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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: TEXAS SERVICE CENTER Date: APR 0 6 2010
SRC 01 215 53023

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:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. If your appeal was dismissed or rejected, all documents have been returned to the National Benefits 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 remanded for further action, you will be contacted.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, 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 he entered the United States before January 1, 1982, and resided in a continuous unlawful status from such date through the requisite period. The director determined that the applicant failed to provide sufficient documentation that as of January 1, 1982, the applicant was in unlawful status and such status was known to the government.

On appeal, the applicant asserts that he was employed in the summers of 1980 and 1981, but he did not report his income.[1] The applicant provides a previously submitted employment declaration. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.[2]

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. 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). 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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[1] It is noted that record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, filed by [redacted] in Ohio on behalf of the applicant. [redacted] indicated that she is an accredited representative; however, neither [redacted] nor the organization is not listed on the Recognized Organizations and Accredited Representatives Roster published on October 7, 2009. Therefore, her appearance will not be recognized.

[2] The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS,* 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

(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.

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 claims to have entered the United States before January 1, 1982, and to have continuously resided in the United States from before such date through the requisite period. The documentation that the applicant submits in support of his claim consists of copies of school transcripts from 1979 to 1983, a copy of Form I-20B student extension from 1983 to 1985, a copy of a 1986 Form W-2, copies of letters, and receipts. The applicant has established his continuous residence from 1979 to 1986.

One issue in this proceeding is whether he established his continuous residence throughout the entire requisite period. As evidence of his residence in 1987 and 1988, the applicant submitted copies of two receipts for donations. This is insufficient evidence of continuous residence.

The second issue in this proceeding is whether the applicant's residence in the United States was unlawful prior to January 1, 1982.

The record reflects that the applicant attended Broome Community College from 1979 to 1981. The record also contains a copy of the applicant's Form I-20A, Certificate of Eligibility (For Nonimmigrant "F-1" Student Status) from September 1980 through June 1982. On appeal, the applicant asserts that he violated his F-1 student status by working without authorization in the summers of 1980 and 1981.

The record contains a declaration from [redacted] The declarant states that the applicant performed television repair work in his motel in 1980. This declaration does not establish that the applicant's unauthorized employment was known to the government. In fact, on appeal, the applicant specifically stated that he did not report his income. The record fails to contain any other evidence that would indicate that the applicant's unauthorized employment was known the government.

However, as previously mentioned, the applicant has demonstrated that he was present in the United States in nonimmigrant status prior to 1982 and 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. In fact, through December 29, 1981, the applicant was required to notify the U.S. government in writing of a change of address within 10 days of the address change and to report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.

Here, the record fails to contain any required address changes or reporting of the applicant's address at the end of each three-month period after his entry, regardless of whether there was any address change. The absence of required documents, including the quarterly address reports, within the record warrants a finding that the applicant was in an unlawful status before January 1, 1982, and his unlawful status was known to the government.

Beyond the decision of the director, 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:
>
> . . .
>
> (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.

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 record contains the applicant's Form I-94, Departure Record, dated January 1, 1984. The applicant presented himself as a lawful nonimmigrant upon admission. Yet, according to the claims which the applicant made in this proceeding, his intent was to continue residing unlawfully in the United States and he was working unlawfully in the United States while on a student visa. Thus, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

An applicant for adjustment of status under section 245A of the 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.2(d)(5). The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The applicant has not submitted to the director the Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of this ground of inadmissibility. Thus, he has not established that he is admissible or that he has requested a waiver of the ground of inadmissibility to which he is subject. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Beyond the decision of the director, the applicant has failed to establish his financial responsibility. The applicant is 65 years old and appears to be in good health as reflected in the Form I-693, dated May 29, 1991 that is contained in the record. The applicant stated that he is married and has four children. The record contains evidence that the applicant received two years of education at the Broome Community college in electrical engineering technology and earned a Bachelors of Science degree at the State University of New York College of Technology at Utica Rome. The applicant claimed that he was employed as a maintenance worker from January to July 1985, earning $3.75 an hour. On his Form I-687, he claimed he worked as an Emp. Comp. operator from January to April 1986, earning $6 an hour and as a SPD operator earning $9 an hour from June 1986 to 1992.

In response to an RFE requesting evidence of financial responsibility, the applicant submitted a W-2 showing he earned $6,610 in 1986 and a W-2 showing he earned $3,658 in 1985.

On his Form I-687, he indicated he worked as a manager trainee from October 1994 to October 1995 earning $18,00 a year as a support technician and from August 1986 to April 1997 earning $29,00 per hear. He did not submit W-2s for this employment.

The applicant did submit a copy of an unsigned Form 1040 for 2002. In the absence of proof of filing this return, it will be given no weight.

The applicant submitted a copy of a single bank statement dated September 3, 2003, showing a balance of $10,289. The applicant failed to submit a Form I-134 affidavit of support from a family member guaranteeing complete or partial financial support. Consequently, it must be concluded that the applicant has failed to meet his burden in establishing proof of financial responsibility as required by the regulation at 8 C.F.R § 245a.2(d)(4). Therefore, it is also concluded that the applicant is likely to become a public charge and he must be considered inadmissible under section 212(a)(4) of the Act. For this additional reason, the application may not be approved.

Although both grounds of inadmissibility are waivable, there is no purpose served in filing a waiver application given the applicant has failed to establish his continuous residence throughout the requisite period.

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