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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] Office: VERMONT SERVICE CENTER Date: OCT 0 5 2009

XMA 88 525 05061

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[redacted]

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 U.S. 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: On July 21, 1989, the application for temporary resident status was denied by the Director, Regional Processing Center. The matter is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be sustained.

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.[2]

The director determined that the applicant had not demonstrated that his immigration status had become unlawful in a manner known to the government prior to January 1, 1982. Therefore he denied the application.

On appeal, the applicant through counsel asserted that he had established that his status was unlawful in a manner known to the government prior to January 1, 1982 and that he is otherwise eligible to adjust to temporary resident status.

As a preliminary matter the AAO points to the following: on September 9, 2008 the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al. vs. USCIS, et al.,* 88-CV-00379 JLR (W.D. Was.) (NWIRP). NWIRP class members are defined, in relevant part, as:

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[1] All legalization cases filed with the U.S. Citizenship and Immigration Services (USCIS) which turn on the question of whether an applicant's unlawful status was known to the government throughout the statutory period and related issues were held for an extended period until the final terms of various legalization class-action lawsuits which relate to these issues were handed down, the final such class-action lawsuit being: *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.,* 88-CV-00379 JLR (W.D. Was.) (NWIRP). It is the facts of this case that forced USCIS to place it and others like it on hold, rather than some request on the applicant's part that the case be held pending the outcome of these class-action lawsuits/settlement agreements. The terms of the NWIRP Settlement Agreement were handed down during September 2008. After that, this office began adjudicating these appeals in the order received. As a consequence, this appeal was not completed within the processing time that legalization appeals are normally completed.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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

(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

i. 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 USCIS action or inaction was because INS or USCIS 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 legalization 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, he 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 school or employer report in government records is not sufficient on its own 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 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.

Regarding the director's statement that the applicant had not shown that his status was unlawful in a manner known to the government prior to January 1, 1982, the AAO finds the following: The applicant violated his F-1 nonimmigrant student status when he failed to file the required quarterly address registration three months after his August 1981 entry as an F-1 student. At that time, he fell out of status and his unlawful status was known to the government. There is no indication in the

record that he ever acknowledged to INS, now USCIS, that he had violated his nonimmigrant status nor that he ever made a request that that status be properly reinstated. Thus, the AAO finds that the applicant was in unlawful status in a manner that was known to the government throughout the statutory period.

An applicant for temporary residence 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. In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time **or** that the alien's unlawful status was known to the government as of such date. Section 245A(a)(2) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2).

The word "government" as used here means the United States government. Where an alien establishes that, prior to January 1, 1982, documents existed in one or more government agencies which when taken as a whole demonstrate that the alien's status in the United States was unlawful, U.S. Citizenship and Immigration Services (USCIS) will find that his unlawful status was known to the government as of January 1, 1982. *See Matter of P-*, 19 I&N Dec. 823 (Comm. 1988).

Although the regulations provide an illustrative list of contemporaneous documents that an applicant may submit to demonstrate continuous residence, 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 U.S. Citizenship and Immigration Services (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 continuously resided in the United States in an unlawful status throughout the statutory period and is otherwise eligible to adjust to temporary resident status.

The documentation which the applicant submitted in support of his claim of having arrived in the United States before January 1982 and of having continuously resided in the United States throughout the statutory period includes: a copy of his passport stamped to show his August 5, 1981 nonimmigrant F-1 student entry at New York City; transcripts from U.S. schools which cover fall term 1981 through spring term 1983; bank statements for 1984, 1985, 1986, 1987 and 1988; Forms 1099, Statement for Recipients of Miscellaneous Income, for 1983 and 1986; a 1986 Form W-2, Wage and Tax Statement; pay stubs for February and March 1988; a copy of the replacement Form I-94, Arrival Departure Card, that INS issued the applicant on November 5, 1984 at the INS Southern Regional Center in Texas; a copy of the applicant's passport which is notated to show that the passport was renewed at the Republic of Bangladesh Consulate, New York City on October 27, 1983. There is no indication in the record that the applicant ever departed the United States after his August 5, 1981 entry and before he filed the Form I-687 on May 4, 1988.

The AAO finds that that the applicant has established continuous residence in an unlawful status in the United States from some date prior to January 1, 1982 and throughout the statutory period. The record indicates that he is eligible to adjust to temporary resident status under section 245A of the Act.

ORDER: The appeal is sustained. The director shall continue the adjudication of the application pursuant to the discussion above and shall enter a new decision which, if adverse to the applicant, is to be certified to the AAO for review.