



U.S. Citizenship  
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FILE:



Office: Nebraska Service Center

Date:

JUN 10 2005

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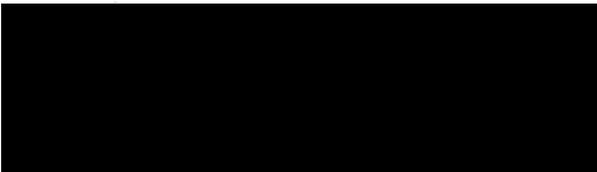
Applicant:



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) was denied by the Director, Western Regional Processing Facility. 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.

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 April 25, 1985. 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.

In rebuttal, counsel states that the applicant believes his deportation hearing violated regulations and due process. Counsel avers the applicant had been eligible for suspension of deportation, and asserts the immigration judge failed to advise the applicant of that eligibility, rendering the deportation null and void. In the alternative, counsel asks that the applicant be granted a waiver of his inadmissibility for having been deported, and maintains that approval of the waiver would also cure the lack of continuous residence stemming from the deportation.

The record does not contain a transcript of the deportation hearing. It does contain the August 2, 1983 Decision of the Immigration Judge With Respect to Custody, releasing the applicant from custody on his own recognizance. It also contains the February 1, 1984 Decision of the Immigration Judge, granting voluntary departure to August 1, 1984 and ordering the applicant to be deported should he not depart by that date. It was noted that the applicant waived his appellate rights. The Form I-210, issued on July 23, 1984, reflects the district director's grant of additional time to depart, until October 23, 1984. It does not appear that actions were taken to abridge the rights of the applicant. Furthermore, more importantly, it is not within the authority of this office to pass judgment on judicial proceedings. The claim that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was appealable at the time to the Board of Immigration Appeals.

Because of the deportation, the applicant did not reside continuously in the United States for the requisite period. On that basis, he is statutorily ineligible for temporary residence.

Counsel asserts that a lack of continuous residence in such circumstances may be waived. 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, 8 U.S.C. 1255a(g)(2), 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 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).

Counsel maintains that it is not logical to conclude that the law allows for a waiver of inadmissibility in the case of a deported alien, and yet provides no waiver for a lack of continuous residence, also based on the same deportation. Counsel argues that such an interpretation renders a waiver of inadmissibility meaningless. However, there is a logical basis for making the distinction between inadmissibility and continuous residence, as the two issues are separate, and not all aliens who were deported fail 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 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 (9<sup>th</sup> Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel INS to change its interpretation of the statute.

The July 31, 2001 letter submitted by counsel from the United States Senate Committee on the Judiciary is noted. The senators urged the Immigration and Naturalization Service (INS, now Citizenship and Immigration Services, or CIS) to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. While we agree that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

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.



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