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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529 - 2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

[REDACTED]

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Date:

NOV 30 2011

Office: Houston

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION:

Application for Temporary Resident Status under 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.

Thank you,

Elizabeth McCormack

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, 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 initially approved by the director of the Houston office. The director subsequently terminated the applicant's temporary resident status and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The appeal will be remanded.

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 on June 21, 2005. The director approved the application on May 27, 2008. The director subsequently terminated the applicant's temporary resident status, finding that the applicant had failed to establish that he had continuously resided in the United States *in an unlawful status* for the duration of the requisite period.

On appeal, counsel for the applicant asserts that the applicant has continuously resided in the United States in an unlawful status throughout the requisite period. The AAO has considered the applicant's assertions, reviewed all of the evidence, and has made a *de novo* decision based on the record and the AAO's assessment of the credibility, relevance and probative value of the evidence.¹

On September 9, 2008, the court approved a Stipulation of Settlement in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). Class members are defined, in relevant part, as:

1. Class Members [include] all persons who entered the United States in a nonimmigrant status prior to January 1, 1982, who are otherwise *prima facie* eligible for legalization under § 245A of the INA [Immigration & Nationality Act], 8 U.S.C. § 1255a, who are within one or more of the Enumerated Categories described below in paragraph 2, and who

- (A) between May 5, 1987 and May 4, 1988, attempted to file a complete application for legalization under § 245A of the INA and fees to an 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

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 long been recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

- (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 not a member of the NWIRP class as he has not established that he meets the requirements of any of the enumerated categories. More specifically, he failed to establish he entered the United States before January 1, 1982 in a lawful nonimmigrant status. In this case, the applicant testified that he entered the United States in 1981 but failed to submit evidence of that entry either in the form of detailed testimony or documentation. The director's finding that the applicant entered the United States on a nonimmigrant visa on December 25, 1981 shall be withdrawn.

The AAO has considered the applicant's assertions, 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.

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) 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 periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The 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). 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 evidence produced

by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6).

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.* 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. See 8 C.F.R. § 245a.2(d)(6). The weight to be given any affidavit depends on the totality of the circumstances, and a number of factors must be considered. More weight will be given to an affidavit in which the affiant indicates personal knowledge of the applicant's whereabouts during the time period in question rather than a fill-in-the-blank affidavit that provides generic information. The regulations provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment or attestations by churches or other organizations. 8 C.F.R. §§ 245a.2(d)(3)(i) and (v).

Even if the director has some doubt as to the truth, if the 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 (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 issue in this proceeding is whether the applicant has furnished sufficient credible evidence to demonstrate that he entered before 1982 and resided in the United States for the requisite period. In this case, the submitted evidence is relevant, probative and credible.

In support of his application the applicant submitted witness statements and affidavits. The witness statements and affidavits provide concrete information, specific to the applicant, which demonstrate a sufficient basis for reliable knowledge about the applicant's residence in the United States during the requisite period. In addition, the applicant submitted a copy of his passport showing he entered the United States on April 1, 1982, May 18, 1986 and on April 19, 1987. He also submitted copies of tax returns, receipts, and pay stubs dated during the requisite period.

In a notice of intent to terminate the applicant's temporary resident status (NOIT), the director informed the applicant that the Service had contacted two of his witnesses, namely [REDACTED] and [REDACTED]. The director stated that Mr. [REDACTED] claimed that he did not know the applicant and [REDACTED] indicated that he had only known the applicant for eight years. In response to the NOIT, counsel for the applicant submitted additional statements from both

witnesses, one of them asserting that he was not contacted by the Service and the other that he misunderstood the question posed to him. Both witnesses expressed their willingness to speak to the Service and provided up-to-date phone numbers. The AAO finds that the applicant has met his burden of proof of establishing that it is more likely than not that he resided in the United States continuously throughout the requisite period.

The director terminated the applicant's temporary resident status, in part, finding the applicant was in lawful status when he reentered the United States on a nonimmigrant visa. Continuous unlawful residence was not broken when the applicant returned as a nonimmigrant subsequent to January 1, 1982 so long as he was in unlawful status prior to January 1, 1982 and returned to unlawful residence in the United States, even if he entered through misrepresentation or fraud. *See* 8 C.F.R. § 245a.2(b)(9).

The applicant has established by a preponderance of the evidence that he entered the United States before January 1, 1982 and maintained continuous, unlawful residence for the duration of the requisite period. Consequently, the applicant has overcome the particular basis of termination cited by the director.

However, beyond the director's decision, the applicant has not established his admissibility.

An applicant for temporary resident status under section 245A of the Act 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.

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.

The record reflects that the applicant was issued a B-2 (temporary visitor) visa. A B-1/B-2 visa is issued to an alien who has a residence in a foreign country which s/he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure. Section 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15)(B). On April 1, 1982, May 18, 1986 and April 19, 1987, the applicant was admitted to the United States as a B-2 visitor. The applicant's admission into the United States as a B-2 visitor is materially inconsistent with information he provided on his Form I-687, Application for Status as a Temporary Resident Under Section 245A of the Act, which he signed under penalty of perjury. The applicant showed on his Form I-687 application that he has continuously resided in the United States since 1981. Therefore, the applicant willfully misrepresented a material fact when he was admitted to the United States as a temporary visitor. The AAO finds that the applicant's admission into the

United States by willfully misrepresenting a material fact renders him inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

Section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), permits the Secretary of Homeland Security to waive certain grounds of inadmissibility, including inadmissibility under section 212(a)(6)(C)(i) of the Act, “in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”

Accordingly, the director shall allow the applicant the opportunity to file a Form I-690 waiver application with appropriate documentation before revisiting the issue of the applicant’s eligibility.

The appeal will be remanded. If the director makes an adverse determination, he shall certify his decision to the AAO. If the director finds the applicant admissible and therefore eligible for temporary resident status, the director shall reopen the applicant’s Form I-698 application for adjustment from temporary to permanent resident status.

ORDER: The director’s decision is withdrawn and the appeal is remanded in accordance with the above discussion and the entry of a new decision, which if adverse to the applicant, shall be certified to the AAO for review.