



U.S. Citizenship  
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MAY 19 2005

FILE:

[REDACTED]

Office: Nebraska Service Center

Date:

IN RE:

Applicant:

[REDACTED]

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:

[REDACTED]

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, California Service Center. An appeal of that decision has been dismissed.

The Director, Nebraska Service Center has 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 she had been outside of the United States after January 1, 1982 under an order of deportation to have her 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.

The applicant was deported on January 15, 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.

No response to the certified denial has been received from counsel or the applicant. Earlier, counsel asserted that it is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to deny temporary residence to the applicant after having granted her husband's application. Counsel maintained that the application should be granted pursuant to the liberal and generous approach intended by Congress.

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. She is therefore statutorily ineligible for temporary residence on that basis.

Counsel states that it is unfair and unconstitutional to deny the application on the basis of a deportation, as the applicant's husband was also deported and yet was legalized. However, the AAO is not required to approve applications where eligibility has not been demonstrated, even if other similar applications were improperly approved.

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, 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, 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 that were prolonged because of 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 her 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) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

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. First and foremost, she failed to maintain continuous residence, and there is no waiver available. Therefore, she is ineligible for temporary residence. Secondly, she is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. The applicant filed a waiver application in an effort to overcome such inadmissibility. That waiver application was denied by the director, and the decision was affirmed by the AAO in a separate decision. There is no other waiver provision, such as consent to reapply for admission into the United States after deportation, available to legalization applicants.

The applicant was deported on January 15, 1985 and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. She remains ineligible for temporary residence, and inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

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