



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

41

[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: MAY 08 2006

IN RE:

[REDACTED]

APPLICATION: Application for Status as a Temporary Resident Pursuant to Section 245A of the
Immigration and Nationality Act, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:

[REDACTED]

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. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Nebraska Service Center. An appeal of that denial has been dismissed by the Administrative Appeals Office (AAO) in a separate decision.

Counsel submitted a motion to reopen 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 or she had been outside of the United States after January 1, 1982 under an order of deportation to file a motion to reopen. The Director, Nebraska Service Center denied counsel's motion because it was not filed within the one-year period that the *Proyecto* settlement provided for, and certified his decision to the AAO for review. *Decision of the Director*, Nebraska Service Center, Lincoln Nebraska, dated January 4, 2005. The decision to deny the motion will be affirmed.

On January 29, 2003, the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), published a notice in the Federal Register to comply with the judgment entered on March 27, 2001 in the *Proyecto* case. The Service later mailed the notice to all aliens that it was aware of who could possibly benefit from the judgment. The notice stated, "The Service will not act to reopen your case unless you notify the Service that you want the Service to do so. If you want to exercise your rights under the *Proyecto* decision, you must file with the Service a motion to reopen, without fee."

The notice also stated, "You must file your motion no later than 1 year from the date you are personally served this notice by the Service, as described below." The notice further explained that if an alien is known to meet the *Proyecto* class definition, the notice will be mailed by certified mail, return receipt requested, to the alien's last known address contained in his or her file.

In this case, the Service mailed the notice on March 14, 2003 to the last known address of both the applicant and the attorney who represented him at the time. The postal receipt, signifying receipt of the notice, was signed by [REDACTED] the applicant's spouse, on March 26, 2003. Counsel's Brief in Support of Reopening Pursuant to *Proyecto San Pablo*, dated July 6, 2004, was received by CIS on July 9, 2004. The director denied the motion because it was not filed within the one-year period that ended on March 26, 2004.

In his Appeal Brief to the AAO, counsel contends that:

- 1) The applicant filed a motion to reopen before the one year deadline;
- 2) The reopening provisions contained in the Federal Register Notice are internally contradictory and violate the *Proyecto San Pablo* court order, therefore they should be applied in the light most favorable to the applicant;
- 3) The applicant timely notified CIS of his intent to pursue temporary resident status;
- 4) The deadline for reopening should be tolled;
- 5) The Federal Register Notice was not personally served on the applicant;
- 6) CIS may not deny the motion reopen because the applicant is waiting for the results of his Freedom of Information (FOIA) request.

Counsel's contentions will be addressed in turn. Counsel refers to the Brief of Appeal, Motion to Reopen, FOIA Request, filed in 1999 by the applicant's prior counsel while the applicant's appeal of the denial of the legalization application was still pending. Counsel maintains that this document, which was filed prior to the

2003 Federal Register notice allowing for motions to reopen, should be considered as a timely motion to reopen under the *Proyecto* ruling because it put the Service on notice that the applicant wished to reopen his case. The AAO notes that no motion to reopen was actually filed in 1999. No fee was registered, and no receipt was issued to the applicant's prior counsel advising him that the motion had been received. This is because no motion to reopen *could* have been filed in 1999. Motions in legalization cases are prohibited by 8 C.F.R. § 103.5(b). Motions are now being considered under the provisions of the 2001 *Proyecto* judgment.

Counsel asserts that there is ambiguity between the *Proyecto* Court Order and the Federal Register notice:

The PSP Court's Judgment and Order *required* the government to reopen cases like [REDACTED] which were denied due to a prior deportation. "The INS *shall reopen and readjudicate* all legalization applications previously denied on the basis of 8 U.S.C. § 1255a(g)(2)(B)(i) [prior deportation]." PSP v. INS, Case No. 89-00456 (D.Ariz. March 12, 2001) at 5 (emphasis added) (attached as Ex. 9). Likewise, the notice of the reopening procedures published in the Federal Register also reflects the Court's order. "The Court's judgment, however, *requires* the Service to reopen certain legalization cases and make new decisions in those cases" (emphasis added). 68 Fed. Reg. 19 at 4519 (January 29, 2003). However, the same Federal Register notice also confusingly states that a case will not be readjudicated unless a request to reopen is made. *Id.*

Counsel contends that this alleged ambiguity must be resolved in the applicant's favor, and that CIS must adjudicate the applicant's motion to reopen. Counsel cited *Matter of Tiwari*, 19 I & N Dec. 875, 881 (BIA 1989), in which the Board of Immigration Appeals stated that, "Considering that there is apparently no legislative history to support the Service's position regarding the respondent's deportability, we note that any lingering ambiguities regarding the construction of the Act are to be resolved in the alien's favor."

The Board's decision in *Tiwari* does not support counsel's position. First, in *Tiwari*, the Board stated, "A fundamental rule of statutory construction is that a specific provision prevails over a more general one." In the present case, the provision in the Federal Register notice that requires an applicant to request that his or her case be reopened is more specific than the language from the *Proyecto* Court Order that states that the Service shall reopen and readjudicate all cases. Second, the present case does not involve any "lingering ambiguities." The Federal Register notice clearly requires the alien to request that his or her case be reopened. The AAO notes that the *Proyecto* plaintiffs and the Service agreed upon the process of reopening cases as set forth in the Federal Register.

Counsel maintains that the applicant's FOIA request, which was filed in April 2003, should be construed as notice to the government that he intended to pursue temporary resident status. Counsel's position is not consistent with the instructions provided in the Federal Register notice, which explicitly described how an alien could request reopening of his legalization application. The instructions stated, "The Service will not make a new decision in your case unless you file a motion to reopen, which you must do within the one-year period . . ." The notice clearly delineates between filing a motion to reopen and filing a FOIA request.

Counsel asserts that litigants without legal counsel often mislabel filings, and that it is common for courts to construe a submission appropriately. Counsel cited *In re Dominguez*, 2003 WL 23216850 (BIA Oct. 6, 2003) to support this assertion. *Dominguez* does not support counsel's position. First, the decision was not published, therefore it cannot be cited as precedent. Second, the facts of *Dominguez* are materially different than the facts in the present case. In *Dominguez*, the respondent filed a motion to reopen with the BIA in which he made two separate arguments. The Board construed one of the arguments as a motion to reconsider.

In the present case, the applicant did not file any type of motion. He filed a FOIA request, which is a request for materials, not a motion seeking relief. Third, the applicant did not mislabel a filing. He filed a document that was clearly labeled as a FOIA request.

Counsel contends that the time for reopening the applicant's case should be tolled from March 2003 (the time the notice was mailed) until the applicant consulted an attorney in April 2004, because the government failed to provide a notice in Spanish or a form to file to reopen the case. Counsel stated that the government could not have reasonably expected the applicant to understand the complex, dual system of filing a FOIA request and filing a separate motion to reopen. Counsel cited no requirement that such notices be issued in languages other than English. The AAO notes that the applicant promptly filed a FOIA request, which was one of the instructions provided in the notice. Accordingly, it appears that the applicant's language skills did not hamper his ability to follow instructions in the notice.

In support of his contention that the applicant's case should be tolled until the time the applicant consulted an attorney, counsel cited *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001), in which the Court of Appeals for the Ninth Circuit analyzed the concept of equitable tolling of a limitations period. Counsel quoted a section of the case in which the Court stated that tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on lack of prejudice to the defendant." The AAO notes that the Court outlined a test, which counsel does not cite, to determine when equitable tolling is appropriate. The Court stated, "[a]ll one need show is that by the exercise of reasonable diligence the proponent of tolling could not have discovered essential information bearing on the claim." Counsel did not apply this test to the facts of the present case.

Counsel asserts that the applicant was not personally served with the Federal Register Notice, because he did not sign the return receipt. The Federal Register Notice specifically defines personal service to include mailing the Notice by certified mail return receipt requested, to the applicant's last known address contained in his or her file. The record reflects that the Service mailed the notice on March 14, 2003 to the last known address of both the applicant and the attorney who represented him at the time. The postal receipt, signifying receipt of the notice, was signed by Lourdes Guerrero, the applicant's spouse, on March 26, 2003. Accordingly, the director complied with the requirement to personally serve the applicant with the Notice.

Counsel's final contention is that CIS cannot rule on the applicant's motion while the FOIA request is still pending. The Federal Register Notice stated that the Service would not rule on a motion to reopen if the alien was still awaiting the results of a FOIA request. As explained by counsel, although the applicant received a response to his FOIA request, he appealed the FOIA determination and is still awaiting the final results.

A review of the Federal Register Notice reveals that the above provision, which allows the decision on a motion to reopen to remain pending while the FOIA matter is resolved, presupposes that a timely motion to reopen was filed in the first place. The Notice explains that a motion to reopen must be submitted within the one-year deadline, regardless of the status of the FOIA request, and that if the class member is still awaiting a response to the request FOIA request, he or she should include a statement to that effect with the motion. The applicant did not file a timely motion to reopen, therefore the procedural requirements regarding the handling of the motion do not come into play.

In denying the applicant's motion to reopen because it was untimely, the director properly complied with the requirements in the Federal Register Notice. The director's decision to deny the motion to reopen shall therefore be affirmed.

It is noted that, in the motion filed by counsel, he addressed the underlying issues in this legalization matter, such as deportation and maintenance of continuous residence. When counsel submitted this motion, the applicant's appeal of the legalization denial was still pending. Counsel was not prohibited from submitting a brief that supplemented prior counsel's appeal. Thus, even though the motion to reopen is being denied, in the interest of fairness, counsel's arguments regarding the legalization issues were considered in the appellate decision rendered by this office.

ORDER: The decision to deny the motion to reopen is affirmed.