



U.S. Citizenship
and Immigration
Services

L. 1

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE:



Office: Nebraska Service Center

Date: JAN 10 2006

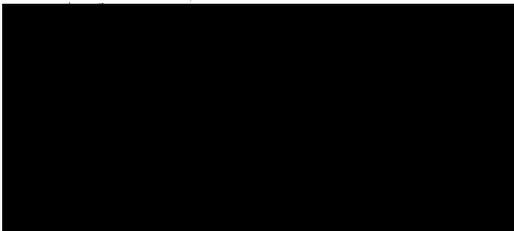
IN RE:

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: The application for temporary resident status (legalization) was denied by the Director, Northern Regional Processing Facility. 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 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 has now denied the application, and certified his decision to the Administrative Appeals Office (AAO). The decision will be affirmed.

In proceedings on September 7, 1978, the immigration judge ordered the applicant to be deported to Mexico unless he departed the United States by November 7, 1978. His period of voluntary departure was extended to March 10, 1979. He did not depart by that date, but did leave the United States on September 9, 1986. He therefore "self-deported" pursuant to the 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.

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.

In response to the certified denial, counsel initially explained that she previously filed Freedom of Information Act (FOIA) requests with both Citizenship and Immigration Services (CIS) and the Executive Office for Immigration Review (EOIR), but did not receive the audiotape (or transcript) of the deportation hearing. She indicated that she filed another FOIA request with CIS and EOIR, and contended that she cannot fully represent the applicant without access to the tape. She requested that she be granted a period of 30 days, after she receives the tape, in which to respond further.

In her subsequent brief, submitted seven months later, counsel does not pursue the point concerning the tape or transcript of the hearing. She requests that the applicant be granted a waiver of his inadmissibility for having been deported, and maintains that approval of the waiver would also cure 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).

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 indicates that she filed a FOIA request with both EOIR and CIS in an attempt to acquire all records relating to the applicant. In his denial notice, the center director stated that the FOIA request was complied with on February 3, 2004, which was more than a year before the center director denied the application. Counsel has explained that she resubmitted a FOIA request with CIS and EOIR. Nevertheless, there is no reason to believe that either CIS or EOIR has any other records to release to counsel that relate to the applicant.

Counsel refers to guidance that was set forth in the Federal Register, Volume 68, No. 19 (Jan. 29, 2003) concerning the implementation of the order in *Proyecto*, supra. In section 13 of the Federal Register, it is stated:

The Service (CIS) may decide your motion to reopen at any time after you file it, unless you indicate in your motion that you are still awaiting the results of your FOIA requests. If you are still awaiting the results of your FOIA requests, the Service will not rule on your motion until you have had an opportunity to obtain and review the FOIA documents. You must submit a brief and any documents you want the Service to consider no later than six months after you have received a response to both of your FOIA requests.

In this case, counsel received the FOIA response, and then filed the motion to reopen. The director held the matter in abeyance for an additional six-months in case counsel wished to file a brief. The director then ruled on the motion to reopen, and subsequently on the legalization application. More than two and a half years have passed since the director first notified the applicant and counsel of the opportunity to file a motion to reopen, and to file FOIA requests. There is no other provision in the Federal Register that allows for another, *indefinite* waiting period for possible additional FOIA action before a final decision may be rendered on the application. Nor is there a provision for multiple FOIA requests once the initial request has been complied with. Counsel's request for additional time is denied.

Implicit in counsel's desire to review the audiotape or transcript of the deportation hearing is the premise that the immigration judge may have somehow erred, and that CIS, in this current proceeding, has the authority to review and overrule the actions of the judge. However, it is not within the authority of CIS to pass judgment on judicial proceedings. The assertion that 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 appeal.

Counsel's assertion that a lack of continuous residence 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, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

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 argues 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 (9th Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel the Immigration and Naturalization Service (INS), now Citizenship and Immigration Services, or CIS, 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 INS to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. While we agree that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Regarding waivers of grounds of inadmissibility, counsel correctly points to H.R. Rep. No. 98-115, 98th Cong. 1st Sess., 69-70, in which it was stated that denials of legalization on the basis of the waivable exclusions normally 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 because he fails to meet the "continuous residence" provision of the legalization program, is not inconsistent with such statement.

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, Nebraska Service Center, 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.

In 1988, also in the legalization program, the applicant filed an earlier waiver application in an effort to overcome his inadmissibility under the same grounds. Neither the director nor counsel has mentioned this application. In the action block on this waiver application the adjudicating officer, on September 15, 1989, identified himself as the officer recommending the action and wrote the word "grant" in the block. When the legalization (temporary residence) application was initially denied six weeks later on November 1, 1989 the Director, Northern Regional Processing Facility's decision stated: "Any waiver application so filed must be rejected." It appears the "grant" notation on the waiver application was a recommendation, which was not actually adopted. Even if we were to consider the waiver application to have been granted, the fact remains that a waiver of inadmissibility does not relate to a failure to maintain continuous residence, as discussed above.

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, 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.