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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: LOS ANGELES, CA Date: SEP 24 2009

MSC 05 279 14437

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

The director stated that the applicant failed to establish that his presence in the United States was unlawful in a manner that was known to the government prior to January 1, 1982 and that the applicant was in lawful status for at least part of the requisite period. Therefore, the director denied the application.

On appeal, the applicant indicated through counsel that he had established that his presence in the United States was unlawful in a manner that was known to the government prior to January 1, 1982, that he resided unlawfully in this country throughout the requisite period, and that he 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]

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

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

[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).

(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

(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

(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.

NWIRP further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after his lawful entry and prior to January 1, 1982, the applicant violated the terms of his 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 he was present in the United States in nonimmigrant status prior to 1982, the absence from his record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that he had violated his nonimmigrant status and was in unlawful status in a manner that was known to the government prior to January 1, 1982. *See* NWIRP settlement agreement, paragraph 8B. *See also*: section 265(a) of the Act as in place through December 29, 1981 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the address change and must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

The applicant indicated on appeal that the director should consider him as having fallen out of lawful status in a manner known to the government prior to January 1, 1982 because he entered the United States on a nonimmigrant F-1 student visa on October 3, 1981, and he failed to file any quarterly address report. However, the applicant's first quarterly address report was not due until three months after his entry, or January 3, 1982. Thus, he may not claim that the government was made aware of his unlawful status prior to January 1, 1982 by his failure to file the initial quarterly address report. Also, the record reflects that the applicant resided at the same address from his October 1981 entry through January 1982. Thus, he was not required to file a change of address report until after January 1, 1982. In addition, the applicant indicated that he fell out of lawful status when he began working without authorization prior to January 1, 1982. Yet, there is nothing in the record to suggest that the government was made aware of his unauthorized employment prior to January 1, 1982. Finally, the applicant indicated through counsel that he was required to transfer to Pacific State University (PSU) as a term of his lawful status, after completing his studies at Don Martin College of English (DMCE). The record reflects that the applicant completed his studies at DMCE on December 15, 1981. Thus, the earliest that the applicant could have transferred into classes at PSU would have been spring term 1982 or during January 1982. Therefore, if transferring to PSU was a required term of his lawful F-1 status, as the applicant has stated, and he fell out of status by not

transferring, this violation of status did not occur prior to January 1, 1982. Therefore, the applicant may not claim that, based on a failure to transfer to PSU, the government was made aware of his unlawful status prior to January 1, 1982.[2]

The AAO finds, in keeping with the terms of the NWIRP settlement agreement, that the applicant has failed to establish that he was in unlawful status in a manner that was known to the government prior to January 1, 1982. Therefore, the applicant has not established that his presence in the United States was unlawful in a manner known to the government prior to January 1, 1982 and that he remained in unlawful status throughout the requisite period.

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.

Where an applicant entered the United States in nonimmigrant status before January 1, 1982, in order to show unlawful residence throughout the requisite period, he must establish that his period of authorized stay expired prior to January 1, 1982 through the passage of time or that he fell into unlawful status and his unlawful status became known to the government prior to January 1, 1982. *See* section 245A(a)(2)(B) 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

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[2] It is noted that the record indicates that during spring term 1982 or January 1982, the applicant did transfer into a college level program at Carl Albert State College. While there is a notation below the applicant's September 21, 1981 F-1 student visa, stamped in his passport, which indicates that the applicant would study at DMCE and would transfer to PSU after he completes his studies at DMCE, it is not clear if this transfer was a required term of his nonimmigrant status, or if, for example, the applicant was allowed to enter another college level program and remain in F-1 status.

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 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.*

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 unlawful residence in the United States throughout the requisite period, and has established that he is otherwise eligible to adjust to temporary resident status. The applicant has failed to meet this burden.

On July 6, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated May 13, 2005 and was submitted with the Form I-687 received on July 6, 2005, that he is a CSS or Newman (LULAC) class member.

On January 17, 2006, the director issued a notice of decision in which she indicated that the applicant failed to establish that he had fallen out of status in a manner that was known to the government prior to January 1, 1982 and that he resided continuously in the United States in an unlawful manner throughout the requisite period. Thus, the director denied the application.

On appeal, the applicant asserted through counsel that his unlawful status was known to the government prior to January 1, 1982 and that he is otherwise eligible to adjust to temporary resident status.

As discussed previously, the AAO finds, in keeping with the terms of the NWIRP settlement agreement, that the applicant has failed to establish that he violated his nonimmigrant F-1 student status in a manner that was known to the government prior to January 1, 1982.

The applicant has failed to establish continuous unlawful residence in the United States throughout the requisite period. *See* section 245A(a)(2)(B) of the Act. He is therefore not eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements. *See* section 245(a) of the Act and CSS/Newman Settlement Agreements.

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