

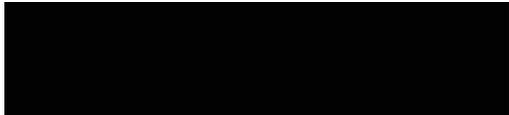


U.S. Citizenship
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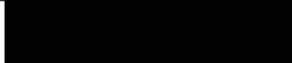
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FILE:



Office: LOS ANGELES

Date: SEP 11 2009

XLA-88-518-02140

IN RE:

Applicant:



APPLICATION: Application to Adjust Status to Temporary Resident Status 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 returned 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 remanded for further action, you will be contacted.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The termination of the applicant's temporary resident status by the Director, California Service Center is before the Administrative Appeals Office on appeal. The appeal will be sustained.

The applicant was granted temporary resident status on April 28, 1989 pursuant to Section 245A of the Immigration and Nationality Act (Act). However, the applicant's temporary resident status was terminated on March 18, 1997. The director noted that the applicant was present in the United States in lawful status during the relevant period and is therefore, not eligible to adjust from temporary to permanent resident status. The appeal to the termination of the applicant's temporary resident status was dismissed by the Legalization Appeals Unit on May 30, 2000. The Form I-687 will now be reopened by the AAO *sua sponte* and the May 30, 2000 decision will be withdrawn. The appeal will be sustained.

The record reveals that on March 18, 1997, the director issued a Notice of Termination (Notice) indicating that the applicant failed to establish that she had violated her lawful status in a manner known to the government. A review of the record reveals that the applicant was admitted to the United States in E-2 status as a minor child dependent of an E-1 Treaty Trader (her father.) She entered the United States with an E-1 visa issued on May 8, 1981 valid for multiple entries through April 24, 1985. Since she was admitted as the dependent of an E-1 treaty trader, the lawfulness of her nonimmigrant status is dependent on the lawfulness of her father's nonimmigrant status.

Accordingly, on appeal, the applicant asserts two independent grounds for finding that she was present in the United States in unlawful status in a manner known to the government.

First, the applicant asserts that although she was admitted as a nonimmigrant, she was actually present in the United States in unlawful status since her entry in May 1981 because her father's E-1 treaty trader visa was obtained through fraud and therefore as the dependent of an E-1 treaty trader she was in unlawful status *ab initio*. Following *de novo* review, the AAO finds that the record of proceedings does not contain sufficient evidence that the applicant's father obtained his E-1 visa through fraud. Accordingly, the applicant has not established that her nonimmigrant status was unlawful *ab initio* following her May 1981 entry to the United States. The AAO also finds that even if the applicant's father's E-1 status was obtained through fraud, this asserted fraud was not known to the government prior to January 1, 1982. Second, the applicant argues that she violated her status by failing to submit quarterly address reports pursuant to Section 265 of the INA.

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). 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 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 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 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 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 NWIRP Settlement Agreement, 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. NWIRP Settlement Agreement paragraph 8 at pp. 14-15.

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.

As stated above, the applicant asserts that although she was admitted as a nonimmigrant, she was actually present in the United States in unlawful status since her entry in May 1981 because her father’s E-1 treaty trader visa was obtained through fraud and therefore as the dependent of an E-1 treaty trader she was in unlawful status *ab initio*. Following *de novo* review, the AAO finds that the record of proceedings contains the following evidence in support of the applicant’s assertion:

- An affidavit from [REDACTED] former Director on Dong Heung & Co., Ltd., attesting that the company sponsoring the applicant’s father’s E-1 visa was engaged in trade primarily between Korea and Japan with few transactions between Korea and the United States. Mr. [REDACTED] further asserts that the E-1 visa application was fraudulently obtained through significant misrepresentations regarding the business transactions of the company in the United States.
- An affidavit from [REDACTED] asserting that she is the sister of the applicant’s father and that she was knowledgeable of the operations of Dong Heung & Co. Ltd.. She asserts that the company did very little business with the United States and that following her brother’s

entry to the United States in May 1981 he did not work for Dong Heung & Co. Ltd and, rather, worked as a gas station attendant. She submits no evidence in support of her assertions.

The applicant has not provided any additional documentation to establish that her father violated his E-1 status by working as a gas station attendant, nor has she provided any evidence to establish that the alleged violation was known to the government prior to January 1, 1982.

Applying the adjudicatory standards set forth in the settlement agreement, the AAO finds that the applicant has failed to establish that her father obtained his E-1 visa through fraud. Two affidavits, without supporting documentation, are not sufficient evidence to establish that the applicant's father obtained his E-1 through fraud. As stated by the director, the applicant's father would have had to submit substantial evidence of the company's business in the United States and her father's role within that business, to the US Consulate in Seoul, Korea in order for the visa to be granted.

However, following *de novo* review, the AAO finds that the applicant 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 testified that she entered the United States May 8, 1981 as the dependent of an E-1 treaty trader. 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 May 8, 1981 until December 29, 1981. 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.

Furthermore, the applicant has submitted evidence supporting 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 and consist primarily of school records from the Los Angeles Unified School District indicating that the applicant was a student of the district from 1981 until 1988, along with the applicant's passport indicating her initial entry in May 1981. 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.

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. Furthermore, the applicant's failure to submit the required address reports prior to January 1, 1982 caused the applicant to be present in the United States in unlawful status, which was known to the government. The documentary evidence of continuous residence 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. Consequently, the applicant has overcome the particular basis of denial cited by the director.

Thus, the applicant's appeal will be sustained. The director shall continue the adjudication of the application in accordance with this decision.

ORDER: The appeal is sustained.