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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

MAR 03 201

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. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The applicant filed an Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (INA) pursuant to the terms of the Northwest Immigrant Rights Project Settlement agreements (NWIRP). The director, California Service Center denied the application noting that the applicant failed to establish both his class membership and his continuous residence in the United States for the relevant period. The applicant filed a timely appeal which is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The director determined that the applicant had not established by a preponderance of the evidence that he 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 using a B-1 nonimmigrant visitor visa on May 1, 1978. He then obtained an F-1 nonimmigrant student visa in Vancouver, Canada in the fall 1978 and maintained his legal student status through July 18, 1986 when he changed his status to H-1B. Thus, the director concluded that the applicant was not eligible for the benefit sought.

On appeal, the applicant indicates that he violated his student status by working without authorization, failing to maintain a full time schedule and transferring schools without prior USCIS authorization.

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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> (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
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> (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.

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 [redacted] 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.

On October 13, 2010, the AAO issued a Request for Evidence (RFE) informing the applicant that he had not submitted sufficient evidence of his continuous residence in the United States from 1985 through the end of the relevant period.

On appeal, the applicant asserts that he is eligible for benefits under NWIRP because he violated his F-1 student status in three ways: 1). by failing to maintain a full-time course of study; 2). working without authorization; and, 3). failing to submit required address updates. He does not address his residence in the United States from 1985 through May 1988.

First, the applicant asserts that he violated the terms of his F-1 status by carrying less than a full course load throughout his period of authorized F-1 student status. The applicant submits transcripts from the San Francisco Art Institute indicating that the applicant was enrolled as a full-time student from fall 1978 summer 1984 with the exception of spring 1980. The record also includes transcripts from the University of San Francisco indicating that the applicant was enrolled as a full time student for the spring 1980 semester. In addition, the file includes a letter from [redacted] was a full-time student in good standing beginning in fall 1978 but that he did not attend in spring 1980 and

that the school notified the Immigration and Naturalization Service (INS) that the applicant was not maintaining his status. The government knowledge of his violation of the "full time status" requirement can also be presumed from the regulatory requirement that schools immediately report students with such violations to USCIS (former INS).

The record of proceedings also contains the following:

- Copies of the applicant's Bachelor of Fine Arts diploma dated May 16, 1982 from the San Francisco Art Institute and a copy of the Master of Fine Arts diploma issued by the San Francisco Art Institute on August 17, 1984.

- A copy of the applicant's I-20 authorizing his F-1 student status on April 17, 1984 through duration of status, authorizing practical training from June 1, 1985 until June 1, 1986.

- A notice of approval of extension of nonimmigrant visa petition of H or L granting H-1 status valid from July 18, 1986 to June 1, 1988.

The applicant asserts that he violated his F-1 student status by working without authorization and by transferring to the University of San Francisco for the spring 1980 semester without prior authorization. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The AAO does not find sufficient support from the record that the applicant's employment as a student caused him to violate his lawful status. While the record contains a copy of a letter from the San Francisco Art Institute confirming the fact that the applicant was employed as a teaching assistant from fall 1980 until fall 1981 it is unclear whether this employment was authorized in conjunction with the applicant's F-1 status.

Following *de novo* review, the AAO finds that the applicant did violate the terms of his F-1 nonimmigrant status by transferring to the University of San Francisco without prior authorization from immigration authorities. This violation is evidenced by the transcripts from both the transcripts from the San Francisco Art Institute indicating that the applicant was enrolled as a full-time student from fall 1978 summer 1984 with the exception of spring 1980 and transcripts from the University of San Francisco indicating that the applicant was enrolled as a full time student for the spring 1980 semester. The record also confirms that the applicant's status violations were known to the government since the registrar of San Francisco Art Institute submitted a letter stating that [redacted] was a full-time student in good standing beginning in fall 1978 but that he did not attend in spring 1980 and that the school notified the Immigration and Naturalization Service (INS) that the applicant was not maintaining his status. The government knowledge of his violation of the "full time status" requirement can also be presumed from the regulatory requirement that schools immediately report students with such

violations to USCIS (former INS). Thus, the AAO finds that the applicant violated his status prior to January 1, 1982.

The record indicates that the applicant's unlawful status was also known to the government prior to January 1, 1982 because he failed to submit required address updates.

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 he entered the United States in August 1978 as an F-1 nonimmigrant student. He 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, from the date of his entry in August 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. 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 his unlawful status was known to the government prior to January 1, 1982.

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.

Once the applicant has established that he violated his student status prior to January 1, 1982 in a manner known to the government, he then must prove that he resided continuously in the United States for the duration of the relevant period.

In this case, the applicant has submitted sufficient evidence of his residence in the United States from the date of his entry to the United States in F-1 status through summer 1984 through the submission of his school transcripts. He also submits a copy of diplomas, paycheck stubs and his Form I-20 authorizing his F-1 student status April 17, 1984 through duration of status, and practical training from June 1, 1985 until June 1, 1986.

However, as noted by the AAO in the Request for Evidence (RFE) dated October 13, 2010, the applicant has not submitted sufficient evidence of his continuous residence in the United States following his graduation from San Francisco Art Institute in summer 1984. The applicant does not submit sufficient evidence or explanation which accounts for the time period after he left the San Francisco Art Institute in summer 1984. The record includes a Notice of Approval or extension of nonimmigrant visa petition of H or L alien dated July 18, 1986 [redacted] as the employer. The H-1 status granted was authorized until June 1, 1988, however, the applicant has not submitted evidence that he remained in the United States. The record also contains a letter from [redacted] dated September 28, 1988, indicating that the applicant holds accounts with the bank that were opened in February 1981 and [redacted] dated February 20, 1987 indicating that the applicant purchased property in San Francisco, California. The record contains very little evidence of the applicant's residence during the period July 18, 1986 until February 20, 1987.

Thus, the applicant has not proven, by a preponderance of the evidence that he continuously resided in the United States for the duration of the relevant period. The applicant provided an additional opportunity to submit evidence pertaining to this period. On appeal, he reiterated his eligibility under NWIRP but failed to address the continuous residence issue.

Furthermore, the record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. As noted above, the applicant obtained a student visa extension without disclosing that he had violated the terms of his initial student visa by not transferring to a different school for one semester prior to requesting the extension of his status. The United States Department of State will not renew an application for student visa if the applicant discloses previous violations of status in the United States. *See,* Section 101(a)(15)(F) of the Act, 8 U.S.C. § 101(a)(15)(F); 9 Foreign Affairs Manual (FAM) 41.61.

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 filed a Form I-690 Application for Waiver of Grounds of Excludability relating to the misrepresentation. The waiver remains pending. As the grounds of inadmissibility have not been waived, the applicant is not admissible and is ineligible for legalization benefits. Accordingly, the applicant's appeal will be dismissed. Even if the waiver were approved, the applicant remains ineligible for the benefit sought for the reasons discussed above.

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