U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

L1

[redacted]

FILE: [redacted] Office: HOUSTON Date: APR 07 2010

MSC 05 130 10118

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 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, Houston, 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. Specifically, the director determined that the applicant failed to establish that his employment before January 1, 1982, was unauthorized. The director also stated that the record reflects that the applicant was involved in a fraudulent marriage.

On appeal, counsel, on behalf of the applicant, asserts that the director erred in determining that the applicant had not engaged in unauthorized employment while attending Seton Hall University on a student visa in 1981. Counsel contends that, although the applicant worked at the campus cafeteria, his work was not authorized by the Foreign Students Office and he did not procure employment through the Foreign Students Office. Counsel asserts that a brief will be submitted to the AAO within 30 days. The record reflects that no brief was received; therefore, the record will be considered complete. 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.[1]

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 –

[1] 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 his Social Security statement reflecting earnings from 1981 to 2004, a school letter verifying enrollment in the Fall of 1981, affidavits, and a copy of his 1981 F-1 visa to the United States. Based on this evidence, the applicant's entry into the United States before January 1, 1982, and continuous residence in the United States during the requisite period is not in dispute. The 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 Seton Hall University in the Fall of 1981 through the Spring of 1982. The record contains a copy of the applicant's F-1 visa, issued in August 1981 for study at Seton Hall University. The record also contains a copy of the applicant's Form I-20 ID Copy, reflecting that the applicant was approved for transfer to San Jacinto College in August 1983. On appeal, counsel asserts that the applicant violated his F-1 student status in 1981 by working without authorization in the school cafeteria. The applicant's Social Security Statement reflects that the applicant earned $61.00 in the year 1981. However, in the Notice of Decision, the director stated that on-campus employment does not require authorization from immigration. Section 8 C.F.R. 214.2 (f)(9)(i) states that on-campus employment is authorized if it is performed

on campus, such as at a bookstore or cafeteria. Based on the above, the AAO finds that the applicant has not satisfied that his employment was unauthorized.

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 reflects that the applicant reentered the United States in March 1985. The record reflects that the applicant contends that he reentered the United States without being questioned or providing documentation. The director determined the applicant's testimony to be unpersuasive. The AAO affirms the director's finding; therefore, it is presumed that 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. 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.

It is also noted that the record reflects that the applicant was involved in a fraudulent marriage and attempted to gain an immigration benefit by virtue of that marriage. The U.S. citizen that the applicant married was married to five other aliens at the same time and filed petitions on their behalf. While the applicant asserts that he believed the marriage to be valid, the director as well as the AAO finds the applicant to be unpersuasive. The applicant's Form I-130 application was denied based on fraud.

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 record reflects that the applicant submitted to the director a 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. However, the Form I-690 was denied. Thus, the applicant has not established that he is admissible to the United States.

The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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