



U.S. Citizenship
and Immigration
Services

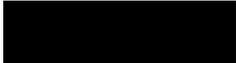
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FILE:



Office: Nebraska Service Center

Date: MAY 12 2005

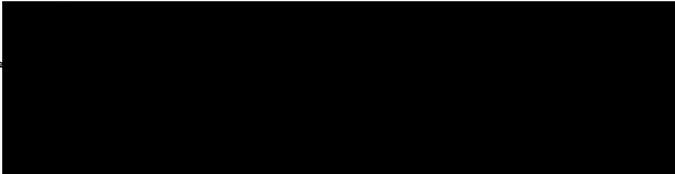
IN RE:

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. It 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 determined that it would be useless to grant a waiver that could not enable the applicant to gain temporary residence.

In response, counsel indicates the applicant has lived in the United States for over half of his life, owns his house, is active in the church, and has children and grandchildren here dependent upon him. Counsel points out that one of the applicant's sons, recovering from substance abuse, continues to count on his parents for support and encouragement. Counsel contends that, if the waiver application is granted, both the applicant's inadmissibility for having been deported and his failure to maintain continuous residence because of 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. He 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 he has resided in the United States since November 1980. Nevertheless, the director denied the waiver application because the applicant cannot otherwise qualify for legalization, as he 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 he was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

Counsel's contention that the lack of continuous residence may be waived is not persuasive. 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, specifically absences that were prolonged 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 his inadmissibility for having been deported and having returned without authorization, both stem from the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II).

Counsel maintains that it would not seem logical for the law to 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 the same deportation. However, there is a logical basis, which stems from the fact that the two issues are separate, and that not all aliens who were deported in the past failed to meet the continuous residence requirement. An alien who was deported in 1978 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. A waiver of inadmissibility in such case would therefore serve a useful purpose, as the alien would then be eligible for legalization.

Counsel stresses 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 the Immigration and Naturalization Service, now Citizenship and Immigration Services, 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. However, 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 he 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.