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U.S. Citizenship
and Immigration
Services



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FILE:



Office: Nebraska Service Center

Date:

XTO 88 106 2052

JUL 26 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:



ORIGINAL COPY

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 application for temporary resident status under section 245A of the Immigration and Nationality Act (Form I-687) was denied by the Director, Western Regional Processing Facility on April 24, 1990. An appeal of that decision was dismissed by the Legalization Appeals Unit on February 27, 1998. 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. May 21, 2001). 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 denied the application, and certified his decision to the Administrative Appeals Office (AAO). The AAO affirmed that decision on January 6, 2006. The AAO now reopens the matter, and will reaffirm the decision of the Director, Nebraska Service Center to deny the application.

The record contains Form I-122, Notice to Applicant for Admission Detained for Hearing Before Immigration Judge. On it is stamped the January 6, 1984 decision of the Special Inquiry Officer (Immigration Judge), ordering the district director to exclude and deport the applicant and noting that the applicant waived his appellate rights. Form I-296, Notice to Alien Ordered Excluded by Immigration Judge (the order), containing the signature and fingerprint of the applicant, demonstrates the applicant was excluded and deported that same day. Both the facility director and the center director 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. Neither the applicant nor former counsel responded to the certified denial. However, counsel points out the decision of the AAO was rendered before the period of time in which the applicant had been given to respond expired. As a matter of fairness, the matter is reopened, and the response generated by counsel will be considered.

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 as a result of a departure under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).

As stated above, the applicant was excluded and deported on January 6, 1984. 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 objects to the characterization of the order as an order of deportation and asserts that the applicant was not outside of the United States as a result of a departure under an order of deportation, rather, under an order of exclusion. He correctly points out that, at that time, exclusions were governed by section 236 of the Act, while section 242 of the Act related to aliens arrested and deported from within the United States.

At the time of the applicant's exclusion, section 236 stated the following:

A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case to determine whether an alien who has been detained for further inquiry under section 235 shall be allowed to enter or shall be excluded and deported.

Furthermore, section 212(a)(16), referring to the excludability of aliens applying for entry who had already been excluded in the past, stated in pertinent part:

Aliens who have been excluded from admission and deported and who again seek admission within one year from the date of such deportation....

Thus, there is no question that, under the law, an alien who was excluded was deported. The term "deported" did not refer only to those arrested in the United States and deported, but also to those "excluded and deported."

Counsel maintains that, because the applicant was excluded, he was blocked from entering the United States, and he therefore cannot be considered to have departed *from* the United States under an order of deportation. The language of the Act at section 245A(g)(2)(B)(i) stipulates that an alien shall not be considered to have resided continuously in the United States if he "was outside of the United States as a result of a departure under an order of deportation." The wording of the Act at this section refers broadly to an enforced "departure under an order of deportation" and does not specifically state that the alien must have been "arrested and deported." There is no indication Congress intended that this section apply only to those who had been arrested and deported rather than those who had been excluded and deported. Because the statute was written in such a broad context, we do not find counsel's argument on appeal persuasive.

Counsel refers to *Matter of Z-*, 20 I&N Dec. 707 (BIA 1993) and *Matter of Patel*, 20 I&N Dec. 368 (BIA 1991). Both decisions relate to the issue of whether an alien made an entry into the United States, and whether he or she should have been placed in exclusion or deportation proceedings. Counsel does not claim that the applicant was improperly placed in exclusion proceedings. Rather, he mentions these decisions in an effort to reinforce his contention that exclusion proceedings were fundamentally different from proceedings that resulted from an arrest and deportation. Counsel is correct to the extent that the Immigration and Naturalization Service (INS, now Citizenship and Immigration Services) used to distinguish exclusion proceedings from deportation proceedings. Nonetheless, the INS ordered the applicant excluded and deported on January 6, 1984.

The applicant was out of the United States after January 1, 1982 under an order of deportation. He therefore failed to maintain continuous residence as required by section 245A(a)(2) of the Act. There is no waiver of that requirement available. Thus, he is ineligible for temporary residence under section 245A of the Act.

ORDER: The director's decision is reaffirmed. This decision constitutes a final notice of ineligibility for temporary resident status.