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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:



Office: LOS ANGELES, CA

Date: NOV 04 2009

MSC 06 101 16511

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:

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 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, Los Angeles, California 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 had remained in lawful status from the date of her December 1981 entry as a nonimmigrant B-2 visitor for pleasure through January 1982 because her entry visa was valid for an indefinite period and remained valid through the date of her 1991 entry as a B-2 nonimmigrant. Based on this, the director found that the applicant had not established continuous unlawful presence during the relevant period and she denied the application.

On appeal, the applicant stated that she had established continuous unlawful residence throughout the requisite period and that she is otherwise eligible to adjust to temporary resident status.

On October 5, 2009, the AAO issued a notice of intent to dismiss in this case. In that notice, as a preliminary matter, the AAO pointed to the following: On September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who –

(A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a 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 her lawful entry and prior to January 1, 1982, the applicant violated the terms of 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, U.S. 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, when an NWIRP class member demonstrates that she 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 had violated her 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 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 indicates that the applicant entered as a B-2 visitor for pleasure on December 23, 1981 and December 24, 1981. The applicant did not assert, nor does evidence in the record indicate, that her lawful status expired prior to January 1, 1982 through the passage of time. The applicant stated that she began working as a babysitter during December 1981. She did not assert, however, that the U.S. government was made aware of her unauthorized employment prior to January 1, 1982. No evidence in the record suggests that the government was made aware of this employment.¹ As a nonimmigrant, the applicant was required to file quarterly address reports and there are no address reports in the record. However, the applicant's first quarterly address report was not due until three months after her entry, or during March 1982. Thus, it may not be said that prior to January 1, 1982 the government was made aware of her unlawful status by her failure to file the initial quarterly address report. Also, the record reflects that the applicant resided at the same address from the time of her December 1981 entry through December 1985. Thus, she was not required to file a change of address report until after January 1, 1982.

The notice of intent to dismiss stated that in keeping with the terms of the NWIRP settlement agreement the record does not establish that the applicant was in unlawful status in a manner that was known to the government prior to January 1, 1982. Therefore, the applicant had not established that her presence in the United States was unlawful in a manner known to the government prior to January 1, 1982 and that she remained in unlawful status throughout the requisite period.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under

¹ In the notice of intent to dismiss, the AAO stated that if the applicant had evidence that her B-2 nonimmigrant status expired prior to January 1, 1982 or that the government was made aware that she had violated her lawful status prior to January 1, 1982, she could submit that evidence in response to the notice.

the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the Immigration and Naturalization Service (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.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term “until the date of filing” shall mean until the date the alien was “front-desked” or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements 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 through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See id.* and § 245A(a)(2)(A) of the Act.

Where an applicant entered the United States in nonimmigrant status before January 1, 1982, in order to show unlawful residence throughout the requisite period, she must establish that her period of authorized stay expired prior to January 1, 1982 through the passage of time or that she fell into unlawful status and her unlawful status became known to the government prior to January 1, 1982. *See* section 245A(a)(2)(B) of the Act.

An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements has the burden to establish by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of Section 245A of the Act, and is otherwise eligible for adjustment of status. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

The regulation at 8 C.F.R. § 245a.2(b) provides in pertinent part:

(b) Eligibility. The following categories of aliens, who are otherwise eligible to apply for legalization, may file for adjustment to temporary residence status:

. . .

(9) An alien who would be otherwise eligible for legalization and who was present in the United States in an unlawful status prior to January 1, 1982, and reentered the United States as a nonimmigrant, such entry being documented on Service Form I-94, Arrival-Departure Record, in order to return to an unrelinquished unlawful residence.

(10) An alien described in paragraph (b)(9) of this section must receive a waiver of the excludable charge 212(a)(19) as an alien who entered the United States by fraud.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides in pertinent part:

Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

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

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.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See 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.

At issue in this proceeding is whether the applicant has established continuous unlawful residence in the United States throughout the requisite period; whether she has established that she is admissible; and whether she has established that she is otherwise eligible to adjust to temporary resident status.

The director found that the applicant had remained in lawful status from the date of her December 1981 entry as a nonimmigrant B-2 visitor for pleasure through January 1982 because her entry visa was valid for an indefinite period and remained valid through the date of her 1991 entry as a B-2 nonimmigrant.² The AAO withdraws this point in the notice of decision. The period of lawful status is determined by the length of one’s period of authorized stay as stated, for example, on the Form I-94, Arrival Departure Record.³ The validity period of the visa defines when that visa may be used for entry. It is not related to one’s period of authorized stay. An individual may have, for example, a B-2 visa that is valid for entry for five years, but only a 6-month period of authorized stay after each entry.

On appeal, the applicant stated that she had established continuous unlawful residence throughout the requisite period and that she is otherwise eligible to adjust to temporary resident status.

As discussed previously, the AAO finds, in keeping with the terms of the NWIRP settlement agreement, that the applicant did not establish that her period of authorized stay/lawful status expired prior to January 1, 1982 through the passage of time, nor did she establish that she violated her nonimmigrant B-2 status in a manner that was known to the government prior to January 1, 1982. Therefore, the record does not establish that she resided continuously in the United States in

² There is no evidence in the record to support the director’s finding that the applicant used her December 15, 1981 entry visa to re-enter in 1991.

³ At times, the period of authorized stay is also noted on the entry stamp in the passport. The applicant’s December 23, 1981 entry stamp is notated to show that the period of authorized stay is listed on the Form I-94. No notation was made on the December 24, 1981 entry stamp in the passport regarding her period of authorized stay.

unlawful status throughout the relevant period. *See* section 245A(a)(2)(B) of the Act. The applicant did not reply to the notice of intent to dismiss. Thus, she never submitted evidence sufficient to overcome this finding.

The notice of intent to dismiss stated that the record also contains the following inconsistent evidence related to the applicant's claim that she resided continuously in the United States throughout the requisite period, that she is admissible to the United States and that she is otherwise eligible to adjust to temporary resident status:

1. The written statement of [REDACTED] on which [REDACTED] stated that he employed the applicant as a babysitter from December 1981 through 1984. He also indicated that during December 1981 and following his address was [REDACTED]
2. The written statement of [REDACTED] on which [REDACTED] stated that he employed the applicant as a babysitter from 1984 through 1990. He also indicated that during the requisite period his address was [REDACTED]
3. The Form I-687 which the applicant signed under penalty of perjury on December 30, 2005 on which she stated at item 33 that she worked as a babysitter for [REDACTED] of Arleta, California from December 1981 through December 1985, and that she worked as a babysitter for [REDACTED] of San Fernando, California from December 1985 through December 1990. The applicant also listed [REDACTED] address during the requisite period: [REDACTED] as her address from December 1981 through December 1985, and [REDACTED] address during the requisite period: [REDACTED] California as her address from December 1985 through December 1990.
4. Notes from the February 12, 2007 CSS/Newman legalization interview at which the applicant testified that she was absent from the United States for one week during August or September 1991, and that she presented herself as a nonimmigrant B-2 visitor for pleasure when she re-entered the United States in 1991.

The applicant's testimony indicates that she willfully misrepresented herself as a lawful nonimmigrant upon entry during August or September 1991 even though her actual intent was to return to the United States to reside in this country indefinitely. The record reflects that she did this in order to gain a benefit under the Act. Namely, she sought to gain entrance into the United States. Thus, she is inadmissible under section 212(a)(6)(C)(i) of the Act. The applicant has not submitted to the director the Form I-690, Application for Waiver of Grounds of Excludability, which is the form she must file to request a waiver of this ground of inadmissibility. She was provided the opportunity to file this form with the director in response to the notice of intent to dismiss. She did

not provide a response to that notice. Thus, she has not established that she is admissible or that she has requested a waiver of the ground of inadmissibility to which she is subject.

In addition, the notice of intent to dismiss stated that the evidence is not consistent regarding when the applicant worked as a babysitter for ██████████ family and when she worked as a babysitter for ██████████ family. The applicant indicated that she worked for ██████████ and she lived at his home from December 1981 until December 1985. Yet, ██████████ stated that he employed her only until 1984. The applicant stated that she began working for ██████████ and began living in his home during December 1985. However, ██████████ stated that he employed her beginning in 1984. These apparent contradictions between the applicant's own account of her addresses and employment during the requisite period and the written statements of her employers call into question whether she resided in the United States during the requisite period.

These discrepancies cast doubt on the authenticity of the evidence of record, including the applicant's claim that she resided continuously in the United States from a date prior to January 1, 1982 through the end of the requisite period.

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

The notice of intent to dismiss stated that such inconsistencies in the record may only be overcome through independent, objective evidence of the applicant's claim that she resided continuously in the United States throughout the statutory period. The AAO pointed out that the statements and affidavits submitted into the record are not independent, objective evidence. They are not sufficient to overcome the discrepancies in the evidence; they contradict the applicant's own statements made on the Form I-687; and they are not probative in this matter. The applicant did not provide any contemporaneous evidence regarding her stated continuous residence in the United States during the requisite period. She also did not provide such evidence in reply to the notice of intent to dismiss.

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

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