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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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[REDACTED]

FILE:

[REDACTED]

Office: LOS ANGELES, CA

Date:

OCT 08 2009

MSC 05 267 12743

IN RE:

Applicant:

[REDACTED]

APPLICATION:

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

ON BEHALF OF APPLICANT:

[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 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 applicant asserted that he entered the United States as a nonimmigrant B-2 visitor for pleasure during March 1981.

On September 3, 2009, the AAO issued a notice of intent to dismiss in this case. In that notice that AAO stated that as a preliminary matter, this office would note 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 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 informed the applicant in the notice of intent to dismiss that the record is not clear regarding whether he is an NWIRP class member as enumerated above. Throughout this proceeding, the applicant indicated that he entered the United States as a nonimmigrant B-2 visitor for pleasure during March 1981. If he did enter as a nonimmigrant, he would have been required to file quarterly address reports with the INS prior to January 1, 1982. No address reports are in the record.

However, there is no documentary evidence of the applicant's stated 1981 nonimmigrant entry in the record. Thus, the following applies: 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 was 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.

In the notice of intent to dismiss, the AAO informed the applicant that he might submit a similar sworn statement in response to the notice in order to support his claim that he was present in the United States in nonimmigrant status prior to January 1, 1982.¹ The sworn statement must specify: the U.S. Consulate where the applicant applied for the pre-1982 visa; the approximate date that he received the nonimmigrant visa; the date that he used the visa to enter the United States; the location where he entered the United States using the nonimmigrant visa; the date on which his period of authorized stay expired; and a brief description of any activities that he engaged in consistent with the terms of the visa immediately after entering the United States.

In response, the applicant submitted a statement which indicated that he was not able to provide such a sworn statement because the entry had occurred too long ago and because he was only seventeen years old at the time of that entry. Instead the applicant provided statements of individual family members and acquaintances which asserted: that the applicant had indicated to each of them that he entered the United States as a visitor during 1981; that he or she had seen the applicant off at the airport in South Korea in 1981; or that the applicant had visited him or her in the United States during 1981.

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 previous nonimmigrant status. This office has conducted such a search and has located no records of the applicant's stated 1981 nonimmigrant entry.

The applicant has failed to establish that he entered as a nonimmigrant in March 1981 or at any time prior to January 1, 1982. Thus, the applicant has not established that he is an NWIRP class member.

The director indicated in the notice of decision that there is no evidence in the record that the applicant was, in any respect, in violation of the terms of his F-1 student status when he entered the United States in July 1983. Therefore, the director denied the application because the applicant had failed to establish that he resided in the United States unlawfully throughout the requisite period.

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.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.*

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.

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.

On June 24, 2005, the applicant filed the Form I-687 pursuant to the terms of the CSS/Newman Settlement Agreements. He also indicated on the CSS/Newman (LULAC) Class Membership Worksheet, Form I-687 Supplement, which is dated April 11, 2005 and was submitted with the Form I-687 received on June 24, 2005, that he is a CSS or Newman (LULAC) class member.

The director issued a notice of decision in which she indicated that a request was made in the notice of intent to deny (NOID) that the applicant document his stated 1983 entry into the United States. The director determined that the applicant had overcome this basis of denial set forth in the NOID because in the rebuttal to the NOID he submitted a copy of the Form I-94 issued to him on July 23, 1983 when he obtained entry as an F-1 nonimmigrant student.

In the notice of intent to dismiss, the AAO withdrew this point in the notice of decision. In the

NOID, the director requested documentation of the applicant's stated 1983 re-entry into the United States that the applicant might adequately support his claim that he resided continuously in the United States throughout the requisite period and that he was never absent for over 45 days in one single absence. In the rebuttal, the applicant submitted evidence which indicates that after his stated exit from the United States in January 1983, he was absent until July 23, 1983. The AAO stated in the notice of intent to dismiss that this is an absence over more than 45 days. Thus, the applicant did not overcome the basis of denial set forth in the NOID, as suggested by the director in the notice of decision. Rather, the Form I-94 stamped to show that the applicant entered on July 23, 1983 viewed together with his claims made throughout this proceeding that he exited the United States in January 1983 and, in particular, his statement made on appeal that he "went back [to Korea] in January 1983" and that he did not enter the United States again until "July 1983" confirms that the applicant was outside the United States for more than 45 days in one single absence during the requisite period.

In the notice of intent to dismiss the AAO stated that the evidence in the record indicates that the applicant was absent from the United States for over five months in one single absence, and there is no assertion in the record that he remained outside the United States for over 45 days due to emergent reasons. Evidence of this January 1983 through July 1983 absence contradicts any claim made in this proceeding that the applicant resided continuously in the United States throughout the requisite period.

This office stated in the notice of intent to dismiss that this contradiction casts doubt on the authenticity of the evidence of record, including the claim that the applicant 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).

Such inconsistencies in the record may only be overcome through independent, objective evidence of the claim that the applicant resided continuously in the United States throughout the statutory period.

The AAO pointed out that the statements and affidavits which the applicant has submitted into the record are not independent, objective evidence. They are not sufficient to overcome the discrepancies in the evidence summarized here and they are not probative in this matter. The AAO also stated in the notice of intent to dismiss that the applicant has not provided any contemporaneous evidence that he was residing in the United States during January 1983 through July 1983.

The AAO provided the applicant the opportunity to provide, in response to the notice of intent to dismiss, any objective, independent evidence that is available to him which supports his claim that he resided continuously in the United States throughout the statutory period and was not absent for over five months during 1983.

In response, the applicant did not provide any independent evidence or any other form of evidence meant to overcome the evidence in the record that he was absent from the United States for over 45 days during 1983. Thus, the applicant has failed to establish continuous residence in the United States throughout the requisite period. The appeal must be dismissed on this basis.

In addition, the AAO stated in the notice of intent to dismiss that the record indicated that the applicant had presented himself to U.S. officials as a lawful nonimmigrant upon entry during October 1988. Yet, according to his claims made in this proceeding, in October 1988, the applicant was returning to continue residing indefinitely in the United States. Therefore, the record indicates that the applicant willfully misrepresented himself as a lawful nonimmigrant upon entry during 1988 in order to gain a benefit under the Act. Namely, he sought to gain entrance into the United States. Thus, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO stated that the applicant has 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. However, on this form, he stated that he is not subject to any ground of exclusion/inadmissibility. He also failed to state reasons why his request for a waiver should be granted and he failed to submit documentation which supports his request.

The Form I-690 has not yet been adjudicated. The AAO provided the applicant an opportunity to file, in response to the notice of intent to dismiss, information regarding why he is excludable/inadmissible and why his request for a waiver should be granted, including any documentation that might support that request. The applicant failed to provide such information and documentation in response to the notice. Thus, the applicant has failed to demonstrate that he is admissible and he has failed to properly complete a request for a waiver of the ground of inadmissibility to which he is subject. The appeal must be dismissed on this basis, as well.

Going beyond any decisions issued previously in this matter, the AAO also finds that the applicant's unwillingness to submit a sworn statement which provides the details surrounding his stated March 1981 entry casts doubt on the applicant's claim that he made any entry in March 1981 or at any time prior to January 1, 1982. Thus, for this reason as well, the applicant has failed to establish continuous residence in the United States throughout the requisite period, a date prior to January 1, 1982 through the end of the requisite period. The appeal must also be dismissed on this basis.

Further, the applicant's next claimed entry is documented in the record as a July 23, 1983 F-1 nonimmigrant entry. The preponderance of the evidence indicates that this is the applicant's first entry into the United States. Further, the record does not indicate that this entry was obtained through fraud or mistake. Thus, at least at the time of this July 1983 entry, the applicant was lawfully present in the United States. Thus, the applicant has failed to show that his presence throughout the requisite period was unlawful. The appeal must be dismissed on this basis, as well.

The applicant is not eligible to adjust to temporary resident status because he has not established continuous, unlawful residence throughout the relevant period. He also failed to demonstrate that he is admissible to the United States or that he has submitted a properly completed request for a waiver

of the ground of inadmissibility to which he is subject. The appeal is dismissed for these reasons with each considered as an independent and alternative basis for denial.

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