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U.S. Citizenship
and Immigration
Services

H4

[REDACTED]

FILE: [REDACTED] Office: Nebraska Service Center
XPH 88 125 1017

Date: **SEP 28 2006**

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. All documents have been returned
to the office that decided and certified your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, California Service Center. An appeal of that decision was dismissed.

The Director, Nebraska Service Center, then granted a motion to reopen that was filed by the applicant pursuant to a class action lawsuit entitled *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB (D. Ariz.). The decision in that case allows an alien whose application was denied because he had been outside of the United States after January 1, 1982 under an order of deportation to have his application reopened. The Director, Nebraska Service Center, has now denied the application, and certified his decision to the Administrative Appeals Office (AAO). The decision will be affirmed.

The applicant was deported on May 17, 1983. Both directors noted that the applicant was outside of the United States under an order of deportation after January 1, 1982, and therefore did not reside continuously in the United States since such date. Neither the applicant nor counsel has responded to the certified decision.

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. § 1255a(g)(2)(B)(i).

As a result of the deportation on May 17, 1983, the applicant did not reside continuously in the United States for the requisite period. He is therefore statutorily ineligible for temporary residence on that basis.

Congress set forth, at section 245A(d)(2) of the Act, 8 U.S.C. § 1255a(d)(2), a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act, 8 U.S.C. § 1182(a). 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 that were prolonged because of 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, are both predicated on the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

In summary, the applicant was out of the United States after January 1, 1982 under an order of deportation, and cannot be granted temporary residence for two reasons. First and foremost, he failed to maintain continuous residence, and there is no waiver available. Therefore, he is ineligible for temporary residence. Secondly, he is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. The applicant recently filed a waiver application in an effort to overcome such inadmissibility. That waiver application

was denied by the director, and the decision has been affirmed by the AAO in a separate decision. There is no other waiver provision, such as consent to reapply for admission into the United States after deportation, available to legalization applicants.

The applicant was deported on May 17, 1983, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence, and inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

According to the notes of the legalization officer who interviewed the applicant regarding this application on March 18, 1988, the applicant was absent from the United States for 122 days in 1985 for a vacation. As the applicant was absent for a period in excess of 45 days, and there is no indication an emergent reason delayed his return to the United States, he failed to maintain continuous residence on this basis as well. *See* 8 C.F.R. 245a.1(c)(1)(i).

It is noted that the applicant was arrested on April 23, 1983 in Phoenix for Shoplifting, case number 8338573 UC. On April 29, 1983 he was convicted of this misdemeanor. Also in Phoenix, he was arrested for two counts of Assault (misdemeanor) on June 30, 1990, agency case number 90181131. Records indicate that one count was dismissed, and that he was convicted of the other count, although the conviction was vacated pursuant to Arizona Revised Statute 13-907, apparently on May 3, 1993.

The applicant was also arrested in Phoenix for Assault (misdemeanor) on October 14, 1994, agency case number [REDACTED], and again in Phoenix on October 21, 1994 for Driving Under the Influence, agency case number [REDACTED]. The dispositions of these arrests are unknown. The possibility exists that the applicant is ineligible for temporary residence due to three or more misdemeanor convictions. *See* section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(4)(B).

ORDER: The director's decision is affirmed. This decision constitutes a final notice of ineligibility.