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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  
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Services

**PUBLIC COPY**

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FILE: [REDACTED]  
MSC 06 095 13653

Office: HOUSTON, TX

Date:

**OCT 29 2009**

IN RE: Applicant: [REDACTED]

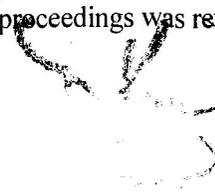
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

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 forwarded to the Citizenship and Immigration Services National Records 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 if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

  
Perry Rhew, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Houston, Texas 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 AAO maintains plenary power to review this matter 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 federal courts have long recognized the AAO’s *de novo* review authority. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.<sup>1</sup>

The record indicates that the applicant entered the United States as a nonimmigrant B-2 visitor for pleasure on May 1, 1980 and August 23, 1981 and as a nonimmigrant on approximately 60 separate dates during the requisite period. The director indicated that based on the applicant’s several nonimmigrant entries during the requisite period, the record establishes that the applicant was lawfully present in the United States for at least part of the requisite period. Therefore, the director denied the application because she found that the applicant had failed to establish that he resided in the United States unlawfully throughout the requisite period.

The AAO issued a notice of intent to dismiss in this matter on September 15, 2009. In that notice, as a preliminary matter, this office pointed to the following: On September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, 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 Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Qualified Designated Entity (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

- a. 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.

....

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 or her lawful entry and prior to January 1, 1982, the applicant violated the terms of his or her 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, 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.

The settlement agreement states further that once USCIS finds that the applicant is a class member, USCIS shall follow the general adjudicatory standards set forth at 8 C.F.R. § 245a.18(d)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Legal Immigration Family Equity (LIFE) Act of 2000] or at 8 C.F.R. § 245a.2(k)(4)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under

the Immigration Reform and Control Act (IRCA) of 1986], whichever is more favorable to the applicant.

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 or notice of change of address 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 report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

In the notice of intent to dismiss, the AAO stated that the record indicates that the applicant is an NWIRP class member as enumerated above, having entered as a nonimmigrant on May 1, 1980 and August 23, 1981.<sup>2</sup> Therefore, as a nonimmigrant, he was required to file quarterly address reports with the INS prior to January 1, 1982. No address reports are in the record. Therefore, the record indicates that the applicant was in the United States in unlawful status in a manner that was known to the government prior to 1982.

Also there is no indication in the record: that the applicant ever acknowledged to U.S. officials that he had committed immigration violations; that the applicant had his lawful status properly reinstated; or that he was granted permission to change to a different nonimmigrant status, such as L-1 status, despite his previous violations. Thus, the AAO also finds, in keeping with the NWIRP settlement agreement, that his various nonimmigrant entries made subsequent to January 1, 1982 were made through fraud or mistake.

The applicant has established that, under the terms of the NWIRP settlement agreement, his presence in the United States during the requisite period was unlawful.

On appeal, the applicant indicated that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

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 INS, now USCIS, followed in adjudicating the Forms I-687 timely filed during the

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<sup>2</sup> In the appeal brief, counsel suggested that the director stated that the applicant had entered the United States without inspection on a date at the beginning of the requisite period prior to January 1, 1982. Yet, the director did not state this in the notice of decision or elsewhere in this proceeding. The documentary evidence in the record, such as copies of the pages of the applicant's passport which show his entry stamps during the relevant period, and his statements in this proceeding indicate that the applicant entered as a nonimmigrant prior to January 1, 1982. Thus, a preponderance of the evidence indicates that the applicant entered as a nonimmigrant in 1980 and in 1981. Building on this evidence, this office concludes that the applicant is an NWIRP class member.

Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

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 245(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 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 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).

Failure to provide evidence other than affidavits shall not be USCIS' sole basis for finding that an applicant failed to meet the continuous residence requirement. *See* CSS/Newman Settlement Agreements. In evaluating the sufficiency of the applicant's proof of residence, [USCIS] shall take into account the passage of time and other related difficulties in obtaining documents that corroborate unlawful residence during the requisite periods. *See id.*

The regulation at 8 C.F.R. § 245a.1(c) read in conjunction with the CSS/Newman Settlement Agreements provides, in relevant part, that an alien shall be regarded as having resided continuously in the United States if:

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed [during the original filing period or the date that the alien was discouraged from filing], unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit, the list also permits the submission of affidavits and any other relevant document. *See* 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The application and other statements of the applicant, both oral and written, are evidence to be considered. *See Matter of E-M-*, 20 I&N Dec. 77 at 79. The applicant's statements must not be the applicant's only evidence used to establish eligibility, but they should be viewed as valid evidence. *Id.*

Documentary evidence may be in the format prescribed by USCIS regulations. *See id.* at 80. For example, 8 C.F.R. § 245a.2(d)(3)(i) states that a letter from an employer should be signed by the employer under penalty of perjury and "state the employer's willingness to come forward and give testimony if requested." *Id.* Letters from employers that do not comply with such requirements do not have to be accorded as much weight as letters that do comply. *Id.* However, even if not in compliance with this regulation, a letter from an employer should be considered as a "relevant document" under 8 C.F.R. § 245a.2(d)(3)(iv)(L). *Id.* Also, affidavits that have been properly attested to may be given more weight than a letter or statement. *Id.* Nonetheless in determining the weight of a statement, it should be examined first to determine upon what basis it was made and whether the statement is internally consistent, plausible and credible. *Id.* What is most important is whether the statement is consistent with the other evidence in the record. *Id.*

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. *Id.* at 79-80. In evaluating the evidence, *Matter of E-M-* also states 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 or applicant 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, to deny the application or petition.

The AAO stated in the notice of intent to dismiss that at issue in this proceeding is whether the applicant has established that he is admissible and whether he has submitted consistent evidence to meet his burden of establishing continuous residence in the United States throughout the requisite period.

On January 3, 2006, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated December 6, 2005 and was submitted with the Form I-687 received on January 3, 2006, that he is a CSS or Newman (LULAC) class member.

The director issued a notice of decision in which she denied the application because she determined that the applicant had not established by a preponderance of the evidence: that he was present in unlawful status throughout the requisite period. As discussed earlier, the AAO finds that he was unlawfully present in a manner that was known to the government prior to January 1, 1982 and that his subsequent nonimmigrant entries were obtained through fraud or mistake. Thus, this office finds that the record indicates that the applicant’s presence in the United States during the relevant period was unlawful.

On appeal, the applicant stated through counsel that he is eligible to adjust to temporary resident status under the CSS/Newman Settlement Agreements.

The notice of intent to dismiss pointed out that the record includes the following inconsistent evidence regarding the applicant’s claim that he resided continuously in the United States throughout the requisite period, that he is admissible to the United States and that he is otherwise eligible to adjust to temporary resident status:

1. The Form I-687 which he filed on or near February 27, 1991 on which he stated under penalty of perjury that subsequent to January 1, 1982 and through the date that he signed that form in February 1991 that his only absences from the United States since entry were the following: 1) during December 1984 to visit family in Mexico; 2) during February 1986 to visit family in Mexico; 3) during March 1988 to visit family in Mexico.
2. The copies of pages of the applicant's various passports in the record which indicate that he was absent from the United States more than 60 times after January 1, 1982 and prior to June 26, 1988. That is, these pages list the following nonimmigrant entries for the applicant into the United States: May 5, 1982, October 26, 1983, December 29, 1983, April 15, 1984, June 28, 1984, July 16, 1984, September 16, 1984, November 23, 1984, December 19, 1984, February 2, 1985, February 27, 1985, June 2, 1985, June 30, 1985, July 14, 1985, July 29, 1985, August 24, 1985, September 10, 1985, September 18, 1985, September 22, 1985, November 10, 1985, November 24, 1985, December 10, 1985, January 5, 1986, February 1, 1986, February 16, 1986, March 9, 1986, March 29, 1986, April 11, 1986, May 28, 1986, July 12, 1986, July 24, 1986, August 10, 1986, August 18, 1986, September 8, 1986, October 1, 1986, October 18, 1986, November 23, 1986, December 1, 1986, December 15, 1986, December 22, 1986, January 21, 1987, February 10, 1987, February 21, 1987, March 16, 1987, May 5, 1987, May 31, 1987, June 16, 1987, June 23, 1987, July 1, 1987, August 5, 1987, August 19, 1987, September 8, 1987, November 16, 1987, November 30, 1987, December 13, 1987, February 2, 1988, March 13, 1988, March 28, 1988, April 11, 1988, May 27, 1988, June 15, 1988, and June 24, 1988.
3. The pages of the applicant's passports also establish that he traveled to Mexico and to Guatemala during the relevant period and that he was granted an L-1 nonimmigrant visa on January 13, 1987 in Mexico. Dates that his passport was stamped by officials of other countries<sup>3</sup> include: June 7, 1985, December 22, 1985, January 29, 1986 (while in Mexico he received a visa to stay 15 days in Guatemala), February 11, 1986 (the applicant's vehicle was allowed entry into Guatemala), February 12, 1986, February 16, 1986, October 16, 1986, March 2, 1987, June 20, 1987, October 15, 1987, November 16, 1987, December 19, 1987, April 16, 1988 and June 24, 1988.

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<sup>3</sup> Nearly all of these stamps do not include the name of the country that issued the stamp. Such stamps include only: the date of the stamp written in Spanish, e.g. 19 Dic. 1987; what appears to be the name of the official/inspector; the inspector's identification number; and the letters [REDACTED]. The stamps also include, at the far edge, either a large letter [REDACTED] or a large letter [REDACTED]. It is not clear from the record what the purpose of the stamps is.

4. This evidence suggests that when only 10 of the applicant's absences during the requisite period are considered, even if he exited the United States exactly on the dates that officials placed stamps in his passport abroad, this would lead to a finding that he was absent from the United States for a total of more than 180 days. Moreover, his entry stamps indicate that he was absent at least an additional 40 times more during the requisite period. [Official stamps in Spanish paired with next possible U.S. entry dates are as follows: June 7, 1985-June 30, 1985, 23 days; December 22, 1985-January 5, 1986, 14 days; January 29, 1986-February 1, 1986, 3 days; February 11, 1986-February 16, 1986, 5 days; October 16, 1986-October 18, 1986, 2 days; March 2, 1987-March 16, 1987, 14 days; June 20, 1987-June 23, 1987, 3 days; October 15, 1987-November 16, 1987, 32 days; December 19, 1987-February 2, 1988, 45 days; and April 16, 1988-May 27, 1988, 41 days.]
5. The educational evaluation letter on Education International Evaluation of Foreign Education and Training letterhead stationery which states that the applicant completed his degree in Electrical Engineering in Mexico during 1983. This letter suggests that he was residing in Mexico and studying in Mexico during 1983 and the years immediately preceding.
6. The statement made on appeal through counsel which indicates that the applicant completed his college degree in Mexico during 1969; however, he did not complete the professional exam related to this degree until July 29, 1983 and he did not obtain his professional identification card until June 22, 1984. Counsel provided this as an explanation for the educational equivalency letter in the record which indicates that the applicant was residing in Mexico and studying in Mexico during 1983. Counsel did not submit a copy of the applicant's official transcripts from college or other independent evidence to support the assertion that the applicant waited twenty-four years before completing his professional examination in electrical engineering and before obtaining an identification card as an electrical engineer.
7. On over 60 occasions, the applicant presented himself to U.S. officials as a lawful nonimmigrant in order to gain entry and to reside indefinitely in the United States.

The record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant upon entry over 60 times in order to gain a benefit under the Act. Namely, he sought to gain entrance into the United States. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant has 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. However, on this form, the applicant stated that he is not subject to any ground of exclusion/inadmissibility. Also, he failed to state reasons why his request for a waiver should be granted and he failed to submit documentation which supports his request.

The AAO stated in the notice of intent to dismiss that the Form I-690 had not yet been adjudicated. This office provided the applicant an opportunity to file, in response to that notice, information regarding why he is excludable/inadmissible and why his request for a waiver should be granted, including any documentation that might support that request.

Also, the notice of intent to dismiss pointed out that the evidence in the record indicates that the applicant was absent from the United States approximately 60 times during the requisite period, and that he was absent a total of more than 180 days in that period. However, the applicant stated on the 1991 Form I-687 that he was absent on only three occasions during the relevant period. In addition, evidence in the record indicates that the applicant was residing in Mexico and working toward a degree at the National Polytechnic Institute in Mexico during 1983 and the period immediately prior to that. Yet, the applicant has made claims in this proceeding that he resided continuously in the United States throughout the requisite period.

The notice of intent to dismiss stated that these discrepancies cast doubt on the authenticity of the evidence of record, including the claim that the applicant resided continuously in the United States throughout the relevant period.

Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

The inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that he was not absent from the United States a total of more than 180 days during the relevant period, and that he otherwise resided continuously in the United States throughout that period.

This office stated in the notice of intent to dismiss that the applicant had not provided contemporaneous evidence that supports the claim that he was residing continuously in the United States from a date prior to January 1, 1982 through the end of the relevant period.

The AAO provided him the opportunity to provide, in response to that notice, any objective, independent evidence available to him which supports the claim that he resided continuously in the United States throughout the requisite period.

In his response to the notice of intent to dismiss the applicant did not provide independent, objective evidence to support his claim that he resided continuously in the United States throughout the relevant period. Rather, the applicant acknowledged through counsel that he was absent from the United States for over 180 days during the relevant period. He suggested that this was due to emergent reasons in that his business required him to spend a significant amount of time outside the

United States. The AAO finds that remaining outside the United States to benefit one's business is not an absence due to emergent reasons.

In response to the notice of intent to dismiss, the applicant also failed to provide information and documentation which properly completes the Form I-690 in the record, as requested in the notice of intent to dismiss.

The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period. He also failed to demonstrate that he is admissible to the United States or that he has submitted a properly completed request for a waiver of the ground of inadmissibility to which he is subject. The appeal is dismissed for these reasons with each considered as an independent and alternative basis for denial.

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