

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

L1

SEP 11 2009

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
XAH-88-636-8169

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. If your appeal was sustained, or if the matter was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The application for temporary resident status 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) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for adjudication of the Form I-690.

The record reveals that the applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act). The director determined that she had not established by a preponderance of the evidence that she had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director found that the applicant, as an F-1 student, did not prove her failure to maintain a full course load prior to January 1, 1982 or her assertion that she engaged in unauthorized employment was known to the government. The director denied the application, finding that the applicant failed to meet her burden of proof and were, therefore, not eligible to adjust to temporary resident status.

On appeal, the applicant asserts that United States Citizenship & Immigration Services (USCIS) erred in finding that she failed to prove that she was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government. On July 2, 2009, the AAO issued a Notice of Intent to Deny (NOID) requesting that the applicant submit evidence of her continuous unlawful residence in the United States for the time period 1987 and 1988. The applicant was advised that she must offer substantial evidence from credible sources addressing and explaining the deficiencies in the evidence for the stated period. On July 30, 2009 the applicant submitted additional evidence to the AAO in response to the NOID. Following de novo review, the AAO finds that the evidence submitted is probative and credible.

On September 9, 2008 the court approved the NWIRP settlement. 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 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 CIS action or inaction was because INS or CIS 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 you are 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 I-687 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, the applicant 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 29, 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 report in government records is not alone sufficient 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 further stipulates that the general adjudicatory standards set forth in 8 C.F.R. § 245a.18(d) or 8 C.F.R. § 245a.2(k)(4), whichever is more favorable to the applicant, shall be followed to adjudicate the merits of the application once class membership is favorably determined.

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 245A(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 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).

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.

In support of the applicant’s claim of continuous unlawful residence in the United States, she submitted evidence establishing that she first entered the United States in September 1975 as an F-1 student to attend the Linfield High School in Temecula, California. She attended this school in the United States until Fall 1976 when she enrolled in Biola University as an F-1 student. USCIS records indicate that the applicant made multiple entries and departures from the United States between 1976 and 1981. USCIS records also indicate that the applicant entered the United States at Calgary, Alberta, Canada pre-flight inspection on December 29, 1981 as a nonimmigrant F-1 student. Transcripts and correspondence from Biola University indicate that she was enrolled as a foreign student from September 1976 until June 1983.

The applicant identified three bases for her assertion that she violated her student status prior to January 1, 1982 and that such violations caused her to be present in the United States in an unlawful status that was known to the government.

First, she asserts that she failed to maintain the required 12 credits to be considered a full-time student, thus violating the terms of her F-1 student status. In support of this assertion, she submits transcripts from Biola University for the time period Fall 1976 until June 1983.

The transcripts from Biola University do verify that the applicant failed to enroll in a full course of study as required by her F-1 status in Spring and Fall of 1981 and the Spring of 1982. Specifically, she took 4 credits in Spring 1981, 7 credits in Fall of 1981 and 9 credits in Spring 1982. The applicant also submitted a statement from the Assistant Director of Admissions of Biola University confirming her assertion. The applicant’s failure to maintain a full course of study is a violation of nonimmigrant student status. 8 C.F.R. § 214.2(f)(6)(i)(B). For these reasons, the AAO finds that the applicant violated her nonimmigrant status in a manner known to the government prior to January 1, 1982.

Second, the applicant asserts that she violated her status by failing to submit quarterly address reports pursuant to Section 265 of the INA.

Until Dec. 29, 1981, section 265 of the Act stated that any alien in the United States in "lawful temporary residence status shall" notify the Attorney General "in writing of his address at the expiration of each three-month period during which he remains in the United States, regardless of whether there has been any change in address." See section 265 of the Act (1980) and PL 97-116, 1981 HR 4327(1981) which confirms that section 265 was modified, effective December 29, 1981, such that lawful non-immigrants were no longer required to file quarterly address reports regardless of whether there had been any change in address.

The applicant entered the United States in September 1975 as an F-1 student. She would have been required to provide written updates of her address at the expiration of each three-month period during which she remained in the United States, regardless of whether there was any change in address, for the period September 1975 until December 29, 1981. The record of proceedings is void of any address updates.

Following *de novo* review by the AAO, USCIS records do not reflect that the applicant filed quarterly or annual address notifications as required prior to December 31, 1981. In accordance with the terms of NWIRP, the AAO finds that the evidence establishes by a preponderance of the evidence that the applicant was unlawfully present in a manner known to the government prior to January 1, 1982. Consequently, the applicant has established that her unlawful status was known to the government prior to January 1, 1982 on this grounds as well.

Third, the applicant asserts that she violated her F-1 nonimmigrant student status when she obtained unauthorized employment. See 8 C.F.R. § 214.2(f)(9)(ii)(which indicates that an F-1 student shall only work off-campus after completing one full academic year and after receiving authorization to do so from the designated school official) See also 8 C.F.R. § 214.1(e)(which indicates that any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(1)(C)(i) of the Act.). In support of this assertion the applicant submits the following:

1. an affidavit from [REDACTED] indicating that the applicant worked for the Mt. Olive Lutheran Church prior to January 1, 1982;
2. an affidavit from [REDACTED] indicating that the applicant was her housekeeper from June 1981 until November 1982;
3. a statement from the applicant attesting to her employment as described above.

The evidence submitted in support of the applicant's assertion does not contain sufficient detail to be probative and credible. Furthermore, neither employment letter complies with the regulations set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether USCIS may have access to

the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The statements submitted by the applicant fail to include much of the required information and can be afforded minimal weight as evidence of the applicant's employment during the period prior to January 1, 1982 and are therefore, not sufficient to establish that she violated her student status by accepting unauthorized employment in a manner known to the government prior to January 1, 1982.

In view of the above decision, the AAO finds that the applicant violated the terms of her student status in a manner known to the government in two ways: by failing to maintain a full course load while enrolled at Biola University in F-1 student status, and by failing to submit quarterly or annual address notifications as required prior to December 29, 1981.

Furthermore, upon review of the totality of the record, the applicant has submitted evidence which tends to corroborate her claim of residence in the United States during the requisite period. The documentary evidence submitted is consistent with the claims made on the application. As stated in *Matter of E--M--*, *supra*, when something is to be established by a preponderance of evidence, the applicant only has to establish that the proof is probably true. The documents of record will be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of unlawful residence in the United States in a manner known to the government from before January 1, 1982 and throughout the requisite period.

However, the application may not be approved at this time as the evidence establishes that the applicant is inadmissible to the United States. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A), requires an alien to establish that he or she is admissible to the United States as an immigrant in order to be eligible for temporary resident status.

The record reflects that the applicant sought through misrepresentation to procure an immigration benefit under the Act. As noted above, the applicant obtained admission to the United States at Calgary, Alberta, Canada Pre-flight Inspection on December 29, 1981 as a nonimmigrant F-1 student without disclosing that she had violated the terms of her initial student visa by not taking a full course of study immediately prior to requesting admission. The United States Department of State will not renew an application for student visa if the applicant discloses previous violations of status in the United States. *See*, Section 101(a)(15)(F) of the Act, 8 U.S.C. § 101(a)(15)(F); 9 Foreign Affairs Manual (FAM) 41.61.

An alien is inadmissible if she seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The AAO notes that in the NOID, the AAO advised the applicant to file a Form I-690 which she did on July 21, 2009. As the grounds of inadmissibility have not been waived, the applicant is not admissible and is ineligible for legalization

benefits at this time. The case will be remanded until such time as the Form I-690 is adjudicated. The director shall issue another decision on the instant application and shall certify the decision, if adverse to the applicant.

ORDER: The appeal is remanded in accordance with the decision above.