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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:



Office: LOS ANGELES

Date:

DEC 30 2010

IN RE:

Applicant:



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:

SELF-REPRESENTED

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.


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Los Angeles, denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act (Act). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director determined that the applicant failed to present credible evidence he continuously resided in the United States throughout the duration of the requisite period. Specifically, the director determined that the applicant was absent from the United States from June 1982 to September 1982 and subsequent summers.

On appeal, the applicant asserts that his absence from the United States from December 22, 1981 to February 5, 1982 did not exceed the 45 day limit and should not be a basis for denial. The applicant asserts that he was required to leave the United States during the summers of 1982 and 1983 due to visa restrictions and, therefore, these absences should not be counted. The AAO has reviewed all of the evidence and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

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 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

¹ The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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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 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.

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 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 as in place through December 29, 1981 (which indicates that nonimmigrants must notify the U.S. government in writing of a change of address within 10 days of the address change and must report their addresses at the end of each three-month period after entering, regardless of whether there is any address change.)

The director determined that the applicant provided evidence of his residence in the United States during the requisite. However, the director determined that the applicant failed to establish he was in unlawful status prior to January 1, 1982. This portion of the director's decision will be withdrawn. After his entry into the United States in September 1980, the applicant would have been required to file a quarterly address report with the Immigration and Naturalization Service (INS). There is no evidence of such a filing in the record. Under the NWIRP settlement agreement, because the applicant failed to file this required address update, he was in violation of his status in a manner that was known to the government prior to January 1, 1982. *See* NWIRP settlement agreement, paragraph 8B. In addition, there is no indication in the record that the applicant ever informed INS of any violations of his status, and then had his lawful, nonimmigrant status properly reinstated. Thus, due to the applicant's failure to file quarterly address reports with the INS, he was in unlawful status in a manner that was known to the government prior to January 1, 1982.

The AAO finds in keeping with the terms of the NWIRP settlement agreement that the record does establish that the applicant was in unlawful status in a manner that was known to the government prior to January 1, 1982. Therefore, he has established that his presence in the United States was unlawful in a manner known to the government prior to January 1, 1982.

An applicant for temporary resident status must establish entry into the United States before January 1, 1982, and who thereafter resided continuously in the United States in an unlawful status, and who has 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). The applicant has the burden of proving by a preponderance of the evidence that he or she has resided continuously in the United States during 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.

An applicant for temporary resident status shall be regarded as having resided continuously in the United States if, at the time of filing the application, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eight (180) days between January 1, 1982 through the date of the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed.

8 C.F.R. § 245a.2(h)(i).

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.*

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.

The issue in this proceeding is whether the applicant has established he has continuously resided in the United States from before January 1, 1982, throughout the requisite period. The record reflects that the applicant had several absences from the United States during the requisite period. The record contains copies of the applicant’s passports, including U.S. visas, entry stamps and exit stamps, throughout the requisite period. The record reflects the following absences during the requisite period: December 22, 1981 to February 5, 1982 (45 days); June 1, 1982 to September 13, 1982 (103 days); August 6, 1983 to September 3, 1983 (28 days); July 11, 1984 to August 24th, 1984 (44 days); and December 20, 1987 to January 4, 1988 (15 days).

On appeal, the applicant submitted his own declaration confirming his absences from the United States. He asserts that his absence from December 22, 1981 through February 5, 1982 should be counted as 37 days since the actual amnesty period starts January 1, 1982. Pursuant to 8 C.F.R. § 245a.2(h)(1)(i), the absence must occur between January 1, 1982 through the date the application is filed. Thus, the applicant’s absence will be counted as starting on January 1, 1982, through February 5, 1982. Therefore, this single absence has not exceeded the forty-five day limit. This portion of the director’s decision is withdrawn.

It is noted, however, that the applicant’s absence during the summer of 1982 has exceeded the forty-five (45) day limit, and the aggregate of all his absences have exceeded the one hundred and eighty (180) days permitted under the regulations at 8 C.F.R. § 245a.2(h)(1)(i). On appeal, the applicant contends that the absences during the summer of 1982 and 1983 should not be counted as he was required to depart the United States due to visa restrictions. There is no provision in the law to make exceptions for the reason of the absence from the United States, unless the absence exceeded the time permitted due to emergent reasons. Here, the record does not reflect that the applicant’s absences from the United States were due to emergent reasons. Although this term is not defined in the regulations, *Matter of C-*, 19 I. & N. Dec. 808 (Comm. 1988) holds that *emergent* means “coming unexpectedly into being.” The AAO finds that the above reason does not meet the definition of emergent. The applicant was aware when he departed the United States in the summer of 1982 and 1983 that would not be able to return until just prior to the fall semester of school.

Upon a *de novo* review of all of the evidence in the record, the AAO finds that the evidence fails to establish the applicant’s continuous residence in the United States during the requisite period. Specifically, the applicant’s absence from the United States in 1982 exceeded the forty-five (45) days permitted in a single absence, and the aggregate of all of his absences exceeded the one hundred and eighty (180) days permitted under the regulations at 8 C.F.R. § 245a.2(h)(i). The

applicant's absences interrupted his claim of continuous residence in the United States during the requisite period. Thus, the applicant has failed to establish by a preponderance of the evidence that he continuously resided in the United States for the requisite period as required under both 8 C.F.R. § 245a.2(d)(5) and *Matter of E- M--*, *supra*.

Beyond the decision of the director, an alien who applies for temporary resident status 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.

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:

(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.

(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.

Section 212(a)(6)(C) of the Act provides in pertinent part:

Misrepresentation. – (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The applicant's Form I-687 indicates that he reentered the United States on his F-1 visa in 1982 (twice), 1983 and 1984, and on his B-1/B-2 visa in 1988. Each time the applicant presented himself as a lawful nonimmigrant upon admission. Yet, according to the claims which the applicant made in this proceeding, his intent was to continue residing unlawfully in the United States. Thus, 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. This ground

of inadmissibility may be waived, but given the applicant's failure to establish continuous residence, no purpose would be served by filing a waiver application.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.