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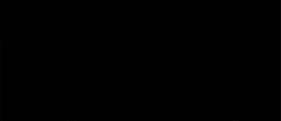
U.S. Citizenship
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Services

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Office: SACRAMENTO

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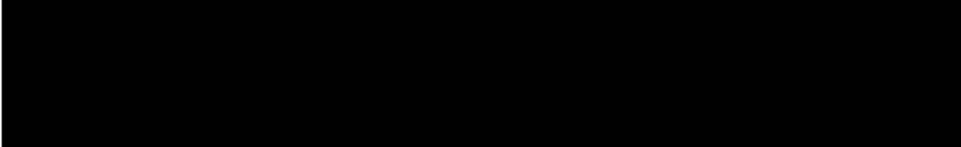
Applicant:



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:



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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status 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, and *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), was denied by the Director, Sacramento. The decision 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, CSS/Newman Class Membership Worksheet. 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, who was an F-1 student, did not prove that he worked off campus illegally in a manner known to the government. The director denied the application, finding that the applicant had not met his burden of proof and was, therefore, not eligible to adjust to temporary resident status pursuant to the terms of the CSS/Newman Settlement Agreements.

On appeal, the applicant asserts that United States Citizenship & Immigration Services (USCIS) erred in finding that the applicant failed to prove that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government.

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

1. 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 submitted evidence establishing that: he first entered the United States on September 16, 1977 as an F-1 student to attend high school; he graduated from high school in California in 1978; on August 27, 1979, he reentered the United States as an F-1 student to attend Los Angeles Pierce College; he continuously studied at Pierce College from the fall of 1979 through the spring of 1981; he earned \$176 in 1979 without work authorization; he did not take a full course of study at Pierce College in the fall 1979 (9 credits) and the fall 1980 (7 credits); he attended California State University at Chico (UC Chico) continuously from fall 1981 through spring 1984; he obtained a student visa in Tijuana on May 31, 1984 and reentered the United States as an F-1 student on August 25, 1984 to resume studies at UC Chico; he earned \$3 in 1984 without work authorization; he enrolled at University of California at Davis (UC Davis) in the fall of 1984 and attended continuously through the fall of 1986; he earned \$3,879.72 in 1986 and \$5,344.80 in 1987 from UC Davis; he earned \$15,884 in 1988. The applicant submits a statement indicating that he worked at UC Davis as a research assistant in 1986 and 1987 while writing his master’s thesis. This statement is corroborated by the 1986-1987 W-2 forms issued by UC Davis to the applicant. The applicant also submitted copies of every page of 5 passports beginning in 1976.

The visa, entry and exit stamps corroborate his statement that he continuously resided in the United States throughout the requisite period.

Applying the adjudicatory standards set forth in the settlement agreement, the AAO finds that the applicant violated the terms of his nonimmigrant status in a manner known to the government prior to January 1, 1982. The applicant entered the United States as an F-1 student on September 19, 1977, and filed no quarterly or annual address reports as required on or before December 31, 1982. The applicant's social security records indicate that he earned \$176 in 1979 without work authorization. The applicant violated his F-1 nonimmigrant student status when he began working off-campus in 1979 without gaining prior authorization to do such work. *See* 8 C.F.R. § 214.2(f)(9)(ii)(which indicates that an F-1 student shall only work off-campus after completing one full academic year and after receiving authorization to do so from the designated school official) *See also* 8 C.F.R. § 214.1(e)(which indicates that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.). Further, transcripts from Los Angeles Pierce College indicate that the applicant did not take a full course of study in the fall of 1979 and the fall of 1980. The applicant's failure to maintain a full course of study is a violation of nonimmigrant student status. 8 C.F.R. § 214.2(f)(6)(i)(B). For these reasons, the AAO finds that the applicant violated his nonimmigrant status in a manner known to the government prior to January 1, 1982. The AAO notes further that the applicant's F-1 student visa obtained in Tijuana on May 31, 1984 and his subsequent readmission to the United States as a valid nonimmigrant student on August 25, 1984 were obtained by fraud or mistake, as the applicant had previously violated his student status and failed to disclose the violation to the consular official at the time the visa was obtained and to the inspecting officer upon reentry to the United States.

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.

The application may not be approved, however, as the evidence establishes that the applicant is inadmissible to the United States. Section 245A(a)(4)(A) of the Immigration & Nationality Act (the Act), 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for temporary resident status.

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 and reentry into the United States without disclosing that he had violated the terms of his student visa by not taking a full course of study and by working without authorization. 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.

Additionally, the applicant obtained a B-1/B-2 visa on May 16, 1994 and entered the United States on June 19, 1994 as a nonimmigrant visitor. On July 3, 1997 he obtained a second B-2 visa and entered the United States on July 4, 1997 as a nonimmigrant visitor. In order to qualify for each visitor's visa, the applicant would have misrepresented that he did not attempt to file an application for permanent residence in the United States.¹ The United States Department of State will not issue a nonimmigrant visitor's visa to an intending immigrant, and if the applicant had disclosed that he attempted to file for amnesty in 1987 and for permanent immigrant employment, he would not have been granted either of the visas. *See*, section 101(a)(15)(B), 8 U.S.C. § 101(a)(15)(B); 9 FAM 41.31. The AAO finds that the applicant misrepresented his intentions in order to obtain an immigration benefit. 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. 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. The applicant may file a Form I-690 Application for Waiver of Grounds of Excludability. Should the director approve such application, the AAO will reopen the matter upon the applicant's filing of a motion to reopen *sua sponte*, without fee, in order to reconsider the applicant's eligibility for legalization in light of the approved waiver.

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

¹ The applicant submits a sworn statement in connection with his Form I-687 application that he attempted to file for temporary residence in the summer of 1987 "in Sacramento at [REDACTED]." The record also reflects that the applicant filed a Form ETA 750B in connection with an application for permanent labor certification and that a Form I-140 petition for immigrant worker was approved on his behalf in 1992.