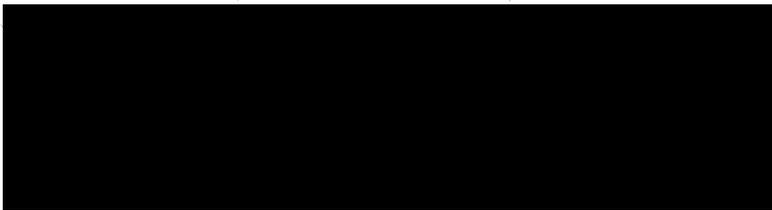




U.S. Citizenship
and Immigration
Services

LA



FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Applicant: [REDACTED] OCT - 82004

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:



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. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, 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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The decision will be affirmed.

According to computer printouts in the record, the application was originally denied by the Director, Western Regional Processing Facility on April 19, 1989. However, the actual denial notice is missing from the record. The Director, Nebraska Service Center granted a motion to reopen that was recently 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 applicant was deported on September 19, 1982 after having failed to depart voluntarily. 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.

On appeal, counsel does not challenge the fact of the deportation. He asserts that the applicant's failure to reside continuously may be waived, and urges that the waiver application be approved.

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).

As a result of the deportation, 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 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.

Counsel points out that the only grounds of inadmissibility that cannot be waived in the legalization program relate to serious offenses such as criminality, terrorism and subversion. These general grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. Counsel correctly states that the applicant's inadmissibility under section 212(a)(9) for having been deported and having returned to the United States without authorization may be waived. However, an alien's inadmissibility under section 212(a) of the

Act is an entirely separate issue from the continuous residence issue discussed above. 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).

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.

In summary, an alien who was out of the United States on or after January 1, 1982 under an order of deportation 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) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. The applicant filed a waiver application in an effort to overcome such inadmissibility. That waiver application was denied by the director, and the decision was affirmed by the AAO in a separate decision.

The applicant was deported on September 19, 1982 and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence.

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