

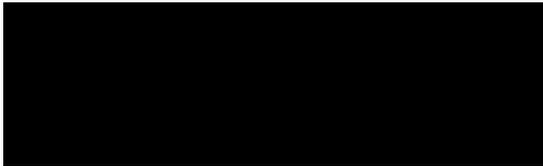
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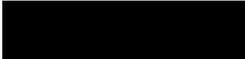


U.S. Citizenship
and Immigration
Services



AI

FILE:



Office: Nebraska Service Center

Date: MAY 12 2005

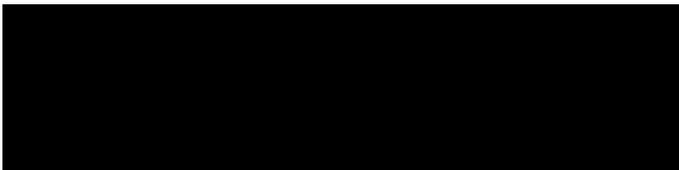
IN RE:

Applicant:



APPLICATION: Application for Waiver of Inadmissibility 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. All documents have been returned
to the office that originally decided your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The director denied the waiver application because the applicant was otherwise ineligible for temporary residence in the legalization program. The director reasoned that there would be no purpose in granting a waiver that could not assist the applicant in gaining temporary residence.

In response to the certified denial, counsel indicates the applicant has lived in the United States for over half of her life, and has children and grandchildren here dependent upon her. Counsel points out that one of the applicant's sons, recovering from substance abuse, continues to count on her for support and encouragement. Counsel asserts that, if the application is granted, both the applicant's inadmissibility for having been deported and her failure to maintain continuous residence due to the deportation will be waived.

The applicant was deported from the United States on March 27, 1985, after having failed to depart voluntarily within the time permitted. She is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), which relates to aliens who were deported and reentered the United States without authorization. Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), such 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.

The applicant states that she has resided in the United States since 1980. Regardless, the director denied the waiver application because the applicant cannot otherwise qualify for legalization, as she fails to meet the "continuous residence" provision of the legalization program.

An applicant for temporary residence 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). An alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255(g)(2)(b)(i).

Because she was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, she is statutorily ineligible for temporary residence.

Counsel's assertion that a lack of continuous residence in such circumstances may be waived is unpersuasive. Congress set forth, at section 245A(d)(2) of the Act, a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act. Section 245A(g)(2) of the Act, concerning *continuous residence*, is a separate section unrelated to the waiver provisions. Congress provided no relief in the legalization program for failure to maintain continuous residence due to a departure under an order of deportation. Relief is provided in the Act for absences based on factors other than deportation, namely absences due to emergencies and absences approved under the advance parole provisions. Clearly, with respect to

maintenance of continuous residence, it was not congressional intent to provide relief for absences under an order of deportation. While the applicant's failure to maintain continuous residence, and her inadmissibility for having been deported and having returned without authorization, are both predicated on the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9).

The question has arisen as to why, if the above interpretation is correct, the law would allow for a waiver of inadmissibility in the case of a deported alien and yet provide no waiver for a lack of continuous residence, also based on a deportation. Clearly, not all aliens who were deported in the past failed to meet the continuous residence requirement. For example, an alien who was deported in 1979 and reentered the United States before January 1, 1982 would be inadmissible because of the deportation and yet would not be ineligible for legalization on the continuous residence issue.

Counsel points out that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) concluded that a waiver would cover *both* the inadmissibility and the continuous residence issue. However, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel INS to change its interpretation of the statute.

Counsel correctly indicates that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well. Nonetheless, for the reasons stated above, we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Regarding waivers of grounds of inadmissibility, *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988) states that denials of legalization on the basis of the waivable grounds of inadmissibility should only occur when the applicant is also ineligible for legalization on other grounds. The director's denial of the waiver application, because the applicant cannot otherwise qualify for legalization because she fails to meet the "continuous residence" provision of the legalization program, is not inconsistent with such precedent decision.

In support of his decision to deny the waiver application because the applicant was otherwise ineligible for legalization, the director cited *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) and *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). While those decisions relate to applications for permission to reapply for admission after deportation, the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because the alien was ineligible for the overall benefit of lawful residence.

It is concluded that the director's decision to deny the waiver application because no purpose would be served in granting it was proper, logical and legally sound. Therefore, it shall remain undisturbed.

ORDER: The decision is affirmed, and the application remains denied.