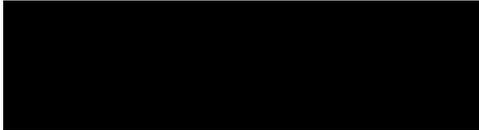


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LS

FILE: [REDACTED]
LIN 06 012 50689

Office: Nebraska Service Center

Date: **AUG 18 2006**

IN RE: Applicant: [REDACTED]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center granted a motion to reopen a temporary residence (legalization) application 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 legalization application was denied because he had been outside of the United States after January 1, 1982 under an order of deportation to have that application reopened. That decision also allows a class member to file a waiver application. The director has now denied the waiver application, and certified his decision to the Administrative Appeals Office (AAO). 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 determined that it would serve no purpose to grant a waiver that could not enable the applicant to gain temporary residence.

In response, counsel asserts that the government's attempt to move the case to Nebraska, outside of the jurisdiction of the 9th Circuit Court of Appeals, is a blatant refusal to comply with the order of a federal judge. He further states that the applicant meets the requirements of the *Proyecto San Pablo* settlement, and that the application should be approved.

The applicant was deported from the United States on July 31, 1984, after having failed to depart voluntarily within the time permitted. He is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), which relates to aliens who were deported and reentered the United States without authorization. Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), 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.

Counsel incorrectly states that the government has moved the *Proyecto* case to Nebraska, outside of the jurisdiction of the 9th Circuit Court of Appeals, in a blatant refusal to comply with the order of a federal judge. The class members of *Proyecto* are aliens who applied for legalization in the former Western and Northern (including Nebraska) regions of the legacy Immigration and Naturalization Service (INS), whose applications were denied because they had been absent from the United States under orders of deportation. The *Proyecto* order only stipulates that the government shall allow for the aliens' applications to be reopened, and does not dictate which INS office handles the matter. Counsel's accusation that INS, now Citizenship and Immigration Services, has refused to comply with a federal judicial order is clearly without merit.

Earlier in these proceedings, counsel pointed out that the applicant was fifteen years of age when he was deported. He asserted that the applicant should not be held accountable for the deportation due to his age. Counsel offered no evidence or other support for this assertion. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The applicant has resided in the United States for over 25 years, and his mother, siblings and son all reside here as U.S. citizens or lawful permanent resident aliens. Nevertheless, the director denied the waiver application because the applicant cannot otherwise qualify for temporary residence, as he fails to meet the "continuous residence" provision of the legalization program.

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. § 1255a(g)(2)(B)(i).

Because he was deported on July 31, 1984, the applicant did not reside continuously in the United States for the requisite period. As a result, 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, concerning 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. An applicant's inadmissibility under section 212(a)(9)(A)(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 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 based on the deportation, a waiver is available 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 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.

Concerning waivers of grounds of inadmissibility, counsel cites *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988) in which it was stated that, normally, 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 due to the "continuous residence" provision of the legalization program, is not inconsistent with that precedent decision.

In support of his decision to deny the waiver application because the applicant is 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). While those decisions relate to applications for permission

to reapply for admission after deportation, 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 the overall benefit of lawful residence.

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.