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U.S. Citizenship and Immigration Services  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
MSC 06 097 11326

Office: NEW YORK

Date: **MAR 23 2010**

IN RE: Applicant: [REDACTED]

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:  
[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 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.

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, New York, 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 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.

The applicant submitted a Form I-687, Application for Status as a Temporary Resident under Section 245A of the Immigration and Nationality Act (Act), and a Form I-687 Supplement, CSS/Newman (LULAC) Class Membership Worksheet. The director denied the application because the applicant failed to establish that he continuously resided in the United States in an unlawful status since before January 1, 1982, through the requisite period. Specifically, the director determined that the applicant was in lawful status throughout much of the requisite period.

On appeal, counsel, on behalf of the applicant, asserts that the director’s decision was against the weight of the evidence. Counsel asserts that the applicant was in unlawful status during the requisite period due to unauthorized employment. Counsel submits additional evidence to be reviewed in this case.

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 –

- (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

....

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.

Based on the NWIRP Stipulation of Settlement at 1(B), the applicant qualifies as a class member. The applicant entered the United States as a nonimmigrant prior to January 1, 1982 and attempted to apply for legalization with an INS officer during the initial filing period.

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 her lawful entry and prior to January 1, 1982, the applicant violated the terms of 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, 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.

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 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 record reflects that the applicant entered the United States on a nonimmigrant F-1 visa on August 26, 1981. In support of his claim of unlawful status, the record contains an affidavit from [REDACTED]. The affiant states that he used to own [REDACTED] in Los Angeles from May 1981 to February 1986. The affiant also states that the applicant worked as a seasonal employee from November 1981 through December 1984. The affidavit does not conform to regulatory standards for letters from employers as stated in the regulation at 8 C.F.R. § 245a.2(d)(3)(i). The affiant failed to provide the applicant's address at the time of employment, state the applicant's duties, declare whether the information was taken from company records, and identify the location of such company records and state whether such records are accessible or in the alternative state the reason why such records are unavailable.

Given the lack of relevant details, the affidavit provides minimal probative value as evidence in support of the applicant's claim to have violated the terms of his F-1 visa and establish unlawful status before January 1, 1982.

It is noted, however, that the applicant was required to file quarterly address reports and there are no address reports in the record. The applicant's first quarterly address report was due three months after his entry, or during November 1981, regardless of whether there was any address change. Thus, it may be said that prior to January 1, 1982, the government was made aware of his unlawful status by his failure to file the initial quarterly address report. Thus, the applicant violated his nonimmigrant status and was in unlawful status in a manner that was known to the government before January 1, 1982.

Under the CSS/Newman Settlement Agreements, USCIS shall adjudicate each Form I-687 under the provisions of section 245A of the Act, regulations and administrative and judicial precedents which the Immigration and Naturalization Service (INS), now USCIS, followed in adjudicating the Forms I-687 timely filed during the Immigration Reform and Control Act of 1986 (IRCA) application period. *See* CSS/Newman Settlement Agreements.

For purposes of establishing residence and presence as defined at 8 C.F.R. § 245a.2(b), the term "until the date of filing" shall mean until the date the alien was "front-desked" or discouraged from filing the Form I-687 consistent with the definition of the CSS/Newman class membership. *See id.*

An applicant who files for temporary resident status pursuant to the CSS/Newman Settlement Agreements 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 through the date of filing the Form I-687 during the original application period or through the date that the applicant attempted to file but was dissuaded from doing so by an agent of the INS. *See id.* and § 245A(a)(2)(A) of the Act.

Where an applicant entered the United States in nonimmigrant status before January 1, 1982, in order to show unlawful residence throughout the requisite period, he must establish that his period of authorized stay expired prior to January 1, 1982 through the passage of time or that he fell into unlawful status and her unlawful status became known to the government prior to January 1, 1982. *See* section 245A(a)(2)(B) of the Act.

An alien who applies for temporary resident status under the CSS/Newman Settlement Agreements 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. *See* CSS/Newman Settlement Agreements and § 245A(a) of the Act.

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 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.*

The absence of contemporaneous evidence is not necessarily fatal to the applicant's claim of continuous residence in the United States during the statutory period. *See id.* at 82-83. Affidavits that are consistent and verifiable may be sufficient to demonstrate continuous residence. *See 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.

As discussed previously, the AAO finds, in keeping with the terms of the NWIRP settlement agreement that the applicant did establish that he violated his nonimmigrant F-1 status in a manner that was known to the government prior to January 1, 1982. At issue in this proceeding is whether the applicant has established continuous unlawful residence in the United States throughout the requisite period. The documentation that the applicant submits in support of his claim to have arrived in the United States before January 1982 and resided in an unlawful status during the requisite period consists of copies of the applicant's F-1 visas to the United States in 1981, 1982, 1986, 1987, and 1988, school records, bank statements, pay stubs, immunization record, and affidavits from individuals claiming to know the applicant during the requisite

period. The AAO has reviewed each document in its entirety to determine the applicant's eligibility. While the record contains evidence of the applicant's residence in the United States during portions of the requisite period, the AAO finds that the applicant's absence in 1982 interrupted his continuous residence in the United States.

"Continuous unlawful residence" is defined at 8 C.F.R. § 245a.2(h), as follows:

An alien shall be regarded as having resided continuously in the United States if 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 eighty (180) days between January 1, 1982, and May 4, 1988, 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.

In the applicant's Form I-687, at Question 32, where asked to list absences from the United States since entry, the applicant listed an absence to Greece/Lebanon from February 12, 1982 to November 15, 1982, a total of 276 days. This absence exceeds the 45 days permitted in a single absence, as well as the 180 days in the aggregate of all absences. Thus, this absence interrupted the applicant's continuous residence in the United States.

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 record contains an affidavit, dated September 28, 2006, from the applicant stating that he was unable to return to the United States due to the political situation in Lebanon. However, in the same affidavit, the applicant states that prior to his leaving the United States, "My parents wanted me to stay in the United States since the political situation was not stable in Lebanon." Based on this evidence, the applicant was aware of the political situation in Lebanon and it did not come unexpectedly into being after his arrival in Lebanon. Therefore, the applicant has not established that an emergent circumstance delayed his return to the United States and his absence interrupted his continuous residence in the United States.

It is also noted that in the applicant's Form I-687, he listed another absence to Belgium, Greece and Lebanon from June 29, 1987, to August 24, 1987, a total of 56 days. This absence exceeds the 45 days permitted in a single absence, and exceeds the 180 days in the aggregate of all his absences. Thus, this absence also interrupted the applicant's continuous residence in the United States. The record does not establish that an emergent circumstance delayed his return to the United States.

Based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he 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, the AAO finds that the applicant is not eligible for temporary resident status pursuant to the terms of the agreements reached in the CSS/Newman Settlement Agreements because the record indicates that he is inadmissible under section 212(a)(6)(C)(i) of the Act.

Upon reentry into the United States in 1982, 1986, 1987 and 1988, 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.

An applicant for adjustment of status under section 245A of the Act has the burden to establish by a preponderance of the evidence that he is admissible to the United States. *See* 8 C.F.R. § 245a.2(d)(5). The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The record indicates that the applicant submitted the Form I-690, Application for Waiver of Grounds of Excludability, which is the form an applicant must file to request a waiver of the grounds of inadmissibility set forth at section 212(a)(6)(C)(i) of the Act. However, the waiver was denied.

The applicant is not eligible for adjustment to temporary residence status for the reasons stated above with each considered as an independent and alternative basis for denial.

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