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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

MAR 30 2011

FILE: [REDACTED] Office: IRVING Date:

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 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 application for temporary resident status 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, and *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, Dallas. The applicant filed a timely appeal which was dismissed by the Administrative Appeals Office (AAO) on September 11, 2009. On September 28, 2009, the applicant filed a Motion to Reopen based on requesting that his Form I-687 Application for Temporary Resident Status be reopened and adjudicated pursuant to the terms of the *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). The Motion was approved and the application is again before the AAO on appeal. The appeal will be dismissed.

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. The director determined that 1.) the applicant had not violated his status in a manner known to the government as of January 1, 1982; and, 2.) the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States for the duration of the requisite period.

Specifically, the director found that the applicant indicated in his testimony provided to United States Citizenship and Immigration Services (USCIS) on June 3, 1993 that he entered the United States, using a B1/B2 nonimmigrant tourist visa, in September 1981. The director noted that, based upon his testimony, the applicant was not in unlawful status on January 1, 1982 and is therefore, not eligible for adjustment to temporary resident status. The director also noted that the applicant failed to submit credible evidence that he resided continuously in the United States for the duration of the relevant period. Each of the reasons noted by the director is independent grounds for denial of the application.

On appeal, the applicant asserts that he is eligible for adjustment to temporary resident status. He indicates that he entered the United States using a visitor visa in September 21, 1981 and continuously resided in the United States throughout the relevant period. He further asserts that his lawful status expired on December 22, 1981 and that he remained in the United States following the expiration of his lawful status. He asserts that he accepted unauthorized employment in January 1982. He does not assert, however, that his unlawful status was known to the government as of January 1, 1982. Furthermore, he has not provided any evidence of his lawful entry.

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 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 CIS action or inaction was because INS or CIS 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 I-687 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, the applicant violated the terms of his or her 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.

In this case, the applicant testified that he entered the United States on September 21, 1981 using a valid non-immigrant visitor visa. He asserts that his visa expired on December 22, 1981. He testified that his original passport was lost in either Hawaii in 1988 or in New York. The applicant has not established that he entered the United States on a nonimmigrant visa prior to January 1, 1982.

It is noted by the AAO that even if the applicant established his entry and that his lawful B-2 status expired prior to January 1, 1982, he has not provided sufficient credible evidence to establish by a preponderance of the evidence, that he resided continuously in the United States for the duration of the requisite period, as noted by the director in the Notice of Denial.

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 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).

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.

The evidence that the applicant has submitted to establish his continuous residency includes affidavits from [REDACTED] and [REDACTED]. Both affiants indicate that they met the applicant in 1981. The affiants do not indicate how they date their initial meeting with

the applicant, how frequently they had contact with the applicant, or how they had personal knowledge of the applicant's presence in the United States. Given these deficiencies, these affidavits have minimal probative value in supporting the applicant's claims that he entered the United States prior to January 1, 1982 and resided in the United States for the entire requisite period.

The record of proceedings also contains two affidavits from [REDACTED] who indicates that he has known the applicant "for a long time." In two separate affidavits he asserts that the applicant worked for him as a waiter. In the first affidavit, on [REDACTED] letterhead, the affiant indicates that the applicant worked for his restaurant from March to May 1985. In the second affidavit, on [REDACTED] letterhead, the affiant indicates that the applicant worked for his restaurant as a waiter from October 1988 until March 1989. Both affidavits are dated June 14, 2001. Neither affidavit complies with certain regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i), which provides that letters from employers must include the applicant's address at the time of employment; exact period of employment; whether the information was taken from official company records and where records are located and whether CIS may have access to the records; if records are unavailable, an affidavit form-letter stating that the employment records are unavailable may be accepted which shall be signed, attested to by the employer under penalty of perjury and shall state the employer's willingness to come forward and give testimony if requested. The statements by [REDACTED] do not include much of the required information and can be afforded minimal weight as evidence of the applicant's residence in the United States for the duration of the requisite period.

The record of proceedings also contains a letter from the [REDACTED] of Texas indicating that the applicant is a member. The letter is dated June 26, 2001, and is therefore, not probative of the applicant's continuous residence during the relevant period.

The record of proceedings contains a letter from [REDACTED] [REDACTED] indicates that he previously owned [REDACTED] and that the applicant worked for his restaurant as a bus boy from January 1982 until June 1982. The applicant asserts that this employment was a violation of his B-2 status. However, as discussed above, this violation, even if established, occurred after the relevant date, January 1, 1982. The affidavit also fails to meet the regulatory standards set forth at 8 C.F.R. § 245a.2(d)(3)(i). The affiant fails to indicate how he dates his knowledge of the applicant's employment or where the applicant resided during the employment. The applicant has not submitted any evidence of this employment except [REDACTED] affidavit. This affidavit will be given minimal weight of the applicant's continuous residence during 1982.

The record of proceedings includes copies of several certificates dated in 1984, an envelope with an illegible date stamp and an envelope that does not contain the applicant's name.

Finally, the record contains several inconsistencies with regard to the applicant's addresses in the United States. First, on his Form I-687 filed in June 1991, the applicant indicates that he lived in [REDACTED] from September 1981 until May 1986 and [REDACTED] from

June 1986 until February 1990. However, on his current I-687 filed on August 10, 2010, the applicant indicates that he lived at New York from 1981 until September 1983 when he moved to [REDACTED]. The applicant indicates that in February 1985 he moved back to [REDACTED] until June 1986 when he moved to [REDACTED]. He indicates on his current application that he moved to [REDACTED] again in 1987.

It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the application. *Id.* at 591.

Therefore, based upon the foregoing, the applicant has failed to establish by a preponderance of the evidence that he resided in the United States in an unlawful status on January 1, 1982 or that his status was known to the government as of January 1, 1982. He also failed to establish 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.

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