



U.S. Citizenship  
and Immigration  
Services

Identif. info. deleted to  
prevent invasion of personal privacy

**PUBLIC COPY**



LI

MAR 02 2005

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

IN RE:

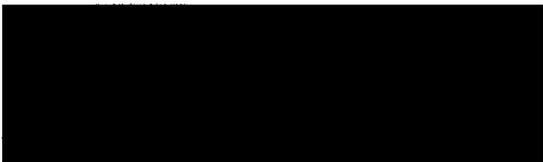
Applicant:



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 originally decided your case.

Robert P. Wiemann, Director  
Administrative Appeals Office

**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.

The application was originally denied by the Director, Western Service Center. 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 purportedly self-deported on September 9, 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.

In rebuttal, counsel maintains the applicant departed the United States voluntarily on September 8, 1982, the last day of his voluntary departure period. 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.

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).

In proceedings on May 11, 1982, the immigration judge at Buffalo, New York ordered that the applicant be deported to Iran unless he departed the United States by August 11, 1982. The period of voluntary departure was extended through September 8, 1982.

The directors' finding that the applicant had been deported was based on a Warrant of Deportation executed on March 15, 1985 in the Houston district, where the applicant was again being charged as deportable after having reentered the United States with a visitor visa. The warrant correctly reflected that the applicant had been granted voluntary departure to September 8, 1982, and that his passport reflected that he entered Canada on September 9, 1982. It was therefore indicated that he "self-deported" pursuant to former 8 C.F.R. § 243.5, now 8 C.F.R. § 241.7. That regulation stated that any alien who departed the United States while an order of deportation was outstanding was considered to have been deported in pursuance of law, except that an alien who departed before the expiration of the voluntary

departure time granted in connection with an alternate order of deportation was not considered to have been deported.

In requesting reopening of this matter, counsel pointed out that, in spite of the executed warrant, the trial attorney acting on behalf of the Immigration and Naturalization Service (INS) at Houston in the 1985-86 deportation proceedings agreed to withdraw the charges which referred to the applicant having been deported in 1982 and having reentered after deportation. Counsel stated that the trial attorney believed the applicant's claim that he had entered Canada at approximately 11:00 p.m. on September 8 but was not actually admitted by Canadian authorities until after midnight. Nevertheless, in subsequently denying the legalization application, the director explained that the trial attorney was exercising prosecutorial discretion in determining which deportation charges should be brought before the court. The director held that this did not constitute an official court decision that invalidated the applicant's September 9, 1982 self-deportation. The director further noted that there was no documentary evidence of the applicant's (claimed) departure on September 8, 1982, and that his claim was supported only by his own testimony.

In rebuttal to the certified denial, counsel quotes the trial attorney in the September 19, 1986 deportation hearing, who stated:

We came across an extension that was granted the respondent extending his stay until September 9 [sic], 1982 ... and I discussed the situation and it seems that the respondent had in fact packed his belongings into his car, ... left the night of September 8<sup>th</sup> and was stop[ped] prior to entering Canada and ... by the time that they finished doing what they were doing and he made an entry into Canada, the stamp was that of the ninth.

Counsel argues that the trial attorney in 1986 did not simply decide to withdraw the deportation charges regarding the alleged 1982 deportation because he was not sure that the applicant had been deported. He argues that the trial attorney *found* that the applicant *was not* deported in 1982 because he departed on September 8. Counsel also states that the applicant should not, as the director suggested, be expected to present evidence from INS or Canadian authorities, or the company that operated the international bridge, of his departure from the United States on September 8, 1982. Counsel points out that the trial attorney did not need such evidence to make a decision, and states that imposing such requirements on legalization applicants is unlawful and ludicrous.

The director did not state that the submission of such border evidence was a requirement. Rather, he simply pointed out that the applicant never submitted such evidence, from September 1982 on. It would be improper to imply that the director is just now asking for evidence that is over 20 years old.

The trial attorney seemingly did exercise prosecutorial discretion in withdrawing the charges relating to the 1982 departure. He had no need to pursue those charges, as there were other, uncontested charges upon which the applicant was ultimately found deportable. Furthermore, as pointed out by the director, the immigration judge in the 1986 proceedings stated that the applicant's testimony "is not perceived as being credible or reliable...."

The applicant was granted a 90-day period in which to depart voluntarily by the immigration judge in the 1982 hearing. He benefited from the 30-day extension of voluntary departure, and was required to depart on or before September 8, 1982. The applicant has failed to establish that he took advantage of the extension of voluntary departure. The documented fact in the record is that the applicant was admitted into Canada subsequent to the period of voluntary departure. Therefore, he effected his deportation. Because of that, he cannot be found to have resided continuously in the United States for the requisite period.

Other issues should be examined as well. 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. In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, such alien must establish that the period of authorized stay as a nonimmigrant expired before such date through the passage of time or that the alien's unlawful status was known to the Government as of such date. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2).

The word "Government" means the United States Government. An alien who claims his unlawful status was known to the Government as of January 1, 1982, must establish that prior to January 1, 1982, documents existed in one or more government agencies that warrant a finding that the alien's status in the United States was unlawful. *Matter of P-*, 19 I&N 823 (Comm. 1988).

The applicant was admitted to the United States on September 16, 1977 as a nonimmigrant student, and his stay was ultimately extended to May 31, 1984. The applicant's authorized stay had not expired by January 1, 1982. To establish eligibility, the applicant must show that he was nevertheless in an unlawful status which was known to the Government as of that date.

In an Order to Show Cause issued on April 16, 1982, INS stated that the applicant was deportable because his attendance at his authorized school terminated on December 11, 1981. INS learned of that from the school official in a letter dated February 4, 1982. Later, on February 26, 1982, the school official indicated in a letter to INS that the termination "has now been rescinded." It is not clear, therefore, that the applicant should be considered to have been unlawful as of January 1, 1982, as the school later rescinded the termination. Regardless, even if he is considered to have been unlawful as of January 1, 1982 due to the termination from school, there is no indication that INS or other federal agencies were aware of it as of that date.

Also, INS learned from the applicant's employer on March 23, 1982 that the applicant had, at least a few times, exceeded the maximum 20 hours per week of employment that INS had granted. The employer, however, did point out that the applicant's average weekly work-hours were only 15. Again, INS was not aware of the violation in terms of hours worked until after January 1, 1982. If taxes and FICA were deducted from the applicant's wages, agencies such as the Internal Revenue Service and the Social Security Administration would have been aware of the employment. However, as they normally received quarterly payments, it is not known how those agencies could have been aware that the employment sometimes exceeded 20 hours per week. And, it is not clear that INS would have even found such employment, which averaged 15 hours per week, to have been unlawful. It is noted that on the Order to Show Cause issued on

April 16, 1982, INS did not mention unlawful employment as a basis for deportability, but rather focused on the termination from school.

In this case it is clear that the authorized stay did not expire prior to January 1, 1982. Moreover, the applicant has not established that he was in unlawful status that was known to the government as of January 1, 1982.

In summary, it is concluded that the applicant departed the United States on September 9, 1982, and is not eligible for temporary residence on that basis, as he effected his own deportation. Additionally, he has failed to demonstrate that he continuously resided in the United States in an unlawful status which was known to the government as of January 1, 1982. Therefore, he is not eligible for temporary residence on that basis as well.

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