

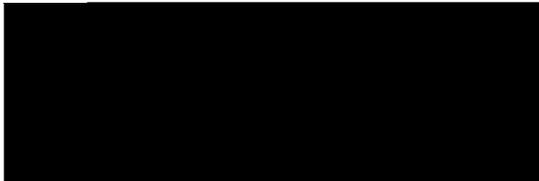
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: BOSTON

Date:

JUL 19 2010

MSC-05-314-12861

IN RE:

Applicant:



APPLICATION:

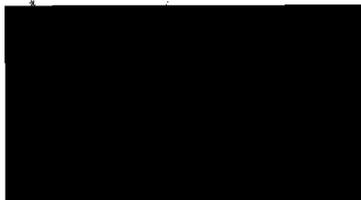
Application for Status as a Temporary Resident pursuant to Section 245A of the  
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a.

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.



Chief, Administrative Appeals Office

**DISCUSSION:** 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), was denied by the director of the Boston office. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The director found that the applicant failed to establish that he began residing unlawfully in the United States on a date prior to January 1, 1982 and that his unlawful status was known to the government prior to January 1, 1982. Therefore, the director determined that the applicant had failed to show that he resided continuously in the United States in unlawful status throughout the relevant period, and she denied the application.

On appeal, the applicant asserts that the United States Citizenship & Immigration Services (USCIS) erred in finding that the applicant failed to prove that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government.<sup>1</sup>

On June 7, 2010, the AAO sent the applicant a follow-up communication informing him that additional documentation was required in order to complete the adjudication of his appeal, and requesting that the applicant provide additional evidence. Specifically, the AAO requested that the applicant provide evidence to establish that he resided continuously in the United States from the date of his entry on April 8, 1981 and throughout the requisite period. The applicant was also requested to submit copies of all pages of his Panamanian passport P826011, and to identify the dentist with Prosthodontic Associates in Brookline, Massachusetts whose letter accompanies the applicant's dental treatment record. The applicant was also asked to state whether he reported any wages to the Social Security Administration for the years 1981 through 1983, and to submit evidence to establish that he is not likely to become a public charge. The applicant was also asked to explain inconsistencies regarding documents submitted by the applicant as follows: employment verification letters from Thomas P. McMullen, a letter dated August 7, 1985 from his ex-wife's attorney, Earl E. Shaffer, the rental records of N.I.C. Management, and the applicant's W-2 forms and tax returns. The applicant did not respond to the AAO's request.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143,145 (3d Cir. 2004).

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 final Stipulation of Settlement in the class-action NWIRP. Class members are defined, in relevant part, as:

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<sup>1</sup> The record reflects that the applicant's FOIA request, BOS880258, was processed on July 29, 1988.

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

(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 USCIS action or inaction was because INS or USCIS 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 CSS/Newman legalization applications and Legal Immigration Family Equity Act of 2000 (LIFE) legalization 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, he violated the terms of his 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 a school or employer report in government records is not sufficient on its own to rebut this presumption. Once the applicant makes a *prima facie* showing of having violated nonimmigrant status in a manner known to the government, USCIS then must rebut the evidence that the applicant violated his status. If USCIS fails to rebut the evidence, 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. 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. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

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 his nonimmigrant status in a manner known to the government prior to January 1, 1982. The applicant entered the United States as a B-2 visitor on December 12, 1970. The applicant was granted a change of nonimmigrant status on March 2, 1972 to an F-1 student. On July 13, 1973 the applicant entered the United States on a multiple-entry F-1 student visa with an expiration date of January 6, 1976. The applicant's authorized period of admission was until July

10, 1974, with part-time employment authorized. The applicant's stay and his part-time employment were extended until October 4, 1976. On February 25, 1977, the applicant was given until August 25, 1977 to voluntarily depart the United States, which period was extended until January 25, 1978. On June 20, 1978, deportation proceedings were instituted against the applicant, as one who has remained in the United States for a longer time than permitted. *See* INA section 237(a)(1)(B). The applicant was given until September 29, 1978 to voluntarily depart the United States. The applicant voluntarily departed the United States on September 29, 1978. The applicant's subsequently obtained B-2 nonimmigrant visitor's visas in Panama on December 13, 1979 and December 18, 1980, and was admitted to the United States as a valid nonimmigrant visitor on December 29, 1979, May 19, 1980, April 8, 1981 and February 27, 1982.

The AAO finds that the government became aware of the applicant's unlawful status when it placed him into deportation proceedings. Consequently, for the reasons stated above, the applicant has partially overcome the grounds for denial cited by the director and has established that his unlawful status was known to the government prior to January 1, 1982.

However, the application cannot be approved because the applicant has failed to establish that he resided continuously in the United States from the date of his entry on April 8, 1981 and throughout the requisite period.

The documentation that the applicant submits in support of his claim that he resided continuously in the United States from the date of his entry on April 8, 1981 and throughout the requisite period, consists of witness statements and documents. The AAO has reviewed each document in its entirety to determine the applicant's eligibility; however, the AAO will not quote each witness statement in this decision. Some of the evidence submitted indicates that the applicant resided in the United States after May 4, 1988; however, because evidence of residence after May 4, 1988 is not probative of residence during the requisite time period, it shall not be discussed.

The applicant has submitted five employment verification letters from [REDACTED] the manager of [REDACTED] restaurants and the owner of [REDACTED] restaurant, all in the Boston area. In an affidavit dated October 1, 1991, [REDACTED] states that the applicant worked for him and with him, intermittently at various restaurants in Boston, from approximately 1974 until December 1983 as follows: at [REDACTED] Restaurant from June 1974 to July 1978 as a kitchen helper; at [REDACTED] Restaurant in Salem in January 1980, from mid-May to mid-August 1980, and from April 1981 through September 1983 as a kitchen helper and maintenance worker; and at [REDACTED] Restaurant from October to December 1983 as a kitchen helper. However, this affidavit is inconsistent with a letter dated May 18, 1988, in which the witness states that the applicant worked for [REDACTED] Restaurant from January 1982 until approximately September or October 1983. The witness's affidavit is also inconsistent with an affidavit dated June 30, 2006, in which the witness states that he first met the applicant in 1975, and that the applicant worked at [REDACTED] Restaurant beginning in 1975, and worked at Brandy's Restaurant beginning in 1978. In addition to being inconsistent with itself, the testimony of the witness is inconsistent with the testimony of the applicant in the instant I-687 application, in which the applicant does not list Vincent's Restaurant as an employer, does not list any employment in the United States prior to December 1980, and states that he worked at [REDACTED] from December 1980 until September 1983 and [REDACTED] Restaurant from October 1983 until February

1984. Due to these inconsistencies, the employment verification letters of [REDACTED] have minimal probative value.

The record contains an employment verification letter from [REDACTED], an office manager for The Café Budapest in Boston, who states that the applicant worked for the restaurant as a waiter from March 1984 to December 1985, at which time the applicant lived at [REDACTED]. This is inconsistent with the applicant's testimony in the I-687 application, in which the applicant states that his residence address from May 1981 to August 1985 was at [REDACTED] and from September 1985 through the requisite statutory period at [REDACTED].

The applicant has submitted employment verification letters from [REDACTED] and [REDACTED] Lagrotteria, managers at [REDACTED] who state that the applicant worked for the restaurant as a waiter from November 3, 1986 for the duration of the requisite period.

The employment verification letters of [REDACTED] do not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letters fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, the witnesses do not state how they were able to date the applicant's employment. It is unclear whether they referred to their own recollection or any records they may have maintained. In addition the witnesses do not state the applicant's address at the time of employment. For these reasons, the employment verification letters of these witnesses are of little probative value.

The applicant has submitted copies of pages 20 and 21 of the applicant's Panamanian passport P826011 which contain a multiple-entry B-2 visitor's visa obtained in Panama on December 18, 1980 valid until December 17, 1984, and two United States entry stamps, dated April 8, 1981 in New York and February 27, 1982 in Toronto, respectively. The record also contains a form I-94 arrival record with a United States entry stamp dated February 27, 1982 in Toronto and a period of stay as a nonimmigrant visitor authorized until March 15, 1982.

The record contains a copy of a divorce complaint and a letter of enclosure, both dated March 9, 1982, sent by the applicant to a court in Boston. The record also contains a copy of a money order dated March 11, 1982. These documents list the applicant's address as 34 Melrose Street in Boston. These documents are inconsistent with the applicant's testimony in the instant I-687 application, in which the applicant states that his residence address from May 1981 to August 1985 was at 162 Saint Botolph Street in Boston.

The applicant has submitted a copy of a dental treatment record forwarded by an unidentified doctor with Prosthodontic Associates in Brookline, Massachusetts. The treatment record lists dates of service as follows: March 22, 24, April 25, 19, July 7, October 13, November 2, and December 9, 1983; January 17, 25, February 1, 22, March 1, May 9, and November 21, 1984; August 15, 1985; August 25, and September 12, 1986; January 27, April 1, April 14, April 28 and May 20, 1987. These documents are some evidence in support of the applicant's residence in the United States during some part of 1983, 1984, and 1987, as well as the applicant's presence in the United States on August 15, 1985, August 25, 1986 and September 12, 1986.

The record contains copies of a 1984 W-2 form and 1984 federal and state income tax returns. These documents list the applicant's address as [REDACTED]. These documents are inconsistent with the applicant's testimony in the I-687 application, in which the applicant states that his residence address from May 1981 to August 1985 was at [REDACTED] in Boston. In addition, the tax returns were signed by a preparer and dated May 1988. These documents are also inconsistent with the applicant's testimony in the instant I-687 application, in which the applicant states that his residence address in May 1988 was at [REDACTED] Boston. Due to these inconsistencies, these documents are of minimal probative value.

The applicant has submitted copies of a 1985 W-2 form and 1985 federal and state income tax returns. These documents list the applicant's address as [REDACTED]. These documents are inconsistent with the applicant's testimony in the I-687 application, in which the applicant states that his residence address from May 1981 to August 1985 was at [REDACTED]. In addition, the tax returns were signed by a preparer in May 1988. These documents are also inconsistent with the applicant's testimony in the instant I-687 application, in which the applicant states that his residence address in May 1988 was at [REDACTED]. Due to these inconsistencies, these documents are of minimal probative value.

The record contains a copy of a letter dated August 7, 1985 from attorney [REDACTED] addressed to the applicant in Panama, stating that a final decree of divorce was entered on July 31, 1985. In an affidavit dated on August 17, 1992, at page 1, the applicant states that attorney Shaffer was his ex-wife's divorce lawyer. The attorney's letter is evidence in support of the applicant's absence from the United States during some part of 1985. This letter is inconsistent with the applicant's testimony in the instant I-687 application, in which the applicant states that he has resided in the United States continuously since his last entry on February 27, 1982.

The applicant has submitted two letters from [REDACTED] Management dated May 15, 1991 and October 15, 1992, respectively. The May 15, 1991 letter states that the rental records of Nicosia Development show that the applicant resided in Boston as follows: at [REDACTED] from September 1976 to September 1978; at [REDACTED] from May 1981 to August 1985, and at [REDACTED] from September 1985 for the duration of the requisite period. The record also contains copies of rental records for the applicant at [REDACTED] for the period of time from January 1985 through December 1987. The rental records are inconsistent with the witness's May 15, 1991 letter and the testimony of the applicant in the I-687 application, both of which state that the applicant did not begin residing at [REDACTED] until September 1985. The record does not contain any rental records for the applicant for the period of time before January 1985. The witness's

October 15, 1992 letter states that she was unable to find any information regarding the applicant's residency at [REDACTED]. Therefore, it is unclear how, in her May 15, 1991 letter, the witness was able to list the applicant's periods of residency at [REDACTED] and at [REDACTED] whether she referred to her own recollection or any records she may have maintained. Due to these inconsistencies, these documents are of minimal probative value.

The applicant has submitted a copy of two 1986 W-2 forms. The applicant has also submitted copies of 1986 federal and state income tax returns. One of the W-2 forms is from an employer named [REDACTED]. This W-2 form is inconsistent with the information contained in the instant I-687 application, in which the applicant does not list this company as an employer. Further, the W-2 forms and tax returns list the applicant's address as [REDACTED]. These documents are inconsistent with the applicant's testimony in the instant I-687 application, in which the applicant states that his residence address from September 1985 for the duration of the requisite statutory period was at [REDACTED]. Due to these inconsistencies, these documents are of minimal probative value.

The record contains a copy of a 1987 W-2 form and 1987 federal and state income tax returns. The W-2 form and tax returns list the applicant's address as [REDACTED]. These documents are inconsistent with the applicant's testimony in the I-687 application, in which the applicant states that his residence address from September 1985 for the duration of the requisite statutory period was at [REDACTED]. Due to these inconsistencies, these documents are of minimal probative value.

The record contains a copy of a 1988 W-2 form and 1988 federal and state income tax returns. The record also contains a license transaction history from the [REDACTED] which shows that the applicant renewed his license on January 19, 1988. The applicant has also submitted a copy of a bank account statement showing activity on a checking account in April and May 1988. These documents are some evidence in support of the applicant's residence in the United States during some part of 1988.

The applicant has submitted a statement of earnings from the Social Security Administration showing the applicant has earnings for the years 1976, 1977, and from 1984 for the duration of the requisite statutory period. In addition, the applicant and [REDACTED] have testified that the applicant received earnings from employment in the years 1981 through 1983. However, at the time of his interview on October 30, 1992, when the applicant was asked why he did not use his social security number to report his earnings for the years 1981 through 1983, since he used his social security number to report earnings in 1976 and 1977, the applicant responded that he had no reason.

While the documents listed above indicate that the applicant resided in the United States for some part of the requisite period, considered individually and together with other evidence of record, they do not establish the applicant's continuous residence for the duration of the requisite period.

The remaining evidence in the record is comprised of copies of the applicant's statements, the instant I-687 application, the initial I-687 application filed in 1991 to establish the applicant's CSS class membership, and an I-485 application to adjust to permanent resident status on the basis of an

underlying I-130, petition for alien relative filed by the applicant's ex-wife. However, as stated previously, to meet his or her burden of proof, an applicant must provide evidence of eligibility apart from the applicant's own testimony, and the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

Here, the applicant has failed to provide probative and credible evidence of his continuous residence in the United States for the duration of the requisite period. The inconsistencies regarding the dates the applicant resided and worked at a particular location in the United States are material to the applicant's claim in that they have a direct bearing on the applicant's residence in the United States during the requisite period. No evidence of record resolves these inconsistencies. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho*, 19 I & N Dec. 582, 591-592 (BIA). These contradictions undermine the credibility of the applicant's claim of entry into the United States prior to January 1, 1982 and continuous residence in the United States during the requisite period.

Upon a *de novo* review of all of the evidence in the record, the AAO agrees with the director that the evidence submitted by the applicant has not established that he is eligible for the benefit sought. The various statements currently in the record which attempt to substantiate the applicant's residence in the United States during the statutory period are not objective, independent evidence such that they might overcome the inconsistencies in the record regarding the applicant's claim that he maintained continuous residence in the United States throughout the statutory period, and thus are not probative.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and 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.

Further, the application may not be approved as the evidence establishes that the applicant is inadmissible to the United States. Section 245A(a)(4)(A) of the Immigration & Nationality Act (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.

Firstly, the application may not be approved as the evidence establishes that the applicant is inadmissible as an alien who is likely to become a public charge under section 212(a)(4) of the Act. If an applicant is determined to be inadmissible under section 212(a)(4) of the Act, he or she may still be admissible under the Special Rule described under paragraph (d)(3) of this section. *See* 8 C.F.R. § 245a.18(c)(2)(iv).

The regulations at 8 C.F.R. § 245a.18(d)(1), 8 C.F.R. § 245a.18(d)(2), and 8 C.F.R. § 245a.18(d)(3) provide the factors to be considered in determining whether an applicant is likely to become a public charge and whether the special rule applies.

(1) In determining whether an alien is "likely to become a public charge," financial responsibility of the alien is to be established by examining the totality of the alien's circumstance at the time of his or her application for adjustment. The existence or absence of a particular factor should never be the sole criteria for determining if an alien is likely to become a public charge. The determination of financial responsibility should be a prospective evaluation based on the alien's age, health, family status, assets, resources, education and skills.

(2) An alien who has a consistent employment history which shows the ability to support himself or herself even though his or her income may be below the poverty level is not excludable under paragraph (c)(2)(vi) of this section. The alien's employment history need not be continuous in that it is uninterrupted. In applying the Special Rule, the Service will take into account an alien's employment history in the United States to include, but not be limited to, employment prior to and immediately following the enactment of IRCA on November 6, 1986. However, the Service will take into account that an alien may not have consistent employment history due to the fact that an eligible alien was in an unlawful status and was not authorized to work. Past acceptance of public cash assistance within a history of consistent employment will enter into this decision. The weight given in considering applicability of the public charge provisions will depend on many factors, but the length of time an applicant has received public cash assistance will constitute a significant factor. It is not necessary to file a waiver in order to apply the Special Rule for determination of public charge.

(3) In order to establish that an alien is not inadmissible under paragraph (c)(2)(vi) of this section, an alien may file as much evidence available to him or her establishing that the alien is not likely to become a public charge. An alien may have filed on his or her behalf a Form 1-134, Affidavit of Support. The failure to submit Form 1-134 shall not constitute an adverse factor.

The burden is on the applicant to establish that he is not likely to become a public charge. The most recent earnings information contained in the record of proceeding is for 2004. The applicant was requested to submit W-2 forms and tax returns for the years 2007 through 2009, as well as an employment verification letter from each of his current employers. The applicant has not submitted any additional evidence. Therefore, the applicant has not established that he is admissible, as he has not established that he is not likely to become a public charge.

Further, the application may not be approved as the evidence establishes that the applicant is inadmissible as one who has sought through fraud or misrepresentation to procure an immigration benefit under the Act. *See* Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

In a decision dated February 23, 1978, the Boston District Director found that the applicant engaged in marriage fraud.

In addition, the record reflects that the applicant repeatedly reentered the United States using a nonimmigrant visitor's visa when he was an intending immigrant. As noted above, on December 13, 1979 and December 18, 1980 the applicant obtained visitor's visas in Panama. The applicant subsequently reentered the United States on December 29, 1979, May 19, 1980, April 8, 1981 and February 27, 1982, without disclosing that he had violated the terms of his student visa by remaining in the United States for a longer time than permitted. In addition, in an affidavit dated January 30, 1998, the applicant stated that he was an intending immigrant with respect to each of those entries. In order to qualify for each visitor's visa, the applicant would have misrepresented that he was not an intending immigrant. The United States Department of State will not issue a nonimmigrant visitor's visa to an intending immigrant, and if the applicant had disclosed his true intentions he would not have been granted either of the visas. *See*, section 101(a)(15)(B), 8 U.S.C. § 101(a)(15)(B); 9 FAM 41.31.

Based on the above, the AAO finds that the applicant misrepresented his intentions in order to obtain an immigration benefit. An alien is inadmissible if he seeks through fraud or misrepresentation to procure an immigration benefit under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Thus, the applicant is inadmissible and ineligible for legalization benefits.

Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), the cited grounds of inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. 8 C.F.R. § 245a.2(k)(2). Although this ground of inadmissibility is waivable, even if the applicant were to be granted a waiver he remains ineligible for failure to establish his continuous unlawful residence. The record indicates that the applicant's Form I-690, Application for Waiver of Grounds of Excludability, is pending.

The record reveals, as stated above, that on February 25, 1977 the applicant was given until August 25, 1977 to voluntarily depart, which period was extended until January 25, 1978. On June 20, 1978, deportation proceedings were instituted against the applicant, as one who has remained in the United States for a longer time than permitted. *See* INA section 237(a)(1)(B). The applicant was given until September 29, 1978 to voluntarily depart the United States. The applicant voluntarily departed the United States on that date.

Therefore, based upon the forgoing, the applicant is not eligible to adjust to temporary resident status because he has failed to establish his continuous unlawful residence in the United States throughout the relevant period. In addition, the applicant is inadmissible as one who is likely to become a public charge. *See* section 212(a)(4) the Act, 8 U.S.C. § 1182(a)(4). In addition, the applicant is inadmissible as one who has sought through fraud or misrepresentation to procure an immigration benefit. *See* section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the dismissal. The applicant is, therefore, ineligible for adjustment to temporary resident status under section 245A of the Act on each of the grounds noted.

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