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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NORFOLK, VA Date: JUN 2 6 2009

XSL 88 176 01004

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 U.S. Citizenship and Immigration Services National Records Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained, or if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On October 11, 2006, the Director, Norfolk, Virginia, terminated the applicant's temporary resident status. The decision to terminate is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further action and consideration.

The AAO maintains plenary power to review this matter on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The federal courts have long recognized the AAO's *de novo* review authority. *See,* e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[1]

As a preliminary matter, the AAO would underscore that the record indicates that the applicant has never been granted temporary resident status. The Form I-687 was filed on May 4, 1988. This case turns on the question of whether the applicant's unlawful status was known to the government throughout the statutory period. As a consequence, the case was held without a decision for an extended period until the final terms of various legalization class-action lawsuits which relate to the issue of when unlawful status is known to the government were settled.[2] On March 24, 2006, the director issued a notice of intent to terminate temporary resident status, in error. That is, if the director found the applicant ineligible, she should have issued a notice of intent to deny because the Form I-687 had never been approved. On October 11, 2006, the director issued a notice to terminate temporary resident status, also in error. The AAO will remand the matter to the director for further action and consideration that she might enter a new decision in accordance with the following analysis.

The director 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 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.

On appeal, the applicant through counsel asserted that he has established his unlawful residence throughout the statutory period and that he is otherwise eligible to adjust to temporary resident status.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] It is the facts of this case that forced USCIS to place it and others like it on hold, rather than some request on the applicant's part that the case be held pending the outcome of these class-action lawsuits/settlement agreements.

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, U.S. Citizenship and Immigration Services (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).

Moreover, on September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al. vs. USCIS, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). NWIRP class members are defined, in relevant part, as:

> 1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –
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> (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or
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> (B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or
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> (C) filed a legalization application under INA § 245A and fees with an INS officer or agent acting on behalf of the INS, including a QDE, and whose application
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> i. has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as 'Sub-class C.i. members'),

ii. was denied or whose temporary resident status was terminated, where the INS or USCIS action or inaction was because INS or USCIS believed the applicant had failed to meet the 'known to the government' requirement, or the requirement that s/he demonstrate that his/her unlawful residence was continuous (hereinafter referred to as 'Sub-class C.ii members').

2. Enumerated Categories

(1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.

(2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.

(3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of
   (a) reinstatement to nonimmigrant status;
   (b) change of nonimmigrant status pursuant to INA § 248;
   (c) adjustment of status pursuant to INA § 245; or
   (d) grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

The AAO finds that the applicant is a member of the NWIRP class as enumerated above and will adjudicate the application in accordance with the standards set forth in the settlement agreement.

NWIRP provides that legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudication standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that prior to January 1, 1982, he violated the terms of his or her nonimmigrant status in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government. It is presumed that the school or employer complied with the law and reported violations of status to the INS. The absence of such school or employer report in government records is not sufficient on its own to rebut this presumption. Once the applicant makes such a showing, USCIS then has the

burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the alien's unlawful status was known to the government as of January 1, 1982. With respect to individuals who obtained their status by fraud or mistake, the applicant bears the burden of establishing that he or she obtained lawful status by fraud or mistake.

The settlement agreement states further that once USCIS finds that the applicant is a class member, USCIS shall follow the general adjudicatory standards set forth at 8 C.F.R. § 245a.18(d)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Legal Immigration Family Equity (LIFE) Act of 2000] or at 8 C.F.R. § 245a.2(k)(4)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Immigration Reform and Control Act (IRCA) of 1986], whichever is more favorable to the applicant.

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 failed to file the required quarterly address registration three months after his August 1981 entry. At that time, he fell out of status and his unlawful status was known to the government. There is no indication in the record that he ever acknowledged to INS, now USCIS, that he had violated his nonimmigrant status nor that he ever made a request that that status be properly reinstated. Thus, the AAO finds that the applicant was in unlawful status in a manner that was known to the government throughout the statutory period.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit to demonstrate continuous residence, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-,* 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See Id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See Id.*

Documentary evidence may be in the format prescribed by U.S. Citizenship and Immigration Services (USCIS) regulations. *See Id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or

statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner or applicant submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence, or if that doubt leads the director to believe that the claim is probably not true, to deny the application or petition.

At issue in this proceeding is whether the applicant continuously resided in the United States in an unlawful status throughout the statutory period and is otherwise eligible to adjust to temporary resident status.

The documentation which the applicant submitted in support of his claim of having arrived in the United States before January 1982 and of having continuously resided in the United States throughout the statutory period includes: transcripts from U.S. universities which cover 1981 through 1984 and 1987 through 1988 and the following: Forms W-2, Wage and Tax Statements, for 1985 and 1987; pay stubs for 1986 through 1987; a course completion certificate from the Missouri Real Estate Commission dated May 1986; bank statements for 1986; an employer letter on letterhead stationery which refers to the applicant's employment from June 1985 through February 1986; and an Internal Revenue Service letter relating to a refund on the applicant's 1986 taxes. There is no indication in the record that the applicant ever departed the United States after his August 21, 1981 entry and before he filed the Form I-687 on May 4, 1988.

The AAO finds that that the applicant has established continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and throughout the statutory period.

Beyond the decision of the director, the AAO finds that the applicant has not yet demonstrated that he is eligible for permanent resident status under the late legalization provisions of the LIFE Act because the record indicates that he is inadmissible under section 212(a)(6)(C)(i) of the Act, and he has not yet filed an application for a waiver of the grounds of inadmissibility to which he is subject.

An applicant for permanent resident status under section 1104 of the LIFE Act has the burden to establish by a preponderance of the evidence that he is admissible to the United States. *See* 8 C.F.R. § 245a.12(e).

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.

A waiver is authorized for this ground of inadmissibility. *See* § 212(a)(6)(C)(iii) of the Act and 8 C.F.R. § 245a(k)(2).

The applicant's replacement Form I-94 issued on March 22, 1983 indicates that on August 31, 1982, after the applicant had lost his lawful status, he misrepresented himself to INS as being in lawful status that he might request and receive an F-1 extension of status through May 30, 1985. The record also indicates that during August 1985, the applicant misrepresented himself to INS as being in lawful status that he might request and receive an extension of status for a period of practical training from August 5, 1985 through February 4, 1986.

Thus, the record indicates that the applicant made willful misrepresentations of material fact, namely he misrepresented himself to INS as a nonimmigrant in lawful status, in order to procure benefits under the Act. As a consequence, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

The regulation at 8 C.F.R. § 245a(k)(2) indicates that the legalization applicant, who is inadmissible on grounds which may be waived, must be advised that he may file the Form I-690, Application for Waiver of Grounds of Inadmissibility. The applicant has not yet filed the Form I-690. The AAO hereby advises the applicant that before he might be found admissible, he must file the Form I-690 with the director and demonstrate that the requested waiver should be granted based on humanitarian reasons, to assure family unity and/or in the public interest. *See* 8 C.F.R. § 245a.18(c).

The AAO remands the matter to the director to afford the applicant the opportunity to file the Form I-690 and to request that the director, in the event that the applicant files such form, adjudicate that request and otherwise complete the adjudication of this application.

ORDER: The application is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the applicant, is to be certified to the AAO for review.