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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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FILE: [REDACTED]  
XSE 88 155 1036

Office: LINCOLN, NE

Date:

SEP 16 2009

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:

[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 U.S. 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.

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On May 2, 1988, the applicant filed the Form I-687, Application for Status as a Temporary Resident. On February 21, 2007 the Director, Lincoln, Nebraska, denied the application.<sup>1</sup> The decision 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.<sup>2</sup>

With respect to the applicant’s request for oral argument, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, U.S. Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, the applicant has set forth no specific reasons why oral argument should be held. Moreover, the written record of proceedings sufficiently represents the facts and issues in this matter. Therefore, the request for oral argument is denied.

The AAO issued a notice of intent to dismiss in this matter on June 5, 2009. This office stated in that notice that evidence in the record suggests that the applicant is a Canadian citizen who was present in the United States as a nonimmigrant prior to January 1, 1982, that he attended university in the United States during 1982, and that he moved from a private home to university housing on or about December 18, 1981. The director found that the absence from the record of a notice of the applicant’s change of address which was due in late 1981, ten days after the applicant moved, is not sufficient proof that this violation of his nonimmigrant status was known to the government prior to January 1, 1982. Therefore, the director denied the application.

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<sup>1</sup> All legalization cases filed with the U.S. Citizenship and Immigration Services (USCIS) which turn on the question of whether an applicant’s unlawful status was known to the government throughout the statutory period and related issues were held for an extended period until the final terms of various legalization class-action lawsuits which relate to these issues were handed down, the final such class-action lawsuit being: *Northwest Immigrant Rights Project, et al. vs. U.S. Citizenship and Immigration Services, et al.*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). It is the facts of this case that forced USCIS to place it and others like it on hold, rather than some request on the applicant’s part that his case be held pending the outcome of these class-action lawsuits/settlement agreements.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 –

(C) filed a legalization application under INA § 245A and fees with an Immigration and Naturalization Service (INS) officer or agent acting on behalf of the INS, including a QDE, and whose application

1. has not been finally adjudicated or whose temporary resident status has been proposed for termination (hereinafter referred to as ‘Sub-class C.i. members’)

....

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.

....

The AAO finds that the record demonstrates 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 NWIRP settlement agreement.

NWIRP further provides that legalization applications, such as the instant application, 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 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the change); 8 C.F.R. § 212.1(a)(1)(which indicates that Canadian citizens entering at a land border may enter the United States as lawful nonimmigrants without a visa)<sup>3</sup>; 67 FR 18065 (2002) (which indicates that, prior to 2002, Canadian citizens who wished to change status to that of nonimmigrant F-1 student after entry were not required to notify U.S. officials of this intent upon admission, and which indicates that, in general, Canadian citizens obtain a Form I-94 upon entry without being required to first obtain a nonimmigrant visa.)

Evidence in the record indicates that the applicant entered the United States at Blaine, Washington prior to January 1, 1982, during late summer or early fall of 1981. For example, the applicant submitted the following credible evidence that in 1981 he was present in the United States and was enrolled or was in the process of enrolling as a student at Western Washington University (WWU): The applicant submitted a photocopy of his student identification card from WWU issued for the 1981-1982 school year. He submitted the original affidavit of [REDACTED], former Assignment Coordinator for the WWU housing and dining system dated November 17, 1987. On this affidavit, the affiant attested: that the applicant had an on-campus housing contract with WWU which began during December 1981; that he signed this contract, paid the security deposit and was issued a key to his housing unit in WWU's Buchanan Towers on December 18, 1981; and that the applicant resided in Buchanan Towers until June 6, 1982. The applicant also submitted a computer printout of his WWU student accounts ledger dated July 1, 1982.<sup>4</sup> This printout indicates that during

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<sup>3</sup> The regulation in place in 1981 allowed Canadian nationals this same privilege.

<sup>4</sup> The ledger lists the same student number [REDACTED] as listed on the WWU identification card, and it lists the applicant's name as it appears on that card: [REDACTED] Thus, a

December 1981, February 1982 and March 1982 the applicant made payments to WWU. In addition, he submitted two affidavits dated December 9, 1987 written by [REDACTED] the first attests that from October 1981 through November 1981 he resided at [REDACTED], Bellingham, Washington and paid rent and utilities to [REDACTED] and the second attests that from August 1982 through October 1982 the applicant painted the house at [REDACTED] and that [REDACTED] paid him with money given to her by her father [REDACTED] of Sedona, Arizona, who owns the residence at [REDACTED]. In addition, the applicant has submitted statements in this proceeding which indicate that he entered at Blaine, Washington in late summer/early fall 1981 and that he received a Form I-94 upon entry. Thus, the evidence currently in the record suggests that, as a Canadian citizen, he was allowed to enter as a nonimmigrant without a visa during late summer or early fall 1981, and he moved from [REDACTED] to Buchanan Towers on December 18, 1981. Thus, the applicant was required to file a notice of change of address with the INS prior to January 1, 1982. The required change of address form is not in the record.

On the other hand, there is currently no documentary proof in the record that the applicant is a citizen of Canada; and there is no direct statement or other evidence that, in 1981, the applicant was allowed to enter the United States as a nonimmigrant, without a visa, and was issued a Form I-94 upon entry because he is a citizen of Canada.<sup>5</sup>

The applicant's May 2, 1988 statement in the record submitted with the Form I-687 indicates that the applicant no longer has the Form I-94, Arrival-Departure Card, which he was issued upon entry. In addition, the applicant indicated that neither he nor WWU has any record of any Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, which he and WWU may have completed, or of the Form I-94. In this statement, the applicant also indicated that during October

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preponderance of the evidence indicates that this is a printout of the applicant's student accounts ledger as it appeared in WWU's database on July 1, 1982.

<sup>5</sup> In her response to the director's notice of intent to deny (NOID), counsel referred to an INS printout in the record which she apparently obtained in response to a Freedom of Information Act request for copies of documents in the A-file. This printout is a copy of an electronic record that summarizes the information on the Form I-687. That printout lists an entry for the applicant on January 1, 1981. However, the record does not indicate that the applicant ever claimed to have entered on January 1, 1981. Rather, it appears that the applicant did not know the exact date of his 1981 entry and thus, during his legalization interview, he estimated that it occurred during summer 1981. This is noted on the Form I-687. Because the INS officer did not have an exact date of entry, she apparently, simply entered January 1, 1981 on the electronic record which summarizes the Form I-687. That record also indicates that she inferred from the applicant's statements regarding having attended university and having completed the Form I-20, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, that the applicant must have entered in F-1 student status in 1981. However, the AAO would underscore that the record does not support the finding that *the applicant* stated that he entered as a nonimmigrant F-1 student in 1981. The Form I-687 indicates that he entered in 1977 and in 1981 without a visa. Thus, the record suggests that the applicant was permitted to enter as a nonimmigrant and to receive the Form I-94 without having obtained a nonimmigrant visa because he is a Canadian citizen.

1980, while he was traveling through Oregon, (after his first entry in 1977), he was robbed of his personal effects, including his identification documents and the Form I-94. When he reached home, the applicant asked U.S. Customs and INS officers at the Blaine, Washington border crossing for a replacement Form I-94. U.S. Customs Officer [REDACTED] indicated that his office had no records of the Forms I-94 issued which might allow that office to provide the applicant with a replacement. The applicant indicated that he was issued another Form I-94 during fall 1981, presumably upon re-entering. He indicated that he no longer had any record of that Form I-94 either.

The AAO stated in the notice of intent to dismiss that the record does not include evidence that at some point in 1981 the applicant received nonimmigrant status.

This office instructed the applicant to submit in response to that notice documentary evidence of his nonimmigrant status in the United States just prior to January 1, 1982, if such evidence is available.

The AAO also stated that if the applicant had no documentary evidence of his 1981 nonimmigrant status, 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 is 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 instructed the applicant to 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.<sup>6</sup> The sworn statement must specify:

(A) that as a Canadian citizen the applicant was admitted to the United States as a nonimmigrant without a visa; list the approximate date(s) that he entered; the location(s) where he entered; the date(s) on which his period of authorized stay was set to expire, if known; list whether this entry or entries were documented on the Form I-94 or other document; and a brief description of any activities that the applicant engaged in consistent with the terms of his nonimmigrant status immediately after being admitted. Also, the applicant must attach to the sworn statement copies of identity document(s) that support the applicant's claim that he is a citizen of Canada, such as a copy of each page of his passport, a copy of his birth certificate or a copy of his Canadian citizenship card.

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<sup>6</sup> 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 nonimmigrant status. This office has conducted such a search and has located no records of the applicant's previous nonimmigrant status.

However, if the applicant did not enter as a Canadian citizen, nonimmigrant, without a visa, but instead entered with a visa as a nonimmigrant F-1 student, then, *in the alternative*, he must submit a sworn statement that specifies:

(B) the U.S. Consulate where he applied for the F-1 visa; the approximate date that he received the nonimmigrant visa; the approximate date that he used the visa to enter the United States; the location where the applicant entered the United States using the nonimmigrant visa; the date on which his period of authorized stay was set to expire; and a brief description of any activities that he engaged in consistent with the terms of the F-1 student visa, immediately after entering the United States.<sup>7</sup>

On rebuttal and on appeal, the applicant indicated that the record establishes that he is otherwise eligible to adjust to temporary resident status.

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).

An applicant for temporary resident status under section 245A of the Act 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 and is otherwise eligible for adjustment of status under this section. 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 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.*

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<sup>7</sup> The notice of intent to dismiss stated that if the applicant entered as a nonimmigrant without a visa and later changed status to F-1 student status, he would not need to submit a sworn statement regarding both the entry and the change of status. He would need only to submit a sworn statement regarding his nonimmigrant status at entry. That is, if the applicant did enter as a nonimmigrant for whom no visa was required in summer/fall 1981 as the record suggests, he would have been required to file a notice of change of address with the INS prior to January 1, 1982, regardless of whether he also applied for change of status to nonimmigrant F-1 student status. There is no evidence in the record that the applicant filed such notice of change of address. Thus, only one sworn statement related to the applicant's nonimmigrant entry is needed to support his claim that his unlawful status was known to the government prior to January 1, 1982.

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 the regulatory 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 May 2, 1988, the applicant filed the Form I-687

The director issued a notice of decision in which he found that the applicant had not established by a preponderance of the evidence that his unlawful status was known to the government prior to January 1, 1982. Therefore, he denied the application.

In the rebuttal and on appeal, the applicant indicated that the record establishes that his unlawful status was known to the government prior to January 1, 1982 and that he is otherwise eligible to adjust to temporary resident status.

The AAO stated in the notice of intent to dismiss that in order to adjust to temporary resident status, the applicant must demonstrate that it is not likely that he will become a public charge. Regarding this, the AAO noted the following: The applicant submitted evidence which indicates that he received unemployment compensation for a brief time during the statutory period and that he

received food stamps during 1980. The AAO does not consider the receipt of unemployment compensation and food stamps to be public cash assistance. *See e.g.* Slattery, Asst. Comm., Legalization, *reprinted in 65 Interpreter Releases* 235 (March 14, 1988)(which indicates that food stamps, unemployment insurance and certain other benefits are not deemed public cash assistance.) The record indicates that the applicant worked at various jobs throughout the statutory period. On appeal, the applicant included a statement which indicates that he currently runs his own business as a professional chauffeur. In the notice of intent to dismiss, the AAO stated that to further complete the record regarding the applicant's current earnings, the applicant should include a U.S. Social Security Administration Statement which summarizes his earnings in the United States. This office allowed the applicant 35 days to provide his response to that notice to allow the applicant adequate time to obtain a Social Security Administration Statement.

The notice of intent to dismiss also specified that the AAO had found that the many pieces of contemporaneous evidence in the record, the majority of which are original documents, do establish that the applicant resided continuously in the United States throughout the statutory period.

In addition, the notice of intent to dismiss stated that if the applicant would provide a sworn statement documenting his nonimmigrant status in the United States in accordance with the guidelines set forth above, he would have overcome the basis for denial as set forth by the director. That is, the applicant would have shown that he was in nonimmigrant status prior to January 1, 1982 and that he violated that status in a manner that was known to the government prior to January 1, 1982.

More than 90 days have passed since the issuance of the June 5, 2009 notice of intent to dismiss and the applicant has not provided the requested documentation which is necessary for this office to complete the analysis of whether, for example, the applicant is likely to become a public charge and whether, as of January 1, 1982, the applicant had violated his nonimmigrant status in a manner that was known to the government. The applicant has not provided any explanation as to why he has not provided the requested documentation.

According to the regulation set forth at 8 C.F.R. § 103.2(a)(13)(i), whenever an applicant does not submit requested material necessary for the processing and approval of a case by the required date, the matter may be summarily dismissed as abandoned.

The applicant has failed to provide within the time period allotted requested documentation necessary for the processing and approval of the instant case. The appeal shall be dismissed as abandoned.

**ORDER:** The appeal is dismissed as abandoned.