



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

MSC-06-059-12219

Office: LOS ANGELES

Date: DEC 07 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 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 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, Los Angeles, 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.

The director found that the applicant failed to meet her burden of proving continuous unlawful residence since before January 1, 1982 and throughout the requisite period. Specifically, the director found that there was no evidence that the applicant was in unlawful status prior to January, 1982 in a manner known to the government. The director also found that the applicant was absent from the United States in 1983 for a period in excess of 45 days, and that she disrupted any continuous residence that she may have accrued. The director denied the application.

On appeal, the applicant states that she left the United States on April 27, 1983, and that she reentered the United States on May 22, 1983, and did not disrupt her continuous residence. She states that she worked without authorization as a nonimmigrant student, and was present in the United States in unlawful status in a manner known to the government prior to January 1, 1982. She states that she resided continuously in the United States throughout the requisite period.

As a preliminary matter, the AAO notes that 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 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, United States 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.

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, if the applicant was present in the United States in nonimmigrant status prior to 1982, the absence from her record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that she violated her nonimmigrant status and was in unlawful status in a manner that was known to the government. *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 record establishes that the applicant obtained a nonimmigrant F-1 student visa in August, 1979. The applicant did not submit copies of any passport pages with entry stamps indicating entries into or exits from the United States. The record indicates that she graduated from Walsh College in the United States in May 1981. There is no evidence of record that she remained in the United States after graduation. The applicant states that she worked without authorization from January, 1982 to May, 1984, and that she was working in the United States in a manner known to the government as of January 1, 1982. She does not submit earnings records, pay stubs, tax records or a letter from her employer, [REDACTED]. She submits a letter from [REDACTED] who states that he worked with the applicant at [REDACTED] from 1981-1984. This letter does not contain sufficient detail to establish the truth of its assertions. The evidence does not establish that the applicant entered the United States as a nonimmigrant and was in unlawful status in a manner known to the government prior to January 1, 1982. The application will be adjudicated in accordance with the standards set forth in 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). The applicant shall be regarded as having resided continuously in the United States if at the time the initial application for temporary resident status is considered filed, 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."

For purposes of establishing residence and physical presence, 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. 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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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.

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period

of time. The documentation that the applicant submits in support of her claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of school records, copies of two F-1 nonimmigrant student visas issued to the applicant in Nairobi on February 10, 1975 and May 6, 1983, rent receipts, car and bank receipts, pay stubs, and a letter from a former employer and a former co-worker.

The evidence of record establishes that the applicant entered the United States as a nonimmigrant student in 1979, attended Walsh College, and graduated from Walsh College in May, 1981. The applicant registered at Southeastern University in Washington, DC in September, 1982. Thereafter, the applicant obtained a student visa in Nairobi on May 6, 1983 to attend Southeastern University.¹ The applicant graduated with a master's degree from Southeastern University in May 1984. The applicant submits color copies of passport pages indicating that she obtained a nonimmigrant F-1 student visa in Nairobi on August 10, 1979 and a second one on May 6, 1983.² The applicant did not submit copies of any passport pages with entry stamps indicating entries into or exits from the United States.

The director found that the applicant was ineligible for adjustment to temporary resident status because she had disrupted any period of continuous residence she may have accumulated when she went to Kenya to obtain her student visa in 1983. The AAO agrees. The Form I-687 at part 32 indicates that the applicant was absent from the United States from June 1983 through July 1983. In a sworn statement dated May 1, 1986 the applicant stated that she traveled to Kenya in June 1982 for four weeks, returning in July 1983. The director found that this evidence establishes that the applicant was outside the United States for more than 45 days, from May 6, 1983 when she obtained her student visa, until her return to the United States in July 1983. On appeal, the applicant states that she left for Kenya on April 27, 1983, and that she reentered the United States on May 22, 1983, an absence of less than 30 days. The applicant does not reference the source of her information and does not submit any evidence in support of her statement that she was absent from April 27 – May 22, 1983, such as airline tickets, phone bills, correspondence, or any other documentary or testimonial evidence. The applicant fails to explain her previous statements on the Form I-687 and in her sworn statement that she returned to the United States in July 1983. She has not submitted credible evidence that she was absent from the United States for fewer than 30 days. She has not overcome the decision of the director that she was absent from the United States for more than 45 days. As she disrupted her period of continuous residence, and has not shown

¹ In order to obtain a student visa at a United States consulate abroad in May, 1983, the applicant would have been required to first obtain a Form I-20 from Southeastern University for presentation at the consulate. The applicant registered for class at Southeastern in September, 1982. It is unclear from the record what her visa status was at the time of her initial registration at Southeastern. As a university with the authority to issue a Form I-20, however, Southeastern would have been required to verify her valid student status before allowing her to register. This suggests that the applicant would have been legally in the United States in September 1982, and that she would not have been working unlawfully in the United States from May, 1981 until September 1982.

² The applicant stated that she no longer has the passport from which these pages were copied, but that she found these copies in her old school records. Color copying was not widely available in the early 1980's, casting doubt on the applicant's assertion that she no longer has the passport.

that her delayed return was due to an emergent reason, she is ineligible for adjustment to temporary resident status.

Further, the record does not establish the applicant's continuous unlawful residence throughout the requisite period. The record establishes that the applicant resided in the United States from some time in 1979 until her graduation from Walsh College in May 1981. The record establishes that the applicant probably resided in the United States from September 1982 though May 1984, when she attended Southeastern University. The record also establishes that the applicant resided and worked in the United States for some portion of the requisite period from December 1986 through May 1988, when she worked for Maryland National Bank.

The applicant probably did not reside in the United States unlawfully from May, 1981 through September 1982. She submits a letter from [REDACTED], who states that he worked with the applicant at [REDACTED] from 1981-1984, but does not submit earnings records, pay stubs, tax records or a letter from [REDACTED]. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. The letter from her co-worker does not provide concrete information, specific to the applicant and generated by the asserted associations with her, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness statements must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statement does not indicate that its assertions are probably true. Therefore, it has little probative value.

The evidence that the applicant submits to establish that she resided in the United States from May 1984 through December 1986 consists of rent receipts dated April 1985 and September 1986. The rent receipts are issued to the applicant on dates for addresses that are inconsistent with the addresses listed by the applicant on the Form I-687 at part 30 for those same dates. Thus this evidence will be given nominal weight.

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.