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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
XSE-87-097-2006

Office: WESTERN SERVICE CENTER

Date: **JUN 22 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:

SELF-REPRESENTED

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 was denied by the Director, Western Regional Processing Facility. The Legalization Appeals Unit dismissed the appeal. Counsel for the applicant asks the Administrative Appeals Office (AAO) to reopen the matter, *sua sponte*. The AAO will reopen the matter, and remand for further action by the director.

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 failed to maintain a full course of study at his approved institution prior to January 1, and, therefore, that he had not met his burden of proving that he was present in the United States in unlawful status in a manner known to the government from a date prior to January 1, 1982. 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.

On appeal, the applicant asserts that the director of the Western Regional Processing Facility 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. He originally filed an appeal of the director's decision with the Legalization Appeals Unit (LAU) which was subsequently dismissed. The matter is now before the AAO following the September 9, 2008, court approved 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).

Accordingly, 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).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

Although the regulation at 8 C.F.R. § 245a.2(d)(3) provides an illustrative list of contemporaneous documents that an applicant may submit in support of his or her claim of continuous residence in the United States in an unlawful status since prior to January 1, 1982, the

submission of any other relevant document is permitted pursuant to 8 C.F.R. § 245a.2(d)(3)(vi)(L).

The “preponderance of the evidence” standard requires that the evidence demonstrate that the applicant's claim is “probably true,” where the determination of “truth” is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that “[t]ruth is to be determined not by the quantity of evidence alone but by its quality.” *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421, 431 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

In support of his claim of continuous unlawful residence in the United States, the applicant asserts that he initially entered the United States on August 19, 1979 in New York, as an F-1 nonimmigrant student. **He was authorized to attend Shoreline Community College.** The applicant attended Shoreline Community College from 1978 until Spring 1981 when he was awarded his degree. The record shows a Form I-20B, Certificate of Eligibility for F-1 nonimmigrant student status, executed on June 1, 1981 by Foreign Student Coordinator, Shoreline Community College, indicating that the applicant terminated attendance on March 20, 1981. There is no other I-20B in the record of proceedings; however, the record does contain an incomplete Application by Nonimmigrant Student for Extension of Stay, School Transfer or Permission to Accept or Continue Employment. The application contains the applicant's name and his address information. On the application, the applicant indicates that he was a full-time student at his original institution. This document does not appear to have been filed with USCIS. Because the applicant left his originally approved F-1 institution, Shoreline Community College on March 20, 1981, the record reveals that the applicant failed to maintain his student status from that date forward. It is unclear if he filed a timely request to transfer to Seattle University as he indicates in his appeals brief. The record also reveals that the applicant reentered the United States on June 17, 1981 in F-1 nonimmigrant status. Therefore, following *de novo* review, the AAO finds that the evidence contained in the record of proceedings establishes that the applicant failed to maintain his student status beginning March 20, 1981. Furthermore, as stated above, it is presumed that the school or employer complied with the law and reported violations of status to the INS.

It is also noted that the AAO maintains plenary power to review each appeal 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 AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). In this case, the AAO finds that the applicant violated his status by failing to submit quarterly address reports pursuant to Section 265 of the INA.

Until December 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 entered the United States on August 19, 1979 in New York, 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, for the period August 19, 1979 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 29, 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 overcome the grounds for denial cited by the director and has established that his unlawful status was known to the government prior to January 1, 1982.

The applicant further asserts that he failed to maintain a sufficient course-load to fulfill the requirements of his F-1 status during Fall Quarter 1979, Winter 1980, Winter 1981 and Fall 1981. The applicant’s transcripts from the Shoreline Community College and Seattle University indicate that the applicant took 10 credits in Fall 1979, 10 credits in Winter 1980, and 10 credits in Fall 1981. 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). The applicant asserts that government knowledge of his violation of the “full time status” requirement can be presumed from the regulatory requirement that schools immediately report students with such violations to USCIS (former INS). Transcripts from both academic institutions indicate that the applicant did not take a full course of study during Fall Quarter 1979, Winter 1980, Winter 1981 and Fall 1981. 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 for this reason as well.

The AAO has conducted a *de novo* review of the record of proceeding to determine if the applicant meets all of the requirements for eligibility, specifically, whether he has established his continuous residence for the duration of the relevant period, and his admissibility.

In the instant case, the applicant has submitted the following evidence of his eligibility: bank statements, lease agreements, and investment documents. The contemporaneous documents submitted by the applicant appear to be credible and the addresses listed for the applicant during the relevant period are consistent with the addresses that the applicant provided in his Form I-687 application.

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 proving 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 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 entered the United States on June 17, 1981 without disclosing that he had violated the terms of his initial student visa by not taking a full course of study immediately prior to reentering the United States in F-1 status. The United States Department of State will not admit a visa applicant 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).

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 application is hereby remanded to allow the applicant to file the Form I-690 waiver and the director to adjudicate any such waiver application.

**ORDER:** The director's decision is withdrawn and the case is remanded for further action consistent with the decision. Should the director's decision be adverse to the applicant, the decision should be certified to the AAO for review.