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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PHOTOCOPY



JUN 10 2005

FILE:



Office: Nebraska Service Center

Date:

IN RE:

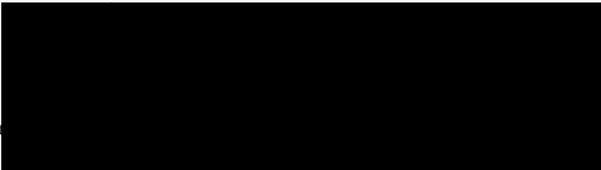
Applicant:



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 decided and certified your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization), filed on April 15, 1988, was originally held in abeyance by the Director, Western Regional Processing Facility. On January 11, 1994, the applicant filed an unnecessary appeal, as his application had not been denied. Although a computer record indicates that the director denied the application on March 31, 1989, the computer record is not correct. The director's subsequent letter of January 12, 1996 to the applicant clearly reiterated that his application was still pending.

The Director, Nebraska Service Center denied a motion to reopen that was filed by the applicant on November 8, 2004 pursuant to a class action lawsuit entitled *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB (D. Ariz.). That director denied the motion because it was untimely filed, and certified his decision to the Administrative Appeals Office (AAO). A separate decision is being rendered by this office regarding that action.

However, in that same decision the director also denied the original application on its merits by fully explaining why the applicant does not qualify for temporary residence. That decision will be affirmed here.

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).

The applicant was deported on October 24, 1984, and on March 31, 1987. Neither the applicant nor counsel has contested the facts of the deportations. The applicant was outside of the United States under two orders of deportation after January 1, 1982, and therefore did not reside continuously in the United States since such date. On that basis, he is statutorily ineligible for temporary residence.

Relief is provided in the Act for absences based on factors other than deportation, specifically 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.

General grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant's inadmissibility under section 212(a)(9)(A)(ii) 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 a separate issue from the continuous residence issue discussed above. Although the applicant's failure to maintain continuous residence, and his inadmissibility for having been deported and having returned without authorization, are both based on the deportation, a waiver is possible only for the inadmissibility.

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 while providing no waiver for a lack of continuous residence, also based on a deportation. It is noted that not all aliens who were deported in the past fail to meet the continuous residence requirement. For example, an alien who was deported in 1980 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, 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. 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) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. However, the applicant has not filed a waiver application.

The applicant was deported, 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 for temporary residence.