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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
and Immigration
Services**

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FILE:

MSC 04 300 22650

Office: ORLANDO, FL

Date:

NOV 02 2009

IN RE:

Applicant:

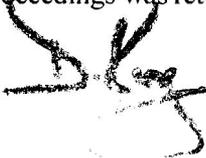
APPLICATION:

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 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, Orlando, Florida terminated the applicant's temporary resident status for which he applied using 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 AAO issued a notice of intent to dismiss on September 16, 2009. That notice stated that in this proceeding, the applicant indicated that he entered the United States on an F-1 student visa prior to enrolling at Xavier University of Louisiana. However, the applicant submitted no evidence of this nonimmigrant entry. Nonetheless, the director found that the applicant had entered the United States as a nonimmigrant F-1 student on an unspecified date prior to his 1980 fall term enrollment at Xavier University.

The Xavier University transcripts in the record establish that the applicant attended this university from fall term 1980 through fall term 1983. The director indicated that the applicant had not shown that he was in violation of the terms of his F-1 student status in a manner known to the government prior to 1982. Therefore, the director found that the applicant had not shown that he had resided unlawfully in the United States throughout the relevant period and he revoked the applicant's temporary resident status.

The notice of intent to dismiss stated that as a preliminary matter: 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 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.)

The AAO stated in the notice of intent to dismiss that the record is not clear regarding whether the applicant is an NWIRP class member as enumerated above. Throughout this proceeding, the applicant indicated that he entered the United States as a nonimmigrant F-1 student prior to the 1980-1981 school year.

However, there is no documentary evidence of his stated 1980 nonimmigrant entry in the record. The applicant has only provided documentary evidence of his November 1998 and May 1999 nonimmigrant entries. The applicant also stated on the Form I-687 that he made entries during December 1983 and December 1986. It is not clear from the record if he re-entered as an F-1 nonimmigrant on these dates.

The AAO requested that the applicant provide in response to the notice of intent to dismiss a complete copy of each page of the passport(s) which he used to enter during 1980, 1983 and 1986, as well as copies of the front and back of any Form I-94, Arrival Departure Record, issued to him upon entry in 1980, 1983 and 1986. This office also requested that if the applicant has other documentary evidence of these entries, he should submit copies of that as well as copies of any other nonimmigrant entries into the United States that he has ever made for which he has not yet submitted evidence. The AAO requested that the applicant also provide a sworn statement regarding the exact dates that he exited the United States during November 1983 and December 1986 as well as the precise dates that he re-entered in December 1983 and December 1986, if he does not provide documentation of these entries.

In response, the applicant did not provide documentation of his stated December 1983 and December 1986 re-entries into the United States. He also did not provide a sworn statement regarding the precise dates that he exited the United States in November 1983 and December 1986 and that he re-entered in December 1983 and December 1986. He did not provide copies of all pages of the passports which he used for entering the United States during the relevant period, as requested, and he did not submit an explanation for his failure to do so. Instead, he submitted only the identity pages and pages 8, 9, 12 and 13 of the Nigerian passport issued to him in London, England on May 21, 1981. On page 13 of this passport is a multiple entry F-1 student visa issued to the applicant on August 5, 1982 in London. On page 12 of this passport is a copy of the applicant's

April 6, 1983 entry stamp issued at Atlanta, Georgia and his August 6, 1988 entry stamp, also issued in Atlanta.

Yet, on the Form I-687 at item 32 where the applicant was required to list all of his absences from the United States since January 1, 1982, the applicant indicated that throughout all of 1982 and all of 1983 and 1988, except for November/December 1983 and December 1988, he was in the United States.

Further, according to the applicant's passport, the applicant was outside of the United States on the following dates: He arrived in Nigeria on January 15, 1985 and departed on July 10, 1985. He embarked/departed from the U.K. at Gatwick, England Airport on May 26, 1981. He apparently entered the U.K. at Gatwick, England Airport on December 19, 1981 and departed on December 23, 1981. He entered at Gatwick, England on January 14, 1982. He arrived in Nigeria on July 18, 1982. He was in Nigeria on March 20, 1983, but it is not clear from the stamp if this was an arrival or departure stamp. He arrived in Nigeria during July 1983. On January 8, 1984, the applicant departed Nigeria. An immigration official of a foreign country stamped the applicant's passport on December 27, 1985, but the name of this official's country is not legible on the stamp.

The AAO explained to the applicant in the notice of intent to dismiss that if he no longer had his expired passports, copies of his expired passports, or other documentation of his 1980, 1983, 1986 entries and other entries that he has made into the United States, the following applies: First, where an applicant is claiming that he made a pre-1982 nonimmigrant entry or is otherwise claiming to have been in the United States in nonimmigrant status prior to 1982 and is claiming that he violated this status in a manner that is known to the government prior to January 1, 1982, and the applicant has no documentary evidence of his nonimmigrant status, the AAO shall use as guidance instructions set forth in the 2008 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). In the attachment to this settlement titled: Exhibit 2 Instructions and Class Member Worksheet at page 5, the NWIRP class member without documentary evidence of his nonimmigrant entry/nonimmigrant stay and without credible declarations from third parties regarding his nonimmigrant status is instructed that he may submit a sworn statement. See copy of Exhibit 2 attached.

The AAO instructed the applicant that he might submit a similar sworn statement in response to the notice of intent to dismiss in order to support the claim that he was present in the United States in nonimmigrant status prior to January 1, 1982.¹

However, this only applies where an applicant no longer has available documentary evidence of his pre-1982 nonimmigrant entry. According to the applicant's wife's October 16, 2009 affidavit, submitted in response to the notice of intent to dismiss, every entry which the applicant made into

¹ Exhibit 2, Instructions and Class Member Worksheet indicates that the applicant may also request that USCIS check its records for evidence of the applicant's nonimmigrant status. This office has conducted such a search and has located no records of your previous nonimmigrant status.

the United States from 1980 through 1986 was made using an F-1 student visa. The record establishes that: on May 21, 1981, a passport was issued to the applicant in London; during summer term 1981, the applicant attended class at Xavier University of Louisiana; during December 1981 and January 1982, the applicant was in England; and during fall term 1982 the applicant attended class at Xavier University of Louisiana. Thus, the applicant had to have made nonimmigrant entries into the United States after the May 1981 passport was issued and prior to beginning class in summer 1981 and fall 1982. The entry prior to summer term 1981 had to have been made prior to 1982. These entries would have been documented on the passport which was issued on May 21, 1981. The record establishes that the applicant still has this passport because on October 16, 2009, he submitted copies of certain pages of this passport. The AAO finds that the applicant may not submit a sworn statement regarding a pre-1982 nonimmigrant entry, where the record establishes that the applicant has documentary evidence of a pre-1982 nonimmigrant entry, but failed to provide that evidence when he failed to provide copies of all pages of his passport(s) from the relevant period, as requested.

The applicant has not properly established for the record that he entered as a nonimmigrant prior to 1982. As such, he is not an NWIRP class member and he has not established that he violated his nonimmigrant status in a manner that is known to the government prior to January 1, 1982.

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 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.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.

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.*

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 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.

What remains 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 unlawful residence in the United States throughout the requisite period.

The AAO stated in the notice of intent to dismiss that the record includes the following inconsistent evidence regarding these points:

1. The Form I-687 signed under penalty of perjury on June 29, 2004 on which the applicant lists his employment in the United States since entry as: [REDACTED] from June 1980 through May 1983; [REDACTED] Louisiana from August 1985 through December 1988; [REDACTED] from July 1999 through September 2003; and [REDACTED] from April 2001 through September 2003²; and [REDACTED] Florida from September 2003 through the date that form was signed.³
2. A copy of an employment letter dated April 14, 2004 on Louisiana State University Health Sciences Center, Health Care Services Division, Medical Center of Louisiana at New Orleans letterhead stationery which indicates that the applicant was employed as a Pharmacist at the Medical Center of Louisiana at New Orleans from December 1983 through August 1985. It is signed by the Intern Director of Pharmaceutical Care at the Medical Center of the (sic) Louisiana at New Orleans.
3. A copy of the applicant's Xavier University of Louisiana diploma which indicates that the applicant received the degree of Bachelor of Science in Pharmacy on May 20, 1984.
4. A copy of the applicant's State of Louisiana Pharmacist License which indicates that he received a license as a Registered Pharmacist on February 22, 1984.
5. Copies of the applicant's entry stamps and Form I-94 which establish that he presented himself to U.S. officials as a lawful nonimmigrant upon entry during November 1998 and May 1999 in order to reside indefinitely in the United States.

The notice of intent to dismiss stated that the record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant upon entry on various occasions, including his 1998 and 1999 entries, in order to gain a benefit under the Act. Namely, he sought to gain entrance

² On the Form I-687, New Smyrna Beach is misspelled as Nsmyna Beach.

³ The Form I-687 does not list the applicant's title/position at this pharmacy.

into the United States. Thus, he is inadmissible under section 212(a)(6)(C)(i) of the Act. In reply to the notice of intent to dismiss, the applicant provided proof that he has submitted to the director the completed 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. Thus, the AAO finds that the applicant has demonstrated that he submitted a properly completed request for a waiver of the ground of inadmissibility to which he is subject.

Also, the notice of intent to dismiss pointed out that the applicant submitted an employment letter which indicated that he was employed at the Medical Center of Louisiana at New Orleans from December 1983 through August 1985; however, he failed to list this employment on the Form I-687.

This discrepancy casts doubt on the authenticity of the evidence of record, including the applicant's claim that he resided continuously in the United States from a date prior to January 1, 1982 through May 4, 1988.

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 AAO stated in the notice of intent to dismiss that such discrepancies in the record may be overcome through independent, objective evidence of the applicant's claim that he resided continuously in the United States throughout the statutory period. Detailed affidavits in which the affiant, for example: attests to having knowledge of the exact address where the applicant resided in the United States during the relevant period; attests to never having gone more than a specific number of days without having seen the applicant during the relevant period; provides proof of identity and of having resided in the United States himself/herself during the relevant period; etc., which support the applicant's claim that he resided continuously in the United States from May 1984 through the end of the statutory period would also be considered.

The notice of intent to dismiss also noted that the applicant stated on the Form I-687 that he was employed at K & B Pharmacy, New Orleans from August 1985 through December 1988, but he did not provide an employment letter or Form W-2, Wage and Tax Statement, to verify this. Also, the applicant did not submit any affidavits or contemporaneous evidence to support the claim that he continued residing in the United States from August 1985 through December 1988.

The AAO provided the applicant the opportunity to provide, in response to the notice of intent to dismiss, objective, independent evidence, including a U.S. Social Security Administration statement, and detailed affidavits which support the claim that he resided continuously in the United States throughout the statutory period, including the period following May 1984. This office stated that if the applicant is not able to obtain additional employment letters or other proof of employment, such as Forms W-2 or a Social Security Administration statement, the applicant should submit a sworn statement regarding why he is not able to do so.

In response, the applicant provided a sworn statement in which he stated that he was not able to obtain an employment letter from K & B Pharmacy, New Orleans because that employment was over 20 years ago. The applicant failed to state why he did not provide: a Social Security Administration statement or other evidence of that employment; or additional evidence of his stated employment from 1983 through 1985 at the Medical Center of Louisiana, which he failed to list on the Form I-687. The only affidavit regarding continuous residence during the relevant period that the applicant provided in response to the notice of intent to dismiss was the October 16, 2009 affidavit from his wife [REDACTED]. On this affidavit, [REDACTED] indicates that the applicant has resided continuously in the United States from 1986 until the present. This affidavit is not detailed, it does not include an address for the applicant during the relevant period and its credibility is undermined by statements which the applicant made at item 32 of the Form I-687 which indicate that he resided in Nigeria, not the United States, from December 1988 through December 1998. The credibility of the evidence overall is further undermined in that the applicant indicated in his sworn statement submitted in reply to the notice of intent to dismiss that he resided on [REDACTED] in Kenner, Louisiana from 1980 through 1984 and on [REDACTED] in New Orleans, Louisiana from 1984 through 1988. Yet, on the Form I-687, he stated that he resided on [REDACTED] in Kenner, Louisiana from 1980 through 1988.

The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period.

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