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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

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[redacted]

FILE: [redacted] Office: NEWARK Date: OCT 04 2010

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 applicant filed a Form I-687 Application for Temporary Resident Status on which was denied on August 11, 1989. The applicant filed a Motion to Reopen which was rejected by the director on June 4, 1991. The applicant was advised to file an appeal to the Administrative Appeals Office (AAO). Counsel for the applicant filed the appeal on July 12, 1991, over 23 months after the decision was issued. The AAO rejected the appeal as untimely filed. However, the AAO has conducted a *de novo* review and pursuant to 8 C.F.R. § 210.2(g), the AAO may *sua sponte* reopen any adverse decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO finds that the Form I-687 filed during original filing period shall be reopened *sua sponte* and adjudicated under the terms of 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). The appeal will be sustained.

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 CSS/Newman Settlement Agreements, 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. CSS Settlement Agreement paragraph 11 at page 6; Newman Settlement Agreement paragraph 11 at page 10.

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.

In support of his claim of continuous unlawful residence in the United States, the applicant asserts that he first entered the United States on September 10, 1978 and that he remained in F-1 student status until July 4, 1982. The AAO notes that the applicant would have been required to provide written updates of his address at the expiration of each three-month period during which he remained in the United States, regardless of whether there was any change in address, for the period September 1978 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. Thus, the AAO finds that the applicant has established his class membership under the NWIRP agreements.

The AAO also noted in a Notice of Intent to Deny (NOID) issued to the applicant on July 7, 2010 that the applicant has failed to establish his continuous residence in the United States for the duration of the relevant period. The applicant was provided with an opportunity to submit additional evidence of his eligibility. Specifically, the AAO requested that the applicant submit a copy of his passport containing his F-1 visa along with his I-20 Certificate of Eligibility for Nonimmigrant F-1 Student Status, issued in connection with his studies at North East Missouri State University. The applicant submitted a copy of his passport, including the F-1 visa indicating that the visa was issued September 3, 1978 and that the applicant entered the United States via Chicago, Illinois on September 10, 1978. He failed to submit his I-20 Certificate of Eligibility for Nonimmigrant F-1 Student Status, indicating that he lost the document.

Also in support of his continuous residence, the applicant submitted a copy of his Social Security Administration (SSA) report. This report indicates that the applicant earned wages in the United States from 1979 onward. However, in the years 1980, 1981, 1982, he earned less than $500 for the entire year. The AAO noted that the SSSA report does not conclusively establish continuous residence. The applicant does not list any employment prior to 1982 on his Form I-687 filed in January 2006.

On his Form I-687 dated 1988, the applicant lists his first employment in the United States with Standard Parking Corp. Initially, he did not list the dates of this employment, however, at his interview with USCIS in connection with this application, the applicant indicated that this employment commenced in November 1983. No prior employment is listed. The AAO has considered the applicant's statements on appeal, as well as the fact that the record contains W-2's indicating that the applicant earned wages in 1984 throughout the end of the relevant period. It is also noted that the applicant's social security number is consistent throughout the record, on both his SSA report and his W-2s. On his Form I-687 filed in 2006, the applicant indicates that he began working for Standard Parking in 1982. On appeal, the applicant indicates that his employment with Standard Parking began in 1982 on a part-time basis and that he was not fully vested for retirement benefits until 1983. This assertion is supported by affidavits in the record which were submitted on appeal. The AAO finds that the applicant has overcome this inconsistency by a preponderance of the evidence.

The applicant also submitted the following evidence of his continuous residence: a pension fund letter, Form W-2 wage earning reports, employer and bank letters, school transcripts and witness statements.

Upon review of the totality of the record, the applicant has submitted evidence which tends to corroborate his claim of residence in the United States during the requisite period. The documentary evidence submitted is consistent with the claims made on the application. As stated in *Matter of E--M--*, *supra*, when something is to be established by a preponderance of evidence, the applicant only has to establish that the proof is probably true. The documents of record will be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of unlawful residence in the United States in a manner known to the government from before January 1, 1982 and throughout the requisite period.

Despite minor inconsistencies within the record, the documentation provided by the applicant establishes by a preponderance of the evidence that he satisfies the statutory and regulatory criteria of entry into the United States before January 1, 1982, as well as continuous unlawful residence in the country during the ensuing time frame of January 1, 1982 through May 4, 1988, as required for eligibility. Consequently, the applicant has overcome the basis of denial cited by the director.

Accordingly, the applicant's appeal will be sustained. The district director shall continue the adjudication of the application for temporary resident status.

ORDER: The appeal is sustained.