



U.S. Citizenship
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Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date:

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 decided your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, Nebraska Service Center, and 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 reasoned that there would be no purpose in granting a waiver that could not assist the applicant in gaining temporary residence.

On appeal, counsel stresses that the waiver application should be granted pursuant to *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988). He maintains that, if the application is approved, both the applicant's inadmissibility for having been deported and his failure to maintain continuous residence due to the deportation will be waived.

Counsel also requests oral argument. Such a request must set forth specific facts explaining why such argument is necessary to supplement the appeal. 8 C.F.R. 103.3(b). Oral argument will be denied in any case where the appeal is found to be frivolous, where oral argument will serve no useful purpose or where written material or representations will appropriately serve the interests of the applicant. The applicant's request does not set forth an explanation of why oral argument is necessary. Nor does it establish that the material submitted will not appropriately serve the interests of the applicant. Accordingly, the request for oral argument is denied.

The applicant was deported from the United States on September 9, 1982, and reentered shortly thereafter. He is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, which relates to aliens who were deported. Pursuant to section 245A(d)(2)(B)(i) of the Act, 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.

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.

Counsel's assertion that a lack of continuous residence in such circumstances may be waived is unpersuasive. 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, 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, were 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.

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 (9th 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.

Regarding waivers of grounds of inadmissibility, counsel correctly points to *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988), in which it was stated that denials of legalization on the basis of the waivable exclusions 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.

Counsel properly points out that the Director, Western Service Center, much earlier in these proceedings, waived another ground of inadmissibility, relating to the applicant having committed fraud in order to acquire visas and entries into the United States subsequent to his deportation. Counsel's point, that INS fully adjudicated and granted the first waiver application, and that CIS should now fully adjudicate (and grant) the current waiver application, seems well taken. However, the inconsistencies in the directors' approaches are not detrimental to the applicant's opportunity to be legalized. In the first instance, the director granted the waiver and denied legalization because the applicant had not resided continuously in the United States due to the deportation. Thus, the applicant did not benefit from the waiver. In the current proceedings, the director denied the waiver application because a waiver would serve no purpose, and again denied legalization for lack of continuous residence. The result is the same; the applicant remains ineligible for legalization due to his failure to maintain continuous residence.

In support of his decision to deny the waiver application, 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). Both decisions relate to applications for permission to reapply for admission after deportation filed by aliens long before the legalization program, yet the decisions are on point and relevant to the current proceedings. In each case the Regional Commissioner clearly found that no purpose would be served in granting an application when the alien was ineligible for the overall benefit.

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.