



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: Nebraska Service Center

Date: **MAR 31 2005**

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 originally decided your case.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The applicant was found to have effected his deportation on November 4, 1985, after having failed to depart voluntarily. The director 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. The director denied the waiver application because the applicant was ineligible for temporary residence in the legalization program, due to his failure to meet the continuous residence requirement. The director reasoned that there would be no purpose in granting a waiver that could not assist the applicant in gaining temporary residence.

Neither the applicant nor counsel responded to the certified denial. Earlier, the applicant pointed out that a waiver should be granted because he has lived in the United States since 1981, which means he has spent his entire adult life in this country.

Also, prior to the denial, counsel argued that the applicant left the United States voluntarily, he should not be considered to have been deported, and he is therefore not inadmissible for having been deported.

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 August 1, 1985, the immigration judge at Chicago ordered that the applicant be deported to Mexico, unless he departed the United States by November 1, 1985. On October 31, the period of voluntary departure was extended through November 3, based on the applicant's presentation of a plane ticket showing he would depart on November 2. However, the applicant departed on November 4. Therefore, he "self-deported" pursuant to former 8 C.F.R. § 243.5, now 8 C.F.R. § 241.7. That regulation states that any alien who departed the United States while an order of deportation was outstanding is 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 is not considered to have been deported.

Counsel asserted that, when the applicant came to the immigration office on October 31 and requested an extension of voluntary departure, he presented a ticket for a November 4 departure. Counsel claimed that the officer granted the request for an extension of voluntary departure through November 4, but erred in noting in the file that the voluntary departure period was extended only to November 3. Counsel has provided a photocopy of such November 4 ticket. Nevertheless, the record also contains a copy of a ticket for November 2, and the deportation officer's notes indicating that the applicant appeared on

October 31 with a ticket for November 2, and that the officer granted the extension of voluntary departure through November 3.

The record supports the director's finding that the deportation officer knowingly and intentionally granted the applicant an extension of the voluntary departure period through November 3, 1985. As the applicant departed on November 4, he effected his deportation. Because of that, he cannot be found to have resided continuously in the United States for the requisite period. On that basis, he is statutorily ineligible for temporary residence.

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.

The 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. 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 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.

In support of his decision to deny the waiver application because the applicant was otherwise ineligible for legalization, 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). Those decisions relate to applications for permission to reapply for admission after deportation, yet the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because the alien was ineligible for lawful residence anyway.

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.