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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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[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: SEP 10 2009

MSC 05 134 10265

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The director concluded that the applicant had not established continuous residence in the United States throughout the requisite period and had not established that her unlawful status was known to the government prior to January 1, 1982. Thus, the director denied the application.

On appeal, the applicant asserted that she has established continuous, unlawful residence in the United States during the requisite period and that she is otherwise eligible to adjust to temporary resident status.

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]

At the outset, the AAO notes that the director made statements in the notice of decision which suggested that the applicant does not qualify for CSS/Newman class membership. The director also adjudicated the Form I-687 on the merits of that request and instructed the applicant to appeal the decision to the Administrative Appeals Office (AAO) by filing a Form I-694, Notice of Appeal. Thus, rather than denying the request based on a denial of the Class Membership Application and notifying the applicant of her right to seek review by a Special Master, the director adjudicated the instant application on the merits. Thus, the AAO will treat the application as if the director has found that the applicant has established class membership.[2]

As a preliminary matter, the AAO points to the following: On September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.,* 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

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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] This office does not have authority to review denials of CSS/Newman Class Membership Applications.

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –

(A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Entity (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

(B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

. . . .

2. Enumerated Categories

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

The AAO finds that the record demonstrates 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 NWIRP settlement agreement.

NWIRP further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after her lawful entry and prior to January 1, 1982, the applicant violated the terms of her nonimmigrant status in a manner known to the government in that, for example, documents and/or the absence of required documents (including, but not limited to, the

absence of quarterly or annual address reports required on or before December 31, 1981) within the records of one or more government agencies, when taken as a whole, warrant a finding that the applicant was in an unlawful status prior to January 1, 1982 in a manner known to the government. Once the applicant makes such a showing, U.S. Citizenship and Immigration Services (USCIS) then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982.

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

Thus, when an NWIRP class member demonstrates that she was present in the United States in nonimmigrant status prior to 1982, the absence from her record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that she had violated her nonimmigrant status and was in unlawful status in a manner that was known to the government prior to January 1, 1982. *See* NWIRP settlement agreement, paragraph 8B. *See also*: section 265(a) of the Act as in place through December 29, 1981 (which indicates that nonimmigrants must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

Evidence in the record establishes that the applicant entered the United States as a B-2 nonimmigrant on August 17, 1981. Thus, the applicant was required to file a quarterly address report with the INS prior to January 1, 1982. The address report is not in the record. Therefore, the record indicates that the applicant was in the United States in unlawful status in a manner that was known to the government prior to 1982.

On January 2, 1983, the applicant again entered as a B-2 nonimmigrant using the same visa on which she entered in 1981. There is no indication in the record that she ever acknowledged to U.S. officials that she had committed previous immigration violations and that she had her lawful status properly reinstated. Also, according to statements made in this proceeding, this January 2, 1983 entry was made with an intent to reside indefinitely in the United States.

The AAO finds, in keeping with the NWIRP settlement, that the applicant was in unlawful status in a manner that was known to the government prior to January 1, 1982 and that her subsequent nonimmigrant entry during the requisite period was made by fraud or mistake. Thus, the applicant has established that her presence in the United States during the requisite period was not lawful.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents

which the Immigration and Naturalization Service (INS), now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term "until the date of filing" shall mean until the date the alien was "front-desked" or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See Id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements 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 through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See Id.* and § 245A(a)(2)(A) of the Act. An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of Section 245A of the Act, and is otherwise eligible for adjustment of status. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

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

> (b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:
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> . . .
>
> (9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.
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> (10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

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

> Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

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

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

> (i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed [during the original filing period or the date that the alien was discouraged from filing], unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

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

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

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

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

whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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

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

At issue in this proceeding is whether the applicant has established continuous residence in the United States throughout the requisite period, and has established that she is admissible. The applicant has failed to meet this burden.

On February 11, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. She also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated January 26, 2005 and was submitted with the Form I-687 received on February 11, 2005, that she is a CSS or Newman (LULAC) class member.

On December 29, 2005, the director issued a notice of decision in which he determined that the applicant had not shown that her absence from the United States for over five months during the requisite period was due to emergent reasons. Thus, the applicant had not established that she resided continuously in the United States throughout the requisite period. On July 14, 1982 the applicant departed the United States and she did not return until January 2, 1983. The director pointed out that the preponderance of the evidence indicates that the applicant departed the United States to marry her fiancé in the Philippines, to give birth to their child and to reside in the Philippines. The director indicated that any assertion by the applicant that her home in the United States was an unrelinquished domicile at all times from July 14, 1982 through January 2, 1983 and that emergent reasons beyond her control prevented her from returning to the United States sooner is undercut by the applicant's own statements. For example, the applicant claimed that after she filed a report with Filipino officials on August 5, 1982 regarding her husband's abusive behavior toward her, she returned to their home and continued to reside with him because he had promised to not be abusive in the future.

On appeal, the applicant did not submit evidence sufficient to overcome the basis of the director's decision to deny, relating to continuous residence. In fact, the AAO finds that the applicant's November 29, 1990 sworn statement resubmitted on appeal further supports the director's conclusion that it cannot be said that the applicant remained in the Philippines for more than 45 days due to emergent reasons. Rather, she had begun residing in the Philippines during 1982 and later decided that she would return to the United States. For example, in the November 29, 1990 statement the applicant indicated that her dreams of a future in the United States ended when she became pregnant and her fiancé decided to take her home to the Philippines. The two married and began residing in the Philippines. Two weeks after the marriage, her husband became abusive and during her seventh month of pregnancy [October 1982], the applicant's husband became violent. During November 1982, his violence behavior toward her prompted the applicant to give birth prematurely. After this, the applicant went to live with her parents. Then the applicant decided to "run away" to the United States. She told her parents of the plan and asked them to take care of her son, and in January 1983, she returned to the United States. Thus, the preponderance of the evidence indicates that for several months of 1982, the applicant had decided to reside in the Philippines. She later changed plans and decided to return to the United States.

As such, the applicant has failed to establish that she was outside the United States for more than 45 days during the requisite period due to emergent reasons, and she is not eligible for temporary resident status under the CSS/Newman Settlement Agreements. *See* 8 C.F.R. § 245a.1(c) and the CSS/Newman Settlement Agreements. The appeal must be dismissed on this basis.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 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)(noting that the AAO reviews appeals on a *de novo* basis).

Beyond the decision of the director, the record indicates that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

The applicant represented herself as a lawful nonimmigrant upon admission to the United States on January 2, 1983. Yet, according to the claims which she made in this proceeding, her actual intent upon returning in 1983 was to return to reside indefinitely in the United States. Thus, the applicant procured entry into the United States by willfully misrepresenting a material fact. She is inadmissible under section 212(a)(6)(C)(i) of the Act based on this misrepresentation.[3]

The applicant submitted the Form I-690, Application for Waiver of Grounds of Excludability, which is the form she must file to request a waiver of the ground of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. On the applicant's November 29, 1990 sworn statement attached to that

[3] The record indicates that the applicant again presented herself as a nonimmigrant upon entry subsequent to the requisite period, also with the intent to reside indefinitely in the United States. She is inadmissible based on the material misrepresentations made upon any such nonimmigrant entry.

form, the applicant indicated that humanitarian grounds for granting her waiver include the fact that her son was born in 1982 with cerebral palsy, he resides with her parents in the Philippines and she is her disabled son's sole provider and her parents' sole provider. However, the applicant submitted a contradictory statement with her appeal of a decision denying her request to adjust to permanent resident status under the Legal Immigration Family Equity (LIFE) legalization provisions. In that document, the applicant stated that several months after she left the Philippines in January 1983, her son's father's "powerful and prominent" attorney took her son from her parents, and that she never saw her son again, other than during one visit in 1992. In this statement she also indicated that her parents became her son's second parents and *benefactors* in 1983. The applicant did not provide any supporting documentation for the Form I-690 other than the November 29, 1990 sworn statement. The Form I-690 has not yet been adjudicated. As such, the applicant currently remains inadmissible under section 212(a)(6)(C)(i) of the Act. Therefore, she is not eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act. The appeal will be dismissed on this basis as well.

The applicant is not eligible to adjust to temporary resident under the CSS/Newman Settlement Agreements for the reasons stated above, with each considered as an independent and alternative basis for denial.

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