



U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: MAY 08 2006

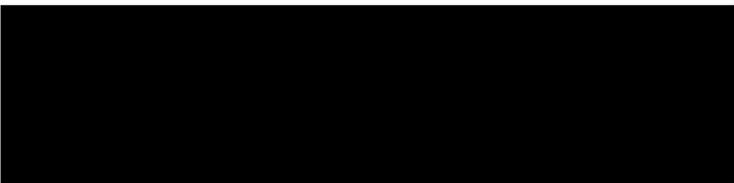
IN RE:

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 originally decided your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The director denied the application because 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. The applicant was deported on July 22, 1982.

On appeal, prior counsel asserted that there was no evidence in the record that the applicant was deported. She also contended that a deportation that occurred in violation of due process could not be used as a basis for denying legalization. She stated that an alien must be allowed to review his entire prior deportation file, and that an alien is entitled to a waiver of a deportation.

That attorney indicated that she would submit a brief after receiving a copy of the record. Although her request for a copy of the record was complied with within one month, she failed to respond further.

While this appeal was pending, current counsel then 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 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 recently denied counsel's motion because it was not filed within the one-year period that the *Proyecto* guidelines allowed for, and certified his decision for review. A separate decision on the denied motion to reopen will be rendered. However, in the interest of fairness, counsel's arguments that he put forth in the motion regarding the issue of continuous residence will be considered here, as they augment prior counsel's appeal.

Counsel argues that a waiver of the applicant's inadmissibility for having been deported and returned without authorization also would serve to waive the break in continuous residence that resulted from the deportation. He provides an affidavit from the applicant, who claims that, at the deportation hearing, the judge did not inform him of his rights to apply for asylum, voluntary departure, hire an attorney, and appeal the order of 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).

At the time that prior counsel acquired a copy of the record, it is possible that the record did not include actual proof of deportation. However, the deportation order and the deportation are reflected by the numerous stamps of the special inquiry officer (immigration judge) and the district director on Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, which appears in the record.

Although counsel states that he has never received the audiotape of the deportation hearing, or a transcript of it, there is no doubt as to the fact of the deportation.

In an affidavit written 22 years after the deportation, without benefit of hearing the audiotape, the applicant claims that the judge in the deportation hearing failed to advise him of his rights to apply for asylum, voluntary departure, hire an attorney, and appeal the order of deportation. It is noted that on June 20, 1982, when he was first processed as a deportable alien, the applicant signed the Form I-221S, indicating that he was requesting an immediate hearing and waiving any right to more extended notice. He also indicated that he was not requesting a redetermination hearing on the custody decision. The agent of the U.S. Border Patrol who processed the applicant on that date indicated that the advisement that the applicant signed was first read to the applicant in the Spanish language. The agent also indicated that a Legal Services notice was given to the applicant. According to Form I-213, Record of Deportable Alien, the agent advised the applicant of his rights pursuant to the *Miranda* decision.

In general, it appears that the processing of the applicant was fair and proper, and that he simply waived his rights to further review in order to expedite the process. In terms of the deportation hearing, it is not known how the applicant would now remember, after 22 years, exactly what he was advised of by the immigration judge.

Citizenship and Immigration Services (CIS) does not have authority to rule on the actions of immigration judges in deportation proceedings. That authority is held by the Executive Office for Immigration Review. The claim that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted.

Because the applicant was deported on July 22, 1982, he did not maintain continuous residence. As a result, the applicant is ineligible for temporary residence.

Counsel's contention that a lack of continuous residence can be waived is unpersuasive. Congress set forth, at section 245A(d)(2) of the Act, a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act. Section 245A(g)(2) of the Act, concerning *continuous residence*, is a separate section unrelated to the waiver provisions. Congress purposefully did not provide relief in the legalization program for an alien who failed to maintain continuous residence because of a departure under an order of deportation. Relief is provided in the Act for absences based on factors *other* than deportation, specifically absences that were prolonged due to 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. The applicant's failure to maintain continuous residence and his inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having been deported and having returned without authorization are both based on the deportation, but a waiver is possible only for the grounds of inadmissibility.

Counsel points out that it would not seem logical that 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. However, there is a logical basis, which stems from the fact that the two issues are

separate, and that not all aliens who were deported in the past failed 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* resolve 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 ruled that the district court lacked jurisdiction to force the Immigration and Naturalization Service (now Citizenship and Immigration Services) to change its interpretation of the statute.

Counsel points out that the purpose of the legalization program is to grant lawful residence if possible. Nevertheless, for the reasons stated above, we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Finally, counsel mentions that the director refused to adjudicate Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, on the grounds of mootness. Form I-212 does not appear in the record, although counsel has provided a photocopy of such application. The copy does not reflect that the application was received and fee-registered. The record is not clear as to what the status of the Form I-212 is. Regardless, the director did receive and adjudicate the appropriate waiver application, Form I-690.

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. Second, 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, and the decision was affirmed by the AAO in a separate decision.

The applicant was deported on July 22, 1982, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence.

ORDER: The appeal is dismissed. This decision constitutes a final notice of ineligibility.