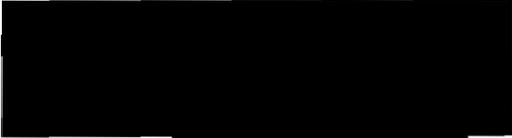




U.S. Citizenship  
and Immigration  
Services

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prevent clearly unwarranted  
invasion of personal privacy



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FILE: [Redacted]  
XFR-87-078-2061

Office: Nebraska Service Center

Date: DEC 15 2006

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:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The applicant's temporary resident (legalized) status was terminated by the Director, California Service Center. An appeal of that decision was dismissed.

The Director, Nebraska Service Center then 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 or status terminated because he had been outside of the United States after January 1, 1982 under an order of deportation to have his application for temporary residence reopened and adjudicated on a *de novo* basis. 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 November 2, 1985. Both directors noted 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.

Neither counsel nor the applicant has responded to the certified decision. Earlier, with the motion to reopen, the applicant claimed that, during the deportation process, the immigration judge and immigration officers never explained to him what was going on. He alleged they never told him he could appeal the deportation order. While the applicant indicated that he was represented during the proceedings, he asserted the judge did not inform him of his right to have his *own* attorney. The applicant also contended that it was his understanding that he signed a paper consenting to voluntary departure. Counsel asserted the applicant departed voluntarily on November 2, 1985, five days prior to the scheduled deportation hearing, and therefore did not depart under an order of deportation. In the alternative, counsel urged that the applicant be granted a waiver of his alleged inadmissibility for having been deported, and maintained that approval of the waiver would also resolve the lack of continuous residence stemming from the deportation.

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).

Counsel is correct in stating that a notice in the record indicates the deportation hearing was scheduled for November 7, 1985. However, it is noted that the reverse of Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, dated October 30, 1985, shows the applicant on that date requested an immediate hearing, and waived any right to more extended notice. Form EOIR-7, Order of the Immigration Judge, dated November 1, 1985, reveals the judge ordered the applicant to be deported to Mexico, and that the applicant waived his appellate rights. The executed Warrant of Deportation, Form I-205, demonstrates the applicant was deported on November 2, 1985. There is no question that the applicant departed the United States under an order of deportation.

Counsel implies that Citizenship and Immigration Services, in this proceeding, has the authority to review prior actions of the immigration judge. However, it is not within the authority of this office to pass judgment on judicial proceedings. The assertion that the judicial actions, including the order of deportation itself, may now be reviewed or essentially appealed in this proceeding, cannot be accepted. The deportation order of the immigration judge was subject to appeal at the time to the Board of Immigration Appeals. The applicant did not file an appeal.

As a result of the deportation, the applicant did not reside continuously in the United States for the requisite period. He is therefore statutorily ineligible for temporary residence on that basis.

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 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 under section 212(a)(9)(A)(ii)(II) of the Act.

Counsel maintains that it is not logical to conclude that the law allows for a waiver of inadmissibility in the case of a deported alien, and yet provides no waiver for a lack of continuous residence, also based on the same deportation. Counsel avers that such an interpretation renders a waiver of inadmissibility meaningless. However, there is a logical basis for making the distinction between inadmissibility and continuous residence, as the two issues are separate, and not all aliens who were deported fail to meet the continuous residence requirement. An alien who was deported in 1978 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. A waiver of inadmissibility in such case would therefore serve a useful purpose, as the alien would then be eligible for legalization.

Counsel stresses that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) concluded that a waiver would cover *both* the inadmissibility and the continuous residence issue. However, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9<sup>th</sup> Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel the Immigration and Naturalization Service, now Citizenship and Immigration Services, to change its interpretation of the statute.

The July 31, 2001 letter submitted by counsel from the United States Senate Committee on the Judiciary is noted. The senators urged the Immigration and Naturalization Service to consider an approved waiver application to overcome the ground of inadmissibility and cure the failure to maintain continuous residence. While it is true that the entire premise of the legalization program is ameliorative, and that the

generous waiver provisions are also, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

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, 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. 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 November 2, 1985, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence, and inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

It is noted that the applicant was arrested by the United States Border Patrol in Livermore, California on October 30, 1985 for *Illegal Entry*, 8 U.S.C. § 1325. It does not appear he was prosecuted.

In Huron, California, on February 22, 1991, the applicant was arrested for *Receive Known Stolen Property*. The case was dismissed on April 1, 1991. Also in Huron, on October 5, 1998, he was arrested for *Forgery*. The disposition of that charge is unknown.

While it is not clear that the applicant is ineligible for temporary residence on account of criminality, he remains ineligible due to his failure to reside continuously in the United States.

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