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U.S. Citizenship
and Immigration
Services

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FILE:

MSC 06 097 11410

Office: SAN FRANCISCO

Date:

JAN 14 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:

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, San Francisco, California denied the Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Immigration and Nationality Act, filed 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). 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 provide sufficient documentation that as of January 1, 1982, the government was aware of the completion of her employment with the Nigerian Consulate and that she was thereafter out of status. The director also stated that the applicant failed to provide sufficient documentation to substantiate her claim of continuous residence in the United States for the duration of the requisite period.

On appeal, counsel asserts that the director's decision is erroneous because the applicant resigned her position at the Nigerian Consulate, San Francisco, in March of 1982 and lost her A2 status effective that date. Counsel contends that if the Nigerian Consulate failed to communicate the fact of her resignation and consequent loss of status to the Department of State, then the applicant is not at fault. Counsel states that a brief will be submitted to the AAO within 30 days. As of the date of this decision, no brief and/or additional evidence has been received. Therefore, the record will be considered complete. 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

Preliminarily, the AAO notes that the director adjudicated the application on the merits and presumptively found the applicant eligible for class membership under the terms of the CSS/Newman Settlement Agreements. 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 –

¹ The AAO maintains plenary power to review each appeal 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 AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

(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

....

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 CSS/Newman Settlement Agreement 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, United States 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.

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, if the applicant demonstrates that she was present in the United States in nonimmigrant status prior to 1982, the absence from her record of a required address update due prior to January 1, 1982 is sufficient to demonstrate that she had violated her 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 United States 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 first issue to be addressed in this proceeding is whether the applicant established that she entered the United States prior to January 1, 1982. The second issue is whether the applicant established that she violated the terms of her nonimmigrant visa status prior to January 1, 1982, and her unlawful status was known to the government as of January 1, 1982.

The documentary evidence in the file includes the following:

- A Form DS-394, Notification of Foreign Government-Related Employment Status, in the applicant's name, indicating that the applicant assumed duties as a secretary at the Nigerian Consulate General in San Francisco on October 6, 1980.

- The Nigerian government issued passport number [REDACTED] to the applicant on August 19, 1981 at the Nigerian Consulate in San Francisco, California.
- The applicant was admitted to Nigeria on December 27, 1981.
- The applicant obtained an A-2 nonimmigrant visa on December 31, 1981 in Lagos, Nigeria.
- The applicant entered the United States on January 14, 1982 on an A-2 nonimmigrant visa valid for duration of status.

In an affidavit, the applicant avers that she obtained a B-2 visa in Lagos and entered the United States in May 1980. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony. 8 C.F.R. § 245a.12(f). However, pursuant to the *NWIRP Settlement Agreement*, the applicant can submit sworn testimony to establish her nonimmigrant entry. Her sworn affidavit, combined with her Form DS-394 and Nigerian passport issued in 1981 in San Francisco, establishes that the applicant entered the United States prior to January 1, 1982. In addition, the record contains several bank statements in the applicant's name, dated from 1980 through 1984. Therefore, the applicant has established that she entered the United States as a nonimmigrant prior to January 1, 1982.

The next issue to be determined is whether the applicant established that she violated the terms of her nonimmigrant visa status prior to January 1, 1982, and whether her unlawful status was known to the government as of January 1, 1982.

A person who violated the terms of her nonimmigrant status prior to January 1, 1982, in a manner known to the government includes those for whom documentation or the absence thereof 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 record is absent of any documentation that the applicant may have filed (including quarterly or annual address reports required on or before December 31, 1981) and; therefore, warrants a finding that the applicant was in unlawful status in a manner known to the government on or before January 1, 1982.

As an *NWIRP* class member, the applicant must now establish her continuous residence throughout the requisite period. The applicant claims to have continuously resided in an unlawful status in the United States from before January 1, 1982, through the requisite period. The documentation that the applicant submits in support of her claim consists of copies of the following: bank statements dated from December 1980 through 1984; school transcripts for the years 1983 through 1988; a Bank of West letter indicating the applicant held an account in 1985 to 1988; social security earning statements in 1987 and 1988; a church letter and an affidavit from individuals claiming to know the applicant for all, or a portion, of the requisite period.

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 245(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). To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony, and the sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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.

An applicant shall be regarded as having resided continuously in the United States if at the time the application for temporary resident status is considered filed, as described above pursuant to the CSS/Newman Settlement Agreements, no single absence from the United States has exceeded 45 days, and the aggregate of all absences has not exceeded 180 days during the requisite period unless the applicant can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the applicant was maintaining a residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h)(1)(i).

While the applicant has submitted significant evidence of her residence in the United States for portions of the requisite period, it is insufficient to establish her continuous residence for the duration of the requisite period. On the applicant's Form I-687, at Question 32, where asked to list her absences from the United States since her entry, she lists numerous absences throughout the statutory period. In addition, during her interview, the applicant testified that she went to Nigeria for at least two to three months every year until 1986, which disrupted her period of continuous residence in the United States in that she exceeded the 45 day maximum for a single absence and the 180 day maximum combined total days absence during the requisite period. Pursuant to the regulation at 8 C.F.R. § 245a.15(c)(1), the applicant's absences have interrupted her claim of continuous residence in the United States.

Therefore, the applicant has failed to establish by a preponderance of the evidence that she continuously resided in an unlawful status 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*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

Beyond the decision of the director, it is noted that the applicant is inadmissible for misrepresentation under Section 212(a)(6)(C) of the Act.

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

Misrepresentation. – (i) In general. – 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.

Under BIA precedent, a material misrepresentation is one which “tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded.” *Matter of S- and B-C-*, 9 I & N Dec. 436, 447 (BIA 1961).

The record reflects that the applicant continued to travel on her A-2 visa by fraud or mistake after her resignation from the Nigerian Consulate General. The applicant knowingly utilized the visa by fraud or mistake in order to procure an immigration benefit and enter the United States.

This applicant misrepresented her eligibility for admittance into the United States. The AAO finds this to be a material misrepresentation. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(6)(C)(i). While this ground of inadmissibility may be waived, no waiver application has been filed.

The application will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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