

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

41



FILE: MSC 07-156-11940

Office: TAMPA

Date: NOV 24 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 National Benefits Center. You no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case. If your appeal was sustained, or if the matter was remanded for further action, the record of proceedings was returned to the office that originally issued a decision in your case, and you will be contacted.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Tampa, 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 entered the United States in lawful F-1 status on January 2, 1982, and remained in lawful status until his graduation from the University of South Florida on December 17, 1983. The director found that the applicant had not established continuous unlawful presence during the relevant period and denied the application.

On appeal, the applicant states that he initially entered the United States on March 7, 1979 on a J-1 visa, and changed to F-1 status on March 19, 1980. The applicant indicates that he attended school in the United States from 1979-1983, that he worked without authorization, and that his unlawful status was known to the government before January 1, 1982. The applicant indicates that his brief absence from the United States from December 18, 1981 – January 2, 1982, did not disrupt his unlawful residence in the United States. The applicant asserts that he established continuous unlawful residence throughout the requisite period and that he is otherwise eligible to adjust to temporary resident status.

As a preliminary matter, the AAO notes that on September 9, 2008 the court approved a final Stipulation of Settlement in the class-action *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

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

- (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an Immigration and

Naturalization Service (INS) officer or agent acting on behalf of the INS, including a Qualified Designated Agency (QDE), and whose applications were rejected for filing (hereinafter referred to as 'Subclass A members'); or

(B) between May 5, 1987 and May 4, 1988, attempted to apply for legalization with an INS officer, or agent acting on behalf of the INS, including a QDE, under § 245A of the INA, but were advised that they were ineligible for legalization, or were refused legalization application forms, and for whom such information, or inability to obtain the required application forms, was a substantial cause of their failure to file or complete a timely written application (hereinafter referred to as 'Sub-class B' members); or

....

2. Enumerated Categories

- (1) Persons who violated the terms of their nonimmigrant status prior to January 1, 1982 in a manner known to the government because documentation or the absence thereof (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) existed in the records of one or more government agencies which, taken as a whole, warrants a finding that the applicant was in an unlawful status prior to January 1, 1982, in a manner known to the government.
- (2) Persons who violated the terms of their nonimmigrant visas before January 1, 1982, for whom INS/DHS records for the relevant period (including required school and employer reports of status violations) are not contained in the alien's A-file, and who are unable to meet the requirements of 8 C.F.R. §§ 245a.1(d) and 245a.2(d) without such records.
- (3) Persons whose facially valid 'lawful status' on or after January 1, 1982 was obtained by fraud or mistake, whether such 'lawful status' was the result of
 - a. reinstatement to nonimmigrant status;
 - b. change of nonimmigrant status pursuant to INA § 248;
 - c. adjustment of status pursuant to INA § 245; or
 - d. grant of some other immigration benefit deemed to interrupt the continuous unlawful residence or continuous physical presence requirements of INA § 245A.

NWIRP further provides that CSS/Newman Settlement Agreement legalization applications pending as of the date of the agreement shall be adjudicated in accordance with the adjudications standards described in paragraph 8B of the settlement agreement. Under those standards, the applicant must make a *prima facie* showing that after his lawful entry and prior to January 1, 1982, the applicant violated the terms of his nonimmigrant status in a manner known to the government in that, for example, documents and/or the absence of required documents (including, but not limited to, the absence of quarterly or annual address reports required on or before December 31, 1981) within the records of one or more government agencies, when taken as a whole, warrant a finding that the

applicant was in an unlawful status prior to January 1, 1982 in a manner known to the government. Once the applicant makes such a showing, United States Citizenship and Immigration Services (USCIS) then has the burden of coming forward with proof to rebut the evidence that the applicant violated his or her status. If USCIS fails to carry this burden, the settlement agreement stipulates at paragraph 8B that it will be found that the applicant's unlawful status was known to the government as of January 1, 1982.

The settlement agreement states further that once USCIS finds that the applicant is a class member, USCIS shall follow the general adjudicatory standards set forth at 8 C.F.R. § 245a.18(d)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Legal Immigration Family Equity (LIFE) Act of 2000] or at 8 C.F.R. § 245a.2(k)(4)[the regulation relating to whether an applicant is at risk of becoming a public charge as analyzed under the Immigration Reform and Control Act (IRCA) of 1986], whichever is more favorable to the applicant.

Thus, 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 due prior to January 1, 1982 is sufficient to demonstrate that he 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 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 initially entered the United States as a J-1 student on March 17, 1979.¹ He subsequently obtained an F-1 student visa in Washington, DC on March 19, 1980. He obtained a second F-1 visa in Caracas on December 29, 1981, and entered the United States on January 2, 1982 as an F-1 student.² He subsequently reentered the United States as an F-1 student on January 9, 1983 and August 23, 1983. School records indicate that the applicant attended the American Language Institute at the University of Tampa in 1979; the University of Tampa from spring 1980 through fall 1981; and the University of South Florida from spring 1982 until his graduation on December 17, 1983. The applicant's social security earnings statement indicates that he earned income in 1980, 1981 and 1984 during the requisite period. The applicant states that he was employed without authorization in 1980 and 1981, and that he obtained his F-1 visa on December 29, 1981 by fraud or mistake in that he did not disclose his unauthorized employment to the consular officials. The AAO agrees that the applicant violated his student status in a manner known to the government prior to January 1, 1982 by working without authorization. Further, as a nonimmigrant, the applicant was required to file quarterly address reports and there are no address reports in the record. The AAO finds that in keeping with the terms of the NWIRP settlement agreement the record establishes that the applicant entered the United States as a nonimmigrant and was in unlawful status in a manner known to the government prior to January 1, 1982. The applicant

¹ The Form DSP-66 reflects that the applicant is subject to the two-year foreign residence requirement.

² His passport reflects that he entered Venezuela on December 18, 1981.

is an NWIRP class member, and the application will be adjudicated in accordance with the standards set forth in the Stipulation of Settlement.

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, the term “until the date of filing” in 8 C.F.R. § 245a.2(b)(1) means until the date the applicant attempted to file a completed Form I-687 application and fee or was caused not to timely file during the original legalization application period of May 5, 1987 to May 4, 1988. The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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

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

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

The issue in this proceeding is whether the applicant (1) entered the United States before January 1, 1982 and (2) has continuously resided in the United States in an unlawful status for the requisite period of time. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and lived in an unlawful status during the requisite period consists of affidavits of relationship written by friends and family, the applicant's statements, his social security earnings records, school transcripts, an affidavit of domicile and copies of pages from the applicant's passport. This evidence of record establishes that the applicant entered the United States as a nonimmigrant prior to January 1, 1985, and resided continuously in the United States through summer 1984.

The applicant's Form I-687 indicates that the applicant returned to Venezuela to work in July 1984 and that he returned to the United States in October 1986. The letter from the Pizza Transit Authority indicates that the applicant was employed as an assistant manager in the branch in June, 1984. The affidavits of [REDACTED] and [REDACTED] state that the applicant worked as a distributor for biomedical companies in the USA and Venezuela after his graduation from college in December 1983. The applicant's passport indicates that the applicant obtained a multiple entry B-1/B2 visa in October 1985, and that he entered both the United States and Venezuela several times beginning in October 1986. The record also contains a letter from [REDACTED] dated December 4, 1986 authorizing the distribution of its bio-scientific products in Venezuela. The applicant's social security earnings statement indicates that he did not earn income in the United States in 1985, 1986 or 1987. The evidence establishes that the applicant did not reside in the United States continuously from July, 1984 until at least October 1986, when he states that he returned to the United States on his Form I-687. Further the applicant probably did not reside continuously in the United States from October 1986 until he was turned away from filing the Form I-687 in 1987.

The affidavits from [REDACTED] and [REDACTED] all contain statements that the affiants have known the applicant for years and that they attest to the applicant being physically present in the United States during the required period. These affidavits fail, however, to establish the applicant's continuous unlawful residence in the United States for the duration of the requisite period. As stated previously, the evidence must be evaluated not by the quantity of evidence alone but by its quality; an applicant must provide evidence of eligibility apart from his or her own testimony; and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility.

None of the witness statements provide concrete information, specific to the applicant and generated by the asserted associations with him, which would reflect and corroborate the extent of those associations and demonstrate that they were a sufficient basis for reliable knowledge about the applicant's residence during the time addressed in the affidavits. To be considered probative and credible, witness affidavits must do more than simply state that an affiant knows an applicant and that the applicant has lived in the United States for a specific time period. Their content must include sufficient detail from a claimed relationship to indicate that the relationship probably did exist and that the witness does, by virtue of that relationship, have knowledge of the facts alleged. Upon review, the AAO finds that, individually and together, the witness statements do not indicate that their assertions are probably true. Therefore, they have little probative value.

The final item of evidence is a sworn attestation of domicile from [REDACTED] indicating that the applicant resided at the stated address from October 1981-February 1987. The regional manager of the complex stated that the address assertions could not be verified from company records. This statement has minimal probative value.

Beyond the decision of the director, the applicant has not established that he is admissible to the United States. 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 applicant's testimony indicates that he willfully misrepresented himself as a lawful nonimmigrant student at the consular office in December 1981 and upon entry in January 1982, even though by his own admission he had already worked without authorization in violation of his student status. Thus, he 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 he must file to request a waiver of this ground of inadmissibility. As the record now stands, the applicant has not established that he is admissible to the United States.

The record also reflects that the applicant was convicted of driving under the influence on November 26, 1991 in the criminal traffic court of Hillsborough County, Florida. This misdemeanor conviction does not make the applicant inadmissible to the United States.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

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