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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
Washington, DC 20529-2090



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

[REDACTED]

L1

Date: FEB 14 2012

Office: HOUSTON

FILE: [REDACTED]

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 of the Houston office. The decision is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and action.

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 NWIRP Class Membership Worksheet, asserting that he is a class member in the class action *Northwest Immigrant Rights Project, et al vs. USCIS, et al*, 88-CV-00379 JLR (W.D. Was.) (NWIRP). The director denied the application, finding that the applicant had not established by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period. Specifically, the director found that the applicant failed to establish that he resided continuously in the United States in unlawful status from 1983 through the end of the relevant period. The director did not make a finding regarding whether the applicant established that he was in unlawful status in the United States prior to January 1, 1982 in a manner known to the government.

On appeal, counsel asserts that the evidence which the applicant previously submitted establishes by a preponderance of the evidence that he had continuously resided in the United States in an unlawful status for the duration of the requisite period.

For the reasons set forth below, 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 director's decision will therefore be withdrawn, and the AAO will review the case 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 to be 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:

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.

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 or notice of change of address 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.)

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, by failing to file required quarterly address updates due prior to January 1, 1982. The record reveals that the applicant entered the United States at Miami, Florida on August 27, 1969 as a nonimmigrant F-1 student, to attend Miami-Dade Junior College. The applicant next entered the United States at Chicago, Illinois on September 23, 1974, as a nonimmigrant B-2 visitor for pleasure.¹ The applicant testified that he remained in the United States until December 1983, when he departed and reentered the United States in January 1984 without inspection.

Until December 29, 1981, section 265 of the Immigration and Nationality Act (Act) stated that any alien in the United States in "lawful temporary residence status shall" notify the Attorney General "in writing of his address at the expiration of each three-month period during which he remains in the United States, regardless of whether there has been any change in address." See section 265 of the Act (1980) and PL 97-116, 1981 HR 4327 (1981), which confirms that section 265 was modified, effective December 29, 1981, such that lawful non-immigrants were no longer required to file quarterly address reports regardless of whether there had been any change in address.

As stated above, the applicant entered the United States in B-2 visitor status on September 23, 1974. The applicant asserts that he remained in the United States until December 1983, when he departed and reentered the United States in January 1984 without inspection. The applicant would have been required to provide written updates of his address at the expiration of each three-month period during which he remained in the United States, regardless of whether there was any change in address, for the period September 23, 1974 until December 29, 1981. The record reveals that the applicant failed to file the required quarterly address report by December 23, 1974, three months after his September 23, 1974 nonimmigrant entry. The record of proceedings is devoid of any address updates. For this reason, the AAO finds that the applicant violated his nonimmigrant status in a manner known to the government prior to January 1, 1982, by failing to file quarterly or annual address notifications as required prior to December 29, 1981.

Consequently, the applicant has established that his unlawful status was known to the government prior to January 1, 1982.

¹ The record reveals that on September 17, 1974, the applicant obtained a single-entry visitor's visa in Karachi. The record does not contain a Form I-94, Arrival/Departure Record, for the applicant's September 23, 1974 entry, and in the instant I-687 application the applicant states that this Form I-94 was lost. In addition, although the period of authorized stay is often also noted on the entry stamp in the passport, no notation was made on the September 23, 1974 entry stamp in the passport regarding the applicant's period of authorized stay.

The AAO must next examine whether the applicant has established that he resided continuously in the United States from the date of his entry on September 23, 1974 and throughout the requisite period. In this case, the submitted evidence is relevant, probative and credible.

On January 29, 2010, the applicant filed his I-687 application. In support of his application the applicant submitted witness statements and documents. The witness statements from [REDACTED], [REDACTED], [REDACTED] state their knowledge of the applicant's residence in the United States for all, or a portion of, the requisite period, and their statements 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 employment verification letters from [REDACTED], [REDACTED], owner of Petrofibres International, Inc. in Houston, and [REDACTED], of Texan, International, Inc. in Houston. Further, the applicant submitted extensive documentation, in the form of individual tax returns, bank records, state motor vehicle records, utility bills, receipts, and correspondence, all dated during the requisite period, as well as a statement from the Social Security Administration of the applicant's earnings during the requisite period.²

On appeal, in support of his assertion the he has established his continuous residence in the United States from 1983 through the end of the requisite period the applicant refers a copy of an international driver's license, issued to him on August 1, 1984 in Virginia and listing his address in DeKalb, Illinois.³ The applicant also refers to the statements of witnesses [REDACTED], [REDACTED] and [REDACTED].⁴ The applicant also explains that there are no earnings listed for him for the period from 1983 through the end of the requisite period because his employers from that period, Petrofibres International, Inc. and Texan, International, Inc. paid him in cash. The March 3, 2005 employment verification letter from Petrofibres International, Inc. states that the applicant was paid in cash. Further, the applicant explains that his failure to list his 1983 absence from the United States in the initial I-687 application filed in 1990 was unintentional. He notes that he listed this absence in the instant I-687, in an additional I-687 filed in 2006, and in two G-325A forms, biographic information sheets, signed by the applicant in 2001.⁵ The AAO finds the applicant's explanation of this inconsistency to be credible.

² Although there are some inconsistencies in the documents regarding the particular dates when the applicant resided at particular locations in the United States, when compared with the instant I-687 application, the addresses on the documentation have been listed as residences in the instant I-687 application, with one exception. The record contains a California identification card issued to the applicant on October 28, 1983, listing his address as [REDACTED].

³ This document was submitted into the record at the time of the applicant's interview on September 20, 2010.

⁴ The applicant submitted additional statements from these witnesses in his rebuttal to the notice of intent to terminate (NOIT) his temporary resident status.

⁵ The two G-325A forms were submitted contemporaneously with two forms I-485, applications to adjust to permanent resident status.

The contemporaneous documents submitted by the applicant appear to be credible. The witness statements submitted by the applicant appear to be credible and amenable to verification in that they include contact telephone numbers and/or contact addresses.

The applicant gave testimony that was consistent with the information in the record when he testified that he entered the United States on September 23, 1974, and continued to reside and work in the United States, mostly in sales, for the duration of the requisite statutory period.

The director has not established that the information in the many supporting documents in the record was inconsistent with the applicant's testimony or with the claims made on his I-687 application. In addition, the director has not established that any inconsistencies exist *within* the claims made in the supporting documents, or that the documents contain false information. As stated in *Matter of E-M*, 20 I&N Dec. at 80, when something is to be established by a preponderance of the evidence, the proof submitted by the applicant has to establish only that the asserted claim is probably true. That decision also states that, under the preponderance of evidence standard, an application may be granted even though some doubt remains regarding the evidence. *Id.* at 79. The documents that have been furnished in this case may be accorded substantial evidentiary weight and are sufficient to meet the applicant's burden of proof of residence in the United States for the requisite period.

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 denial cited by the director.

However, the record reveals that the applicant sought through misrepresentation to procure an immigration benefit under the Act. On March 1, 1990, the applicant reentered the United States as a B-2 nonimmigrant visitor, without disclosing that he was an intending immigrant with respect to his entry. The AAO finds that the applicant misrepresented his intentions in order to obtain an immigration benefit. An alien is inadmissible, and therefore ineligible for legalization benefits, 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). However, 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. Therefore, the applicant shall be requested to submit to the director of the Houston office a Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of this ground of inadmissibility/exclusion.

Therefore, case will be remanded for the director to permit the applicant to submit a Form I-690, waiver of grounds of inadmissibility, and for the director to adjudicate the waiver application. If the waiver application is approved, the director will render a new decision on the application for temporary resident status which addresses the above. If the waiver application is

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denied, the director will render a new decision, denying the application, and will certify the decision to the AAO.

ORDER: The case is remanded for further consideration and action.