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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: Nebraska Service Center

Date: **MAY 26 2005**

IN RE:

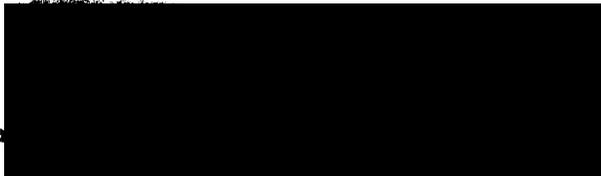
Applicant:



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 decided and certified your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: According to computer printouts in the record, the application for temporary resident status (legalization) was originally denied by the Director, Western Regional Processing Facility. However, the actual denial notice is missing from the record.

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 Director, Nebraska Service Center then denied the application for temporary residence, and it is now before the Administrative Appeals Office (AAO) on certification. 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 to Mexico on October 3, 1986, according to the executed warrant of deportation, Form I - 205. Earlier in these proceedings, the applicant claimed that he did not actually leave the United States at that time. However, he did not explain how that could be true if the warrant were executed. Now, in rebuttal to the certified denial, counsel states the applicant does not remember if the October 3, 1986 date is correct. However, she also states that he remembers being released into Mexico. Therefore, in the absence of contradictory documentation, the executed warrant will be considered to be valid evidence of the deportation.

It is noted that counsel states that neither the Executive Office for Immigration Review nor Citizenship and Immigration Services (CIS) sent her evidence of the actual deportation. However, on April 9, 2004, the Director, Nebraska Service Center sent copies of the deportation-related documents, including the executed warrant of deportation, to the applicant, in care of counsel's office.

Counsel raises a number of challenges to the deportation process. She states that the applicant does not recall ever receiving the decision of the Board of Immigration Appeals (BIA) regarding his deportation case, and questions whether the BIA did indeed properly send the notice. She points out that the applicant's attorney during that process had withdrawn from the case, and implies that the attorney may have improperly withdrawn without advising the applicant. Counsel contends that a review of the deportation and appeal proceedings will result in a finding that the applicant might well have departed voluntarily within the time permitted if the BIA had acted properly.

Counsel maintains that Citizenship and Immigration Services, in this proceeding, has the authority to review prior actions of the BIA. However, it is not within the authority of this office to pass judgment on

judicial proceedings. The claim that the BIA's handling of the matter may now be reviewed or essentially appealed in this proceeding cannot be accepted.

Counsel states the applicant was not advised until this year that his temporary residence application was initially denied in 1989. She avers this lack of information prevented him from challenging the decision on appeal, and perhaps determining that there were grounds for collaterally attacking the deportation. As stated above, the record is bereft of the alleged 1989 decision. Nevertheless, this reopening under *Proyecto* has given the applicant another opportunity to have his case reviewed by both the center director and this office.

Because of the deportation, the applicant did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

Relief is provided in the Act for absences based on factors other than deportation, specifically absences that were prolonged 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.

General grounds of inadmissibility, set forth in section 212(a) of the Act, apply 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)(II) of the Act, 8 U.S.C. 1182(a)(9)(ii)(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 a 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 both stem from the deportation, a waiver exists only for the inadmissibility.

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 while providing no waiver for a lack of continuous residence, also based on a deportation. It is noted that not all aliens who were deported in the past fail 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.

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)(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.

The applicant was deported, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence.

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