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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

# PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEW YORK, NY Date: OCT 08 2009

MSC 04 272 10004

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, New York, New York 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 director stated that the applicant was in lawful status for at least part of the requisite period subsequent to his February 1982 entry as a nonimmigrant F-1 student. She also found that the applicant had not established continuous residence in the United States throughout the requisite period. Therefore, the director denied the application.

On appeal, the applicant indicated through counsel that after his initial nonimmigrant entry in February 1982, he immediately began working without authorization. Based on this, he asserted that this lawful entry in 1982 did not support the finding that he was present lawfully in the United States for part of the requisite period. He asserted through counsel that he had established continuous residence during the requisite period and that he is otherwise eligible to adjust to temporary resident status.

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.

As a preliminary matter, the AAO points 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 –
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> (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, 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. 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.

The applicant has made no assertion that he was present in the United States as a nonimmigrant prior to January 1, 1982, that he violated that status in a manner that was known to the government prior to January 1, 1982 or that he obtained his nonimmigrant status through fraud or mistake. The applicant is claiming that he first entered the United States without inspection in November 1981, that he departed in January 1982 and that he returned twenty-five days later during February 1982 as a nonimmigrant F1 student. Thus, the AAO finds that the applicant is not an NWIRP class member.

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 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.

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 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, has established that he is admissible and has established that he is otherwise eligible to adjust to temporary resident status. The applicant has failed to meet this burden.

On June 28, 2004, 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 June 22, 2004 and was submitted with the Form I-687 received on June 28, 2004, that he is a CSS or Newman (LULAC) class member.

On September 4, 2008, the director issued a notice of decision in which she indicated that the applicant failed to establish that he resided continuously in the United States in an unlawful manner throughout the requisite period. For example, the director indicated that the applicant entered February 13, 1982 as a nonimmigrant F-1 student and thus he was lawfully present during at least part of the requisite period. Thus, the director denied the application.

On appeal, the applicant asserted through counsel that he began working without authorization immediately after entering in February 1982. That is, the applicant indicated that he entered lawfully but that he violated his lawful status shortly after entering.

The applicant did not assert nor does the record indicate that his February 13, 1982 F-1 entry was obtained through fraud or mistake. Thus, the AAO finds that even if the applicant did fall out of status shortly after entering on February 13, 1982, he was lawfully present for at least part of the requisite period. Further, the applicant's statements made on both Forms I-687 in the record contradict the applicant's claim that he began working shortly after his entry in 1982.[1] On the Forms I-687 where the applicant was required to list all his employment in the United States since January 1982, the applicant stated that he first began working in the United States during 1988.

Therefore, the applicant has failed to establish unlawful continuous residence throughout the requisite period. The appeal is dismissed on this basis.

The director also suggested that the applicant has an obligation to provide documentary evidence of his stated entry into Canada in 1981 and/or subsequent entry without inspection into the United

[1] The record includes the Form I-687 filed June 28, 2004 and one which the applicant submitted later and referred to as the corrected copy of the Form I-687.

States during November 1981. The AAO withdraws these points in the notice of decision. There is no statutory or regulatory requirement that a legalization applicant must, in all instances, submit documentary evidence of having made an entry prior to January 1, 1982 to establish residency throughout the relevant period.

An application that fails to comply with the technical requirements of the law may be denied on those grounds by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Beyond the decision of the director, the AAO finds that the applicant is not eligible to adjust to temporary resident status because the record indicates that he did not reside continuously in the United States throughout the requisite period and that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

First, the applicant failed to provide consistent evidence to support his claim that he entered the United States without inspection during November 1981, that he remained in this country through January 1982, and that he resided continuously in the United States throughout the relevant period.

The applicant testified that he first entered the United States during November 1981. However, the original Form I-687 filed on June 28, 2004 states that the applicant resided on [redacted] California from June 1981 through June 1982. The other Form I-687 in the record initially stated that the applicant lived at the [redacted] Fresno address from February 1982 through May 1982, but this was modified to state November 1981 through May 1982. Further, on the applicant's June 23, 2004 affidavit he attested that he first entered the United States in November 1981 to pursue academic training. However, in his letter dated August 27, 2008, submitted in response to the director's notice of intent to deny, the applicant indicated that he decided to enter the United States because he wanted to visit California. He indicated that he liked Fresno, California and, therefore, he began to consider attending schools in Fresno. He also stated in this letter that he decided to depart the United States in January 1982 because the International English Institute in Fresno recommended that he return to Indonesia to obtain his F-1 visa. Yet, on the June 23, 2004 affidavit he stated that he returned to Indonesia in January 1982 for twenty-five days to visit his family.

Finally, [redacted] head of the interior design major at California State University Fresno (CSUF), submitted a letter in which she indicated that she met the applicant in November 1981 in Fresno and that the applicant enrolled full-time at CSUF during fall term 1982. However, the applicant's CSUF transcript in the record specifies that the applicant attended the Art Center College of Design during fall term 1982 and he did not matriculate at CSUF until spring term 1983.

These discrepancies in the applicant's evidence, intended to support the finding that he resided in the United States from November 1981 through January 1982, such as whether he resided in the United States beginning in June 1981 or November 1981; whether he entered the United States in November 1981 to pursue academic training or to visit California; etc. call into question whether the

applicant did reside in the United States prior to his February 13, 1982 F-1 entry and cast doubt on all the evidence of record.

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. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

This office finds that the various statements in the record are not objective, independent evidence such that they might overcome the discrepancies in the evidence described here. Also, the contemporaneous evidence in the record, such as the applicant's transcripts from fall term 1982 and following and the applicant's 1988 Form W-2, Wage and Tax Statement, do not overcome the discrepancies in the record related to the applicant's claim that he resided in the United States from November 1981 through January 1982.

The applicant has failed to establish that he resided continuously in the United States throughout the requisite period, and therefore he is not eligible for temporary resident status under the CSS/Newman Settlement Agreements. *See* 8 C.F.R. § 245a.1(c) and the CSS/Newman Settlement Agreements. The appeal is dismissed on this basis as well.

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:
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> . . .
>
> (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.
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> (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.

On January 15, 1984 and January 10, 1985, the applicant presented himself as a lawful nonimmigrant F-1 student upon admission at San Francisco. Yet, according to the claims which the applicant made in this proceeding, his intent upon returning in 1984 and 1985 was to continue

residing unlawfully and working without authorization in the United States. Thus, in 1984 and 1985, the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is inadmissible under section 212(a)(6)(C)(i) of the Act.

The regulation at 8 C.F.R. § 245a(k)(2) indicates that the legalization applicant, who is inadmissible on grounds which may be waived, must be advised that he may file the Form I-690, Application for Waiver of Grounds of Inadmissibility. The record indicates that the applicant has not yet been advised that he may file the Form I-690. Therefore, this office does not base this dismissal on the fact that the applicant is presently inadmissible.

Finally, the record shows that Immigration Judge (IJ) granted the applicant voluntary departure on February 26, 2004. The IJ stated that if the applicant did not depart on or before June 25, 2004, the grant of voluntary departure would be withdrawn and the applicant would become subject to a removal order without any further notice or proceedings. The record indicates that the applicant failed to depart the United States on or before June 25, 2004. Thus, the applicant became subject to a removal order on June 26, 2004, two days prior to filing the Form I-687. The Notice to Appear charged the applicant with violation of section 237(a)(1)(C)(i) of the Act in that after his admission as a nonimmigrant under section 101(a)(15) of the Act, the applicant failed to comply with the conditions of nonimmigrant status under which he was admitted.

The applicant is not eligible to adjust to temporary resident status because the record indicates that he was present in the United States in lawful status for at least part of the requisite period and because he has not established continuous residence throughout the relevant period. 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.