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

U.S. Citizenship and Immigration Services

PUBLIC COPY

L1

[redacted]

FILE: [redacted] Office: LOS ANGELES Date: MAY 26 2010

MSC-05-137-10242

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 termination of the applicant's temporary resident status is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement. The director determined that the applicant had not established by a preponderance of the evidence that she had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director found that the applicant entered the United States in F-1 student status in January 1981 to attend California State University, Long Beach. The director noted that the applicant had not established her continuous residence in the United States because she departed the United States on three occasions during the relevant period, causing the applicant to be absent from the United States for a total of 220 days during the relevant period. The director noted that the applicant was therefore not eligible for temporary resident status and issued a Notice of Termination on July 30, 2009.

On appeal, the applicant asserts that USCIS erred in finding that her continuous residence was interrupted by her absences. She asserts that on both occasions, her return to the United States was delayed for an emergent reason.

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
>
> (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 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

(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

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 CIS action or inaction was because INS or CIS 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 I-687 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, the applicant 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 report in government records is not alone sufficient 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 further stipulates that the general adjudicatory standards set forth in 8 C.F.R. § 245a.18(d) or 8 C.F.R. § 245a.2(k)(4), whichever is more favorable to the applicant, shall be followed to adjudicate the merits of the application once class membership is favorably determined.

An applicant for temporary resident status 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. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). The applicant must also establish that he or she has been continuously physically present in the United States since November 6, 1986. Section 245A(a)(3) of the Act, 8 U.S.C. § 1255a(a)(3). The regulations clarify that the applicant must have been physically present in the United States from November 6, 1986 until the date of filing the application. 8 C.F.R. § 245a.2(b)(1).

For purposes of establishing residence and physical presence under the NWIRP Settlement Agreement, the term "until the date of filing" in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. NWIRP Settlement Agreement paragraph 8 at pp. 14-15.

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 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).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

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. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated 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 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, deny the application or petition.

Until Dec. 29, 1981, section 265 of the Act stated that any alien in the United States in "lawful temporary residence status shall" notify the Attorney General "in writing of his address at the expiration of each three-month period during which he remains in the United States, regardless of whether there has been any change in address." *See* section 265 of the Act (1980) and PL 97-116, 1981 HR 4327(1981) which confirms that section 265 was modified, effective December 29, 1981, such that lawful non-immigrants were no longer required to file quarterly address reports regardless of whether there had been any change in address.

The applicant testified that she entered the United States in January 1981 as an F-1 nonimmigrant student. She would have been required to provide written updates of her address at the expiration of each three-month period during which she remained in the United States, regardless of whether there was any change in address, from the date of her entry in 1981 until December 29, 1981. The record of proceedings is void of any address updates.

Following *de novo* review by the AAO, USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 31, 1981. In accordance with the terms of NWIRP, the AAO finds that the evidence establishes by a preponderance of the evidence that the applicant was unlawfully present in a manner known to the government prior to January 1, 1982. Consequently, the applicant has established that her unlawful status was known to the government prior to January 1, 1982.

Thus, the next issue is whether the applicant has established her continuous residence for the duration of the relevant period.

In support of her claim of continuous unlawful residence in the United States, the applicant asserts that she first entered the United States in January 1981 to attend California State University, Long Beach. She submits copies of her undergraduate transcripts indicating that she was enrolled as a full time student from January 1981 until graduating in December 1984. She also submits a copy of her undergraduate diploma issued by California State University, Long Beach on December 24, 1984.

The applicant also submits the following in support of her continuous residence in the United States during the relevant period:

- a copy of her Social Security Wage (SSA) report indicating that she has earned taxable wages in the United States from 1984 through the end of the relevant period;
- a copy of her I-20 Notice and Report Regarding Nonimmigrant F-1 student which is dated August 21, 1981;
- a copy of a tax report dated May 1986, concerning tax year 1985.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Following *de novo* review, the AAO finds that the applicant has not provided sufficient evidence of her continuous residence for the entire relevant period. Specifically, the applicant indicates that she graduated from college in December 1984. Her SSA earnings reflect that she earned taxable wages in 1984 and 1985, however, the applicant does not list employment between May 1984 and March 1985 on her Form I-687.

Furthermore, the applicant has provided incomplete and inconsistent information regarding her absences from the United States.

The applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

If the applicant's absence exceeded the 45-day period allowed for a single absence, it must be determined if the untimely return of the applicant to the United States was due to an "emergent reason." Although this term is not defined in the regulations, *Matter of C-*, 19 I&N Dec. 808 (Comm. 1988), holds that "emergent" means "coming unexpectedly into being."

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. 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).

On her Form I-687 filed on December 20, 2004, the applicant indicates three absences from the United States since her first entry in January 1981. First she indicates that she returned to China from May 21, 1982 until September 5, 1982 and that her return was delayed because she required surgery in China on July 6, 1982 for appendicitis. The director indicates that the applicant has submitted evidence of her medical condition and surgery and agrees with the applicant that she has demonstrated that her returned was delayed for an emergent reason. The AAO concurs.

The applicant indicates her second absence was from December 20, 1983 until January 25, 1983. This absence did not exceed the 45 day limit and therefore does not interrupt the applicant's continuous residence.

The director concluded that the third absence, from May 23, 1983 until August 23, 1983 did interrupt the applicant's continuous residence as it exceeded the 45 day limit for a single absence. On the Form I-687 filed by the applicant on November 16, 1988, the applicant indicates the reason for her absence was to attend her grandfather's funeral. She submitted evidence of the extensive memorial services that required her attendance. She also listed her grandfather's funeral as the reason for her absence in 1983 on her current Form I-687.

On February 2, 2009 the director issued a Notice of Intent to Terminate (NOIT) indicating that the applicant was not eligible for temporary resident status due to her absences from the United States. In response, the applicant submitted a letter from her father indicating that the applicant initially went to Taiwan to attend her grandfather's memorial service, she was forced to remain in Taiwan until September 1983 to care for her mother who was suffering from heart disease. The applicant's father also submitted a letter which was previously provided in which he indicates that he has tried to obtain medical records from the clinic that treated the applicant's mother, however, the clinic is closed and the records are unavailable. The director noted that the letter from the applicant's father indicates that the heart disease began in January 1983 and she was last treated in December 1983. Thus, the director concluded that the reason for the delay in the applicant's return did not "come unexpectedly into being," rather, her condition existed both before the applicant's departure to Taiwan and following her return in September 1983.

This affidavit, therefore, does not confirm the applicant's assertion that her mother became ill while she was in Taiwan; rather it indicates that her mother has had a long-term illness for which she is receiving treatment. The applicant did not provide any further evidence that her mother suffered a sudden change in her health that would have caused the applicant to delay her return.

The applicant's admitted absence from the United States from May to September 1983, a period of more than 45 days, is clearly a break in any period of continuous residence she may have established. As she has not provided sufficient evidence that it was her mother's unexpected and sudden poor health that was the "emergent reason" for her failure to return to the United States in a timely manner, she has failed to establish by a preponderance of the evidence that she has continuously resided in an unlawful status in the United States for the requisite period, as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E-M-, supra*.

Furthermore, the applicant has provided inconsistent information regarding her absences from the United States. For example, the applicant indicates on both of her Form I-687 only the three absences listed above. However, a copy of the applicant's passport indicates that she entered China on May 25, 1981 and returned to the United States on August 21, 1981 and also that she entered China on December 21, 1981 and returned to the United States on January 31, 1982. While these absences partially fall prior to the relevant period, they are relevant to the applicant's credibility.

The record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. As noted above, the applicant entered the United States multiple times using a F-1 nonimmigrant student visa. During her January 1982 and January 1983 entries and her September 1982 and August 1983 entries, she failed to disclose that she had violated the terms of her visa by establishing residence in the United States.

An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that the applicant has not filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation. Furthermore, even if the waiver were approved, the application would not be approvable since the applicant failed to establish her continuous residence for the duration of the relevant period. Accordingly, the applicant's appeal will be dismissed.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that she entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--, supra*. 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.