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U.S. Department of Homeland Security  
U.S. Citizenship & Immigration Services  
Office of Administrative Appeals MS 2090  
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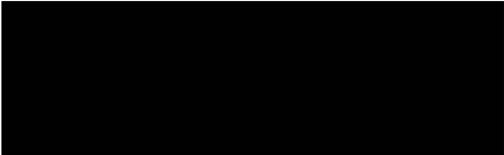


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: SEP 14 2009  
XVN 88 517 3119

IN RE: Applicant: [REDACTED]

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

ON BEHALF OF APPLICANT:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office on your appeal. If your appeal was dismissed or rejected, your file has been sent to the National Benefits Center. You no longer have a case pending before this office. If your appeal was sustained or the matter was remanded for further action, your file has been returned to the office that originally decided your case, and you will be contacted. You are not entitled to file a motion to reopen or reconsider your case.

John Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The application for temporary resident was denied by the Director, California Service Center. The director subsequently reopened and adjudicated the application under the terms of the Stipulation of Settlement reached in *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). The director denied the application and the case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act) on May 4, 1988. The director found that the applicant had not established by a preponderance of the evidence that she entered the United States in a lawful nonimmigrant status and violated that status in a manner known to the government prior to January 1, 1982 and resided unlawfully in the United States throughout the requisite period. The director denied the application, finding that the applicant had not met her burden of proof and was, therefore, not eligible to adjust to temporary resident status.

On appeal, the applicant asserts through counsel that she entered the United States as a nonimmigrant student in 1975, worked unlawfully beginning in 1978 and resided continuously in the United States in an unlawful status and throughout the requisite period. Counsel asserts that United States Citizenship & Immigration Services (USCIS) erred in finding that the applicant 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.

Class members are defined under the terms of the NWIRP Stipulation of Settlement, 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 applicant stated that she entered the United States in 1975 as a nonimmigrant student and attended high school in the Los Angeles Unified School District. She did not submit evidence of entry into the United States as a nonimmigrant or records to establish that she attended high school in Los Angeles. In the denial decision, however, the director recognized the applicant as a nonimmigrant student, concluded that she was not in an unlawful status known to the government, and thus denied the Form I-687.

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.

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.

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.

Applying the adjudicatory standards set forth in the settlement agreement, the AAO finds that the applicant violated the terms of her nonimmigrant status in a manner known to the government prior to January 1, 1982. The applicant claims that she entered the United States as an F-1 student in 1975, which fact was accepted by the director and formed the basis of the denial. She filed no quarterly or annual address reports as required on or before December 31, 1982. The applicant’s social security records indicate that she earned income from 1978 – 1988 without work authorization. The applicant violated her nonimmigrant student status when she began working without gaining prior authorization to do such work. *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. 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.

In order to establish her continuous unlawful residence since before January 1, 1982 and throughout the requisite period, the applicant submitted documentary evidence establishing that she: was issued a passport by the Royal Thai Consulate General in Los Angeles in 1976 and in 1983; received a California driver’s license in 1982; was married and insured and obtained a duplicate birth certificate in the United States in 1984; divorced in the United States in 1987; was issued utility and medical bills in 1985, 1987 and 1988; and worked in the United States every year from 1978 – 2003. The record does not establish that she was in lawful status or that her employment was authorized.

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.

Section 245A(a)(4)(A) of the Immigration & Nationality Act (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 suffered an intracranial hemorrhage in June 2003 and has not worked since 2003. An applicant for temporary resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in section 212(a) of the Immigration and Nationality Act. 8 U.S.C. § 1182(a). Among the categories of inadmissible aliens are those likely to become a public charge. If an applicant is determined to be inadmissible under section 212(a)(15) of the Act, he or she may still be admissible under the Special Rule. *See* 8 C.F.R. § 245a.2(d)(4) and (k)(4).

The regulation at 8 C.F.R. § 245a.2(d)(4) provides the factors to be considered in determining whether an applicant is likely to become a public charge and whether the special rule applies.

(4) Proof of financial responsibility. An applicant for adjustment of status under this part is subject to the provisions of section 212(a)(15) of the Act relating to excludability of aliens likely to become public charges. Generally, the evidence of employment submitted under paragraph (d)(3)(i) of this section will serve to demonstrate the alien's financial responsibility during the documented period(s) of employment. If the alien's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the alien may be required to provide proof that he or she has not received public cash assistance. An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The burden of proof to demonstrate the inapplicability of this provision of law lies with the applicant who may provide:

- (i) Evidence of a history of employment (i.e., employment letter, W - 2 Forms, income tax returns, etc.);
- (ii) Evidence that he/she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or

(iii) Form I - 134, Affidavit of Support, completed by a spouse in behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

The burden is on the applicant to establish that she is not likely to become a public charge. *See* 8 C.F.R. § 245a.2(d)(5). The AAO issued a request for evidence (RFE) to the applicant requesting that she submit evidence that she is not likely to become a public charge. Evidence of record indicated that she applied for social security disability and medical benefits from the United States government. For consideration in its adjudication of the appeal, the AAO requested the applicant to provide:

- (1) Evidence of current employment including the number of hours worked in a week and the rate of pay per hour; and/or
- (2) Evidence that the applicant is able to support herself without public assistance; and/or
- (3) A notarized Form I-134, Affidavit of Support along with any supporting documentation required; and/or
- (4) Any other evidence establishing that she is not likely to become a public charge.

In reply to the RFE, the applicant submitted sufficient information to indicate that she had not received medical benefits or disability income payments from the federal or state government. She submitted evidence that her medical condition is stable, that she is physically cared for and financially supported by her family, and that she is not likely to require extraordinary medical care on an ongoing basis. The applicant also submitted a notarized Form I-134, Affidavit of Support along with required supporting documentation from her sister. The record establishes that the applicant is not likely to become a public charge.

The applicant has established by a preponderance of the evidence that she entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the duration of the requisite period, and that she is not likely to become a public charge.

The appeal will be sustained. The director shall continue the adjudication of the application for temporary resident status.

**ORDER:** The appeal is sustained.