, and that INS annotated his Form I-20 ID to indicate that his F-1 status had been reinstated, a document that he has retained for nearly twenty-five years. Also, the AAO notes that when the applicant enrolled in graduate programs in Texas during the mid-1980s, he presented himself to INS, to UTD and to TWU on the Form I-20 A-B as a nonimmigrant F-1 student. Yet, as stated earlier, the applicant had lost his lawful F-1 status prior to this while an undergraduate student in Oklahoma and he had never effectively reinstated that status as INS did not have authority to reinstate the F-1 status of aliens who work off-campus without authorization. *See* 8 C.F.R. § 214.2(f)(12)(1)(D)(1984). The record suggests that the applicant made these misrepresentations for various self-serving purposes such as to prompt USCIS, formerly INS, to allow him to adjust to temporary resident status; to issue him a certificate of eligibility as a nonimmigrant F-1 transfer student in lawful status and create an official record that he was in lawful status; as well as to prompt TWU to enroll him, to employ him as a teaching assistant and to allow him to earn a master's degree, based in part on the belief that he was a nonimmigrant, residing lawfully in the United States. Such inconsistencies in the record cast further doubt on the reliability of all the applicant's statements regarding immigration matters and on all the statements and evidence presented by the applicant.

The AAO finds that based on the serious doubt cast on the applicant's claim that he did not depart the United States during the statutory periods and cast on the remaining evidence of record, as set forth above, the applicant has failed to establish by a preponderance of the evidence that he resided continuously and was physically present in the United States throughout the statutory periods. He is therefore not eligible for temporary resident status under section 245A of the Act. His appeal of the decision to terminate his temporary resident status is dismissed based on this ground.

The AAO also finds that the applicant willfully misrepresented a material fact when he testified and presented written claims to immigration officials that he did not depart the United States during the statutory periods and that he did so in order to procure a benefit under the Act. He is therefore inadmissible, and not eligible for temporary resident status under section 245A of the Act. His appeal of the decision to terminate his temporary resident status is dismissed based on this ground as well.

As noted earlier, an application that fails to comply with the requirements of the law may be denied and temporary status based on that application may be terminated by the AAO even where the director has not identified such basis for denial in the decision of denial or notice to terminate. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(which notes that the AAO reviews decisions on a *de novo* basis).

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.

8 C.F.R. § 214.2(f)(12)(1984) states that a district director may consider reinstating to F-1 student status an F-1 student who has violated his or her conditions of stay only if the student has not been employed off-campus without authorization. *See* 8 C.F.R. § 214.2(f)(12)(1)(D)(1984).

As stated in the December 31, 2008 Notice of Derogatory Information, the applicant submitted evidence with the brief dated December 8, 2008 that indicates the following: During 1984, he filed a request for reinstatement of his F-1 nonimmigrant status with the Dallas District Office. The record indicates that the applicant wanted his F-1 status reinstated that he might regain lawful status in the United States, after having violated that status when, for instance, he failed to enroll in classes during Fall Semester 1983. The applicant also wanted his F-1 status reinstated that he might pursue graduate studies as an F-1 transfer student. In response to this filing, an immigration officer at the Dallas District Office made a request that the applicant provide information regarding why he had not enrolled in classes during fall 1983. The applicant replied with a letter which he signed and dated August 1, 1984 on which he provided an explanation for not having enrolled. After this, Dallas District Office immigration officer #38 made annotations on the applicant's Form I-20 ID, the F-1 nonimmigrant student's identification document which must be kept in the student's possession, to indicate that on November 2, 1984 the Immigration and Naturalization Service (INS) reinstated his F-1 status for the duration of that status. That is, his status was reinstated for as long as he maintained the terms of lawful F-1 student status. On the same date, November 2, 1984, Dallas District Office immigration officer #38 issued the applicant a replacement Form I-94, Departure Record, bearing admission number [redacted] and listing him as an F-1 nonimmigrant student for the duration of that status. The evidence which the applicant submitted with the December 2008 brief also indicates that he presented this Form I-20 ID annotated to show that his F-1 status had been reinstated together with the replacement Form I-94 in February 1986 to Texas Woman's University (TWU) when he requested that TWU complete the Form I-20 A-B, Certificate of Eligibility for Nonimmigrant (F-1) Student Status – For Academic and Language Students on his behalf to present him to INS as an F-1 transfer student in lawful status who has admission number [redacted]

Yet, in the brief dated September 10, 2007, the applicant stated through counsel that INS never reinstated his student status, and in the brief submitted on December 14, 2007, the applicant stated through counsel that he has never made a request to reinstate or extend his lawful F-1 student status. In both briefs, the applicant claimed that based on these misrepresentations USCIS should find that he never regained lawful status during the statutory period, after he began working without authorization prior to January 1, 1982, and that therefore he should be allowed to adjust to temporary resident status.

Also, on the Form I-687, Application for Status as a Temporary Resident (under Section 245A of the Immigration and Nationality Act), which the applicant signed under penalty of perjury on May 2, 1988, he stated at item 15 that he did not have any other records with INS at the time that he completed that form, even though he knew that an INS record had been created for him as: he had filed a request to reinstate his F-1 status with the Dallas District Office in 1984; he had received correspondence from INS related to that request; he had responded to the request by writing a letter to the INS officer in charge of his case; and several months later, in response to

his request, this immigration officer annotated his Form I-20 ID to indicate that INS had reinstated his F-1 status and issued him a replacement Form I-94 which lists him in F-1 status.

All this was set forth for the applicant in the December 31, 2008 Notice of Derogatory Information. After considering the applicant's January 13, 2009 response to that notice, the AAO finds that a preponderance of the evidence shows that when the applicant made statements to USCIS and/or to INS to indicate: that he had never made a request to reinstate his F-1 status, that INS had never annotated his Form I-20 ID to indicate that his F-1 status was reinstated, and that he had no other records with INS when he filed the Form I-687, he made material misrepresentations that were willful and were made to help him procure temporary resident status. The AAO also notes that each misrepresentation on its own is material and willful, and each was made by the applicant to help him procure a benefit under the Act.

In the brief dated December 8, 2008, the applicant indicated through counsel that on December 2, 2008 he "discovered" evidence that INS reinstated his F-1 status on November 2, 1984. Thus, he suggested that from the period in May 1988 when he completed and filed the Form I-687 until December 2, 2008, he had no memory of this previous record/request filed with INS, nor of the INS' decision in that proceeding and that his several previous misrepresentations related to this record/request were not willful. Yet, the preponderance of the evidence demonstrates that his misrepresentations: that he had no previous INS record, that he never filed a request for reinstatement, and that INS never reinstated his F-1 status were willful and not inadvertent for several reasons. First, obtaining an annotation on the Form I-20 ID that INS had reinstated his F-1 status was a time-consuming and involved process. The applicant first had to file the request for reinstatement with the Dallas District Office. Later, he received at least one request for additional information. He had to respond to the request by writing a letter of explanation regarding his failure to enroll in classes in fall 1983. Several months after this, he had to present his Form I-20 ID that the INS officer might annotate it to indicate that INS had reinstated his F-1 status. Further, the record shows that for years the applicant kept: the Form I-20 ID annotated to show that INS had reinstated his F-1 status, as a lawful F-1 student would be required to do; the replacement Form I-94 issued at the same time by the same INS officer on November 2, 1984; and a copy of his response to a request for additional information regarding his failure to enroll in fall 1983. Then, over the years whenever the documents might help him, the record shows that the applicant was aware that he had the documents and was aware of where he could retrieve them so that he might submit them to officials.

For example, the record indicates that in 1986 the applicant utilized this Form I-94 and Form I-20 ID showing reinstatement of F-1 status when requesting that the Form I-20 A-B be completed on his behalf by TWU. That is, during February 1986, the Designated School Official (DSO) at TWU completed the Form I-20 A-B to indicate that the applicant had presented proof to the DSO that he was an F-1 transfer student in lawful status having the admission number listed on the Form I-94 issued on November 2, 1984. The record indicates that the Form I-20 ID annotated to show that his F-1 status was reinstated on November 2, 1984 would have been his only proof at that point which presented him as being in lawful status despite having failed to enroll during Fall Semester 1983. Thus the record indicates that the Form I-20 ID would have been the proof that the applicant presented to the DSO. Also, the DSO entered the admission number from his

replacement Form I-94 on his Form I-20 A-B, indicating that the applicant also gave the DSO this second document issued to him on November 2, 1984.

Further, in 1988, when applying for temporary resident status, the applicant produced for the record the replacement Form I-94 issued on November 2, 1984. It is equally important to note that at this time, he did not produce the Form I-20 ID annotated on November 2, 1984 to show that INS reinstated his status, or any other documents which might alert the INS officer to the fact that he made a request for reinstatement of F-1 status in 1984 and that that status was reinstated, disclosures which would lead to inquiries that would likely result in his application for temporary resident status being denied.[17]

Moreover, the record shows that the applicant backed down from his earlier statements and immediately became willing to admit: that he had requested F-1 reinstatement, that INS had annotated his Form I-20 ID to indicate that it had reinstated his F-1 status, and that he had documentation of these things, only after the AAO issued the November 24, 2008 Notice of Derogatory Information. This notice points out that the applicant had volunteered that he had never requested nor received any reinstatement of his F-1 status, and that he had no other records with INS; yet, evidence in the record indicates that he made claims that he was an F-1 student in lawful status on his Forms I-20 A-B completed and filed with the INS during the mid-1980s, years after he had fallen out of F-1 status by working without authorization. The AAO then determined that those claims were willful, material misrepresentations that he was in lawful status which rendered the applicant inadmissible. That is, the applicant only made an effort to take back his misrepresentations and be forthcoming about having requested reinstatement and having been granted F-1 reinstatement, when it appeared that he had to do so to create the appearance that during the mid-1980s he sincerely believed that he had lawful F-1 status, but had since learned that the November 2, 1984 reinstatement had no legal effect. It appears that he decided that he had to do this that this office might find him admissible.

Any suggestion by the applicant that the only reason that he is backing down from his earlier misrepresentations now is because the November 24, 2008 Notice of Derogatory prompted him

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[17] Evidence that INS reinstated the applicant's F-1 status would lead to a line of inquiry regarding whether he had lawful status during the statutory period and a line of inquiry regarding whether he made willful, material misrepresentations when requesting reinstatement of his F-1 status. **These points are further developed later in this notice. The AAO notes that a** replacement Form I-94 such as the one presented by the applicant early on in the adjudication of the Form I-687 may be issued based on an alien's demonstration that the entry as an F-1 listed on that form occurred, without more. That is, INS officer #38 could have issued this replacement Form I-94 without making a finding that the applicant had maintained the terms of his F-1 student status or that he had that status reinstated. It was only after the applicant backed down from his claims: that he had no other records with INS; that he had never requested reinstatement; etc. and then presented proof that officer #38 adjudicated a request for reinstatement which he had filed and annotated his Form I-20 ID on November 2, 1984 to show that INS had granted that request, that this office was made aware that the replacement Form I-94 dated November 2, 1984 which the applicant submitted into the record early on in this proceeding was, in fact, issued in conjunction with a request for reinstatement of F-1 status.

to search through, for the first time in this proceeding, all his documents from the statutory period is without merit. Also without merit is the corresponding suggestion that that search led him to "discover" documents related to his request for F-1 reinstatement, which, in turn, caused him to recall, for the first time since at least as far back as May 1988, that: he made this request; that he had documentation of it; and that INS had granted this request for F-1 reinstatement. First, as noted previously, the record indicates that the applicant has remembered that he made a request for F-1 reinstatement and has retrieved documentation of it on each occasion that it seemed it might help him to secure a benefit and has concealed having made this request whenever it seemed it might lead to a denial of a benefit under the Act. The AAO finds as well that the applicant had to review his relevant documentation from the statutory period prior to completing the Form I-687 in 1988 in order to produce evidence from that period such as school records to support that application. Also, the applicant had to review his documents from the statutory period during several other points in this proceeding such as when compiling his response to the May 5, 2008 Notice of Derogatory Information which included, for example, copies of letters and other documents which TWU issued to him during the mid-1980s, the same period: during which his Form I-20 ID was annotated to show INS granted his request for F-1 reinstatement; during which he completed the Form I-20 A-B that presents him as an F-1 transfer student in lawful status while enrolled at TWU; etc.

The preponderance of the evidence indicates that the applicant was aware: that he had made a request for reinstatement of his F-1 status, that INS had annotated his Form I-20 ID to indicate that that status was reinstated, and that he already had a record with INS, when he completed the Form I-687 as well as when he submitted evidence and subsequent statements related to that filing throughout this proceeding. The record also indicates that the applicant has consistently admitted to having knowledge related to this other record with INS, the request for reinstatement, when he thought that doing so would improve his chances of receiving a benefit under the Act and that he has consistently denied such, when he thought that doing so would likely lead to a denial of the benefit sought.

The AAO finds that a preponderance of the evidence indicates that the applicant willfully misrepresented: that he had no other records with INS on the Form I-687 in 1988; that he willfully misrepresented that he never made a request for reinstatement of his F-1 status in the brief submitted on December 14, 2007; and that he willfully misrepresented that he never received INS approval of his request for reinstatement of F-1 status in the brief dated September 10, 2007.

The record indicates that these misrepresentations were material. In *Matter of S—and B—C,* 9 I&N Dec. 436, (BIA 1960)(abrogated as to the issue of *per se* materiality of misrepresentations as to identity; abrogation recognized by *Rahman v. Mukasey*, 272 Fed. Appx. 35 (2d Cir. 2008); note also, this BIA decision ends with the Attorney General's analysis of the decision: *In re: Matter of S— and B—C—* at pages 444-451), the Attorney General determined that a misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to cut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that the alien be excluded. Where the assertion is made that the line of inquiry may well have led to a proper

determination that the alien be found inadmissible or otherwise ineligible, the alien bears the burden of proof in showing that the inquiry would not have done so. *See id.* at 449. In the case of S—, the alien failed to disclose his prior application for a non-immigrant visa and that he had been a member of the Communist Party in Hungary from 1947 through 1956. *Id.* at 445. Later, before a special inquiry officer, the alien admitted his Communist Party membership, but he asserted that his membership was involuntary, and thus not a ground of exclusion or inadmissibility. *See id.* In analyzing the matter, the Attorney General indicated, adopting the reasoning of *Ganduxe y Marino v. Esperdy*, 278 F.2d 565, 567 (S.D., N.Y., 1959), *affirmed sub nom. Ganduxe y Marino v. Esperdy*, 278 F.2d 330 (2d Cir. 1960), *cert. den.* 364 U.S. 824 (1960), that to allow an alien to make a false statement which cuts off investigation into a significant question of eligibility for a benefit under the Act, and then when the false statement is discovered, to consider the alien's eligibility as if no false statement had been made, would amount to an invitation to present misrepresentations to U.S. officials. *See id.* at 446. The Attorney General emphasized that in the case of S— the truthful disclosure of the alien's Communist Party membership in connection with the visa application would likely have led to further investigation of the question of whether his membership was in fact voluntary, noting that in the previous visa application in which the alien did reveal his Communist Party membership, the visa was denied. *Id.* at 450. The Attorney General indicated that while he did not have independent evidence to show that the alien is excludable or inadmissible as one who had voluntarily joined the Communist Party, he had determined that his failure to disclose his Communist Party membership in relation to his visa application is material in that its disclosure may well have led to a finding that his membership in the Communist Party was voluntary and as such he is not admissible. *See id.*

In *Matter of L –D –L –R*, 9 I&N Dec. 623 (BIA 1962) the Board also held that when an alien makes a willful misrepresentation which cuts off a line of inquiry, the misrepresentation is material if an inquiry might have resulted in a denial of the benefit sought. The Board held that any uncertainty that results from the alien's obstruction of the inquiry may be resolved against the alien. *See id.* In that case, when obtaining a visa, the alien misrepresented that he had no arrest history. *Id.* at 623. The Board determined that although the record indicates that the applicant had not been convicted of a crime, his misrepresentation is material because an inquiry into his arrest record may have enabled U.S. officials to confront him such that he might have admitted to committing the crime with which he was charged or he might have provided other information that would make him inadmissible, where the record shows that the alien was found in possession of stolen property, that he was implicated in the theft by the individual who had apparently stolen the property, and where the record indicates that he had admitted to the Mexican police that he committed the crime and he agreed to make and did make restitution for the crime. *Id.* at 626.

In this instance, the applicant cut off the lines of inquiry that would have become necessary if he had provided a truthful answer on the Form I-687 at item 15 stating "yes" he had another record with INS, and if he had not submitted false statements in September 2007 and December 2007 which asserted that he had never made any request for F-1 reinstatement and that INS had never granted his request for reinstatement. If he had been forthcoming throughout this proceeding and stated: that in 1984 he had filed with INS a request for F-1 reinstatement and that INS had granted that request, he would not have cut off questions such as the following: When requesting

reinstatement of his F-1 status, had the applicant made any false statements, written or oral, to INS officials that he had never worked without authorization since entering the United States? Had he been in lawful F-1 status during the statutory period and as such ineligible for temporary resident status?

Regarding the first question/line of inquiry, the regulations in place in 1984 emphasize that when an alien had fallen out of F-1 status and requested reinstatement of that status, the district director first had to determine whether the alien had ever worked off-campus without authorization. If the alien had, the district director did not have the authority to grant the request for F-1 reinstatement. *See* 8 C.F.R. § 214.2(f)(12)(1)(D) (1984). The applicant presented extensive evidence with his application for temporary resident status that he had worked off-campus without authorization for several years prior to 1984, when he requested F-1 reinstatement. Thus, if he had acknowledged throughout this proceeding that he already had a record or filing with INS, that he made a request for reinstatement of his F-1 status in 1984 and that on November 2, 1984, INS officials granted that request, INS and USCIS officials would have needed to question him such that they might determine whether in 1984 he made a willful, material misrepresentation to INS officials that he had never worked off-campus without authorization in order to secure a benefit under the Act, namely reinstatement of lawful F-1 status. Such a misrepresentation would render him inadmissible and thus ineligible for temporary resident status.

The applicant did not submit into the record a copy of his initial request for reinstatement, a copy of any requests for additional evidence that INS may have issued in that matter or other documentation related to that request. He provided only a copy of a letter that he submitted in response to the Dallas District Office request for additional information related to his request for reinstatement/failure to enroll in fall 1983 and proof that INS officials had annotated his Form I-20 ID to indicate that they had reinstated his F-1 status. Yet, it is not necessary to produce documentary evidence of a misrepresentation made in 1984 when analyzing whether he cut off a material line of inquiry. Rather, if the record shows that each or any one of his misrepresentations (that he had no previous records with INS, that he had never filed any request for reinstatement of F-1 status and that INS officials never indicated to him that they had reinstated that status) cut off an inquiry that may well have resulted in the finding that he willfully misrepresented to INS officials in 1984 that he had never worked off-campus without authorization in an attempt to have his F-1 status reinstated, then the misrepresentation(s) are material.

Based on the record and the regulations in place in 1984, a preponderance of the evidence indicates that the applicant would have needed to state directly to INS officials that he had never worked off-campus without authorization to have his F-1 status reinstated. Thus, a preponderance of the evidence also indicates that an inquiry into his 1984 filing for F-1 reinstatement would have led to a finding that he had made this willful, material misrepresentation in 1984. The finding might have been made: by asking the applicant for copies of his request for reinstatement and all related documents, and by examining those documents; by questioning him regarding what specifically the INS officials asked him to explain or attest to when making his request for reinstatement; by examining his INS record related to F-1 reinstatement, which in 1988 and for several years following likely would have

still been accessible; by him admitting to having made such misrepresentation in 1984; etc. Because the applicant obstructed this line of inquiry, it cannot now be stated with certainty to what evidence that inquiry would have led. Yet, as stated previously, in *Matter of L –D –L –R*, 9 I&N Dec. 623 (BIA 1962), the Board held that any uncertainty that results from the alien's obstruction of a given line of inquiry may be resolved against the alien. Thus, the AAO finds that a preponderance of the evidence shows that this line of inquiry regarding his F-1 reinstatement would have led to a finding that the applicant made a willful, material misrepresentation to INS officials in 1984 that he had never worked off-campus without authorization so that his request for reinstatement of lawful F-1 status might be granted. Such a finding would have led to a denial of the Form I-687 because the applicant would have been found inadmissible for having made a material misrepresentation in 1984 in an attempt to procure a benefit under the Act.

In the brief dated January 13, 2009, the applicant suggested through counsel that the AAO bears the burden of producing evidence from the INS/USCIS record of the applicant's 1984 request for F-1 reinstatement, such as a written statement on which the applicant misrepresented that he had never worked off-campus without authorization, before this office may find that the applicant made this or a similar material misrepresentation in that proceeding. The applicant is not correct. As noted earlier, in *Matter of S—and B—C,* 9 I&N Dec. 436 at 449, the Attorney General emphasized that when it is found that the line of inquiry that was cut off by the alien may well have led to a proper determination that the alien be found inadmissible or otherwise ineligible, the alien bears the burden of proof in showing that the inquiry would not have done so. Likewise, in *Matter of L –D –L –R*, 9 I&N Dec. 623 (BIA 1962) the Board held that any uncertainty that results from the alien's obstruction of the inquiry may be resolved against the alien.

In the brief dated December 8, 2008, the applicant indicated through counsel that because he had worked off-campus without authorization throughout his undergraduate career and following, INS officials did not have the authority to reinstate his lawful F-1 status on November 2, 1984. He suggests that because of this his request for F-1 reinstatement and any documentation which he submitted in that proceeding, as well as any resulting decision to grant him F-1 reinstatement and any documentation of that decision are neither probative nor relevant. This is not correct. As outlined here, the preponderance of the evidence indicates that the applicant made a willful misrepresentation of a material fact in that proceeding in an effort to gain a benefit under the Act, namely reinstatement of lawful F-1 nonimmigrant status. This renders him inadmissible. This is true regardless of whether the INS' decision to grant him F-1 reinstatement is determined, in the end, to have no legal effect because the INS did not have the authority to reinstate the F-1 status of an alien who had worked off-campus without authorization. Also, as demonstrated above, the applicant then made a willful misrepresentation of a material fact each time that he asserted in the adjudication of the Form I-687 that he had never requested nor been granted F-1 reinstatement and that he had no other records with INS, also in order to gain a benefit under the Act, namely temporary resident status, as this cut off a material line of inquiry related to his request for F-1 reinstatement.[18] As a consequence, the applicant is not admissible and not eligible for temporary resident status.

[18] As noted earlier, the applicant's material misrepresentations that he had never requested nor

In the brief dated January 13, 2009, the applicant indicated through counsel that he made a timely retraction of his misrepresentations and as such his misrepresentations may not be used to find him inadmissible. As authority for this position, the applicant makes reference to an AAO decision that is not published and to guidance for U.S. Department of State Consular Officers set forth in the State Department *Foreign Affairs Manual*.

First, any reliance upon unpublished, non-precedent decisions of this office is misplaced. Although 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although the applicant is permitted to note the reasoning of a non-precedent decision and to urge its extension, this office notes that such a non-precedent decision has no authoritative value. The U.S. Department of State *Foreign Affairs Manual* is also not binding on this office. The AAO would note that certain BIA precedent decisions do make reference to the possibility of an alien's timely retraction of *false oral testimony* allowing for a finding of *good moral character* as in the following: In *Matter of Namio* 14 I&N Dec. 412 (BIA 1973), the Board held that the alien's false statements made under oath precluded him from being found to have good moral character under section 101(f)(6) of the Act. The Board stated that the alien's claim that he may still be found to have good moral character because he made a timely retraction of the false statements is without merit because the alien's recantation took place so long after the alien made the false statements, approximately one year later, and the recantation was made only after it seemed clear that the falsity of the statements was going to be revealed. *Id.* The Board explained that it has consistently held that a timely retraction must be without delay and it must be voluntary, and it found that the instant retraction was neither. *See id.* If the applicant is urging that a similar timely retraction doctrine be considered in the instant matter, the AAO would simply note that the applicant's retractions of his claims that he had no other records with INS, that he never requested reinstatement of his F-1 status and that INS never granted him reinstatement were not voluntary nor were they timely. The applicant only made these retractions in December 2008, after the AAO issued its November 2008 notice which pointed out that the applicant had stated that he never requested nor received reinstatement of his F-1 status; yet, on the Form I-20 A-B completed in 1986, he had represented himself as an F-1 student in lawful status to INS, years after he had lost his lawful F-1 status by violating the terms of that status by, for example, working without authorization. Thus, the record indicates that he made the retractions in order to avoid being found: inadmissible based on a previous material misrepresentation. That is, the record indicates that he presented the Form I-20 ID annotated to show that in 1984 his F-1 status was reinstated to create the appearance that in 1986

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received F-1 reinstatement and that he had no other INS record also cut off inquiry into whether he was in lawful status during the statutory period based on the November 2, 1984 reinstatement of F-1 status granted by INS. This office notes that this also may have been what caused the applicant to make these willful misrepresentations. That is, he may have made the false statements regarding the 1984 reinstatement request because he did not want INS or USCIS officers to question him about this and conclude that he was in lawful status during the statutory period beginning November 2, 1984, and in turn find him ineligible for temporary resident status. This office has already demonstrated that the applicant cut off a material line of inquiry with his willful misrepresentations, and thus need analyze whether this additional line of inquiry, which was cut off by the applicant's willful misrepresentations, was also material.

he genuinely believed that he was in lawful status, but has since realized that the November 2, 1984 reinstatement had no legal effect. Further, he made these retractions more than one year after having made the misrepresentations in his September 10, 2007 and December 14, 2007 briefs, and more than twenty years after having made the misrepresentation on the Form I-687. Thus, it cannot be said that he made the retractions without delay. *See id.* The applicant suggests through counsel that any misrepresentations retracted prior to a final decision being rendered in a proceeding should be considered "timely" and should lead to a finding that the misrepresentations are not material. These assertions are without merit. *See id. See also Matter of L –D –L –R*, 9 I&N Dec. 623 (BIA 1962); *Matter of S—and B—C,* 9 I&N Dec. 436, (BIA 1960).

In the brief dated January 13, 2009, when addressing whether a material line of inquiry had been cut off, the applicant through counsel again refers to guidance in the State Department *Foreign Affairs Manual* that is not binding in this matter. That guidance suggests that where the U.S. consular officer's file has evidence that points to the false nature of an alien's misrepresentation, it may be found that no line of inquiry was cut off by the misrepresentation. As illustrated in the BIA decisions discussed earlier, this contradicts the legal precedents which the AAO must follow in this matter. This office would note incidentally that no evidence in the A-file pointed to the falsity of the applicant's claims regarding never having filed for reinstatement, never having been granted F-1 reinstatement, etc., until he retracted these misrepresentations during December 2008. Also, any claim by the applicant that he had the right to expect information related to his F-1 reinstatement to be in his A-file is misplaced. INS now USCIS is not under any obligation to automatically consolidate all immigrant and nonimmigrant records for each alien who files immigration forms. On the other hand, in this instance, the applicant was under an obligation to inform the INS/USCIS of his other records/filings with this agency, but he failed to do so.

In the brief dated January 13, 2009, the applicant indicated through counsel that when he stated on the Form I-687 at item 17 that in 1979 he entered the United States on a student visa, he was in a sense indicating that he had another record with the INS that related to his student status. Based on this, the applicant suggested that the fact that he answered "no" to the question at item 15 regarding whether he had any other records with INS is not a willful, material misrepresentation. He suggested that the request for F-1 reinstatement is part of the same proceeding as the student visa application. These assertions are not correct for several reasons which include the following.

First, the form includes both questions. The instructions to the form and the form itself make clear that the applicant was to answer each question accurately under penalty of perjury. The applicant was fluent in English, he had earned a U.S. undergraduate degree and he had completed several years of graduate-level courses at universities in Texas when he read the Form I-687 and the instructions to this form in 1988. The instructions warn that whoever knowingly and willfully misrepresents, conceals or covers up a material fact or makes any false statements on this form will be subject to criminal prosecution and/or deportation. *See* Exhibit 5, copy of the Form I-687 (Revision date April 1, 1987) with Instructions. Equally straightforward is the wording of item 15 of the Form I-687 which asks the applicant if he has any other record with INS. This is followed by the request that he list any number(s) that may be associated with the record(s), such as an A-number or other number. Any assertions that these questions at item 15 are misleading, that they seem to be asking only for records relating to requests for permanent

residence, and/or that the applicant was not sophisticated enough or proficient enough in English at the time to understand the questions at item 15 or the instructions warning against concealing information when completing this form are without merit. Also, as the applicant is aware, when he filed the application for the student visa to enter the United States, which is mentioned at item 17 of the Form I-687, he filed the application with the U.S. Department of State/U.S. Consulate, not the INS. In any event, the applicant was required to answer each item accurately and not conceal that he had made a separate INS filing and had another INS record because in 1984 he requested reinstatement of his F-1 status from the Dallas District Office.

Any assertion that the applicant did not need to answer item 15 on the Form I-687 accurately because he had the right to assume that copies of his request for F-1 reinstatement and the grant of that request would already be in his INS file by the time of his legalization interview, given that he had acknowledged that he entered the United States on a student visa, is without merit. The applicant was clearly instructed to answer each question accurately under penalty of perjury. Also, the very presence of the questions at item 15 on the form makes clear that the alien must be forthcoming regarding his various INS records, before the INS (now USCIS) may be certain that it has knowledge of all the applicant's U.S. immigration records.

Thus, the AAO finds that on the Form I-687 and in the evidence that the applicant submitted in support of that application, the applicant made willful misrepresentations of material facts, by cutting off a material line of inquiry, when he stated: that he had no previous record with INS, that he had never filed any request for reinstatement of F-1 status and that INS officials never indicated to him that they had reinstated his F-1 status. The record also demonstrates that he made these material misrepresentations in an attempt to procure benefits under that Act.

Thus, the applicant is inadmissible for the willful misrepresentations of material facts which he made to INS and later USCIS officials in an effort to secure benefits under the Act.

In order to qualify for temporary resident status an applicant must demonstrate that he is admissible. *See* section 245A(a)(4)(A) of the Act. *See also* 8 C.F.R. § 245a.2(u)(1)(iii)(which indicates that temporary resident status may be terminated where the evidence demonstrates that the applicant is not eligible for such status.) An applicant might only overcome this particular ground for terminating his temporary resident status if he applies for and secures a waiver of the grounds of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.2(u)(1)(iv). The appeal is dismissed on this basis.

Also, as set forth in the November 24, 2008 Notice of Derogatory Information, on the Form I-20 A-B that the applicant completed while studying at TWU and which the record demonstrates was filed with the INS, the applicant certified to INS officials that "**all** information provided on this form refers specifically to me and is true and correct to the best of my knowledge." (Emphasis added.) *See* Exhibits 3 and 4, copies of pages of the Form I-20 A-B (Revision date May 1, 1983); note that certain pages were signed by the applicant and the DSO at TWU during February 1986. Yet, the form as completed makes misrepresentations to INS which include the following: it presents the applicant as a nonimmigrant F-1 transfer student in lawful status who is eligible for a certificate confirming his nonimmigrant F-1 student status, and at various places on that form refers to the applicant, the student who is the subject of the form, as a nonimmigrant

student or F-1 student. Yet, the applicant had lost his F-1 nonimmigrant status before he enrolled as a graduate student at TWU. In addition, INS did not have the authority to properly reinstate his F-1 status because he had worked off-campus without authorization; thus, the annotations that INS entered on his Form I-20 ID on November 2, 1984 which refer to his F-1 status being reinstated had no legal effect. Moreover, the preponderance of the evidence indicates that in 1984 the applicant made a willful, material misrepresentation to INS that he had never worked off-campus without authorization in an attempt to prompt INS to grant his request for F-1 reinstatement, and that without this misrepresentation INS would not have annotated his Form I-20 ID to show that his F-1 status was reinstated. As a result, this office finds that it is more likely than not that in February 1986 when the applicant certified that the information on all eight pages of the Form I-20 A-B was correct, including any representations that he was an F-1 student in lawful status and that he was eligible for a certificate of eligibility as an F-1 nonimmigrant transfer student, he was making material misrepresentations that were *willful* in an attempt to procure benefits under the Act.[19] Thus, the applicant is inadmissible on this basis as well.

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[19] It is noted that the attached copy of various pages of the Form I-20 A-B, Exhibits 3 and 4, indicates on page 1 that it "[e]xpires 4-30-86". However, INS did not update the Form I-20 A-B until 1988, and the agency accepted the 1983 revision of the form through October 16, 1989. *See e.g.* Fragomen, Del Rey and Bell, *1991 Immigration Procedures Handbook*, 2-10. It is also noted that the following sections of the Act and the corresponding regulations which implement the Act were in place in 1986 during the period that the applicant completed the Form I-20 A-B presenting himself as an F-1 student in lawful status to INS. They serve to illustrate that the Form I-20 A-B afforded the applicant numerous benefits under the Act and the regulations which implement the Act.

Section 101(a)(15)(F)(i)(1980-1990) of the Act refers to the F-1 student as: "an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established college, university . . . ."

The regulation at 8 C.F.R. § 214.2(f)(1985) states in relevant part that:

> [e]xcept as provided in paragraph (f)(4) of this section, an alien seeking admission to the United States under section 101(a)(15)(F)(i) of the Act (as an F-1 student) and the student's accompanying F-2 spouse and minor children, if applicable, are not eligible for admission unless—
>
> (f)(1)(i)(A) The student presents a Certificate of Eligibility for Nonimmigrant (F-1) Student Status, Form I-20A-B, properly and completely filled out by the student and by the designated official of the school to which the student is destined and the documentary evidence of the student's financial ability required by that form; and
>
> (f)(2) Form I-20 ID copy. The first time an F-1 student comes into contact with

The applicant's suggestions, made through counsel, that he may not be held responsible for any misrepresentations which he made when certifying the accuracy of information on an INS form where certain points written on the form appear in small font, such as the font that is used in some sections of the Form I-20 A-B (Revision date May 1, 1983), are without merit. Also without merit are any suggestions that when the applicant presented himself on the Form I-20 A-B as an F-1 nonimmigrant in lawful status it was not a willful, material misrepresentation as it was the duty of the INS to review the form and determine if he was indeed an F-1 student in lawful status; as such, the applicant was merely using the form to ask the INS to determine whether he was in lawful F-1 status. As discussed earlier, the preponderance of the evidence indicates that the applicant knew both of the following when he completed the Form I-20 A-B in 1986: that he had fallen out of F-1 status and that the INS' reinstatement of that status issued in 1984 had no legal effect as it was based on his misrepresentation that he had never worked without authorization. Thus, when he certified that all information on the Form I-20 A-B was accurate even though the form presented him to INS as an F-1 transfer student in lawful status throughout and it referred to him as an F-1 nonimmigrant student, etc., he made willful misrepresentations of material fact in an attempt to procure benefits under the Act.

Thus, the AAO finds that on the Form I-20 A-B completed by the applicant and the TWU DSO and submitted to INS in 1986, the applicant made willful misrepresentations of material facts in an attempt to procure benefits under that Act, and that he is inadmissible on this basis as well.

As already noted, to qualify for temporary resident status an applicant must demonstrate that he is admissible. *See* section 245A(a)(4)(A) of the Act. *See also* 8 C.F.R. § 245a.2(u)(1)(iii)(which indicates that temporary resident status may be terminated where the evidence demonstrates that the applicant is not eligible for such status.) An applicant might only overcome this particular ground for terminating his temporary resident status if he applies for and secures a waiver of the

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> the Service for any reason, the student must present to the Service a Form I-20A-B properly and completely filled out by the student and by the designated official of the school the student is attending or intends to attend. The student will be issued a Form I-20 ID copy with his or her admission number. The student must have the Form I-20 ID copy with him or her at all times.
>
> . . . . .
>
> (f)(4) Temporary absence.— (f)(4)(i) General. An F-1 student returning to the United States from a temporary absence to attend the school which the student was previously authorized to attend must present either—
>
> (f)(4)(i)(A) A properly endorsed page 4 of Form I-20A-B if there has been no substantive change in the information on the student's most recent Form I-20A since the form was initially issued; or
>
> (f)(4)(i)(B) A new Form I-20A-B if there has been any substantive change in the information on the student's most recent Form I-20A since the form was initially issued.

grounds of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.2(u)(1)(iv). The appeal is also dismissed on this basis.

In conclusion, the applicant is not eligible for temporary resident status because he is inadmissible based on his several misrepresentations of material facts which he made when attempting to procure benefits under the Act. He also is not eligible for temporary resident status because he has failed to establish continuous residence and continuous physical presence during the statutory periods.

The applicant's appeal of the director's decision to terminate his temporary resident status is dismissed for the reasons stated above, with each considered as an independent and alternative basis for such termination.

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