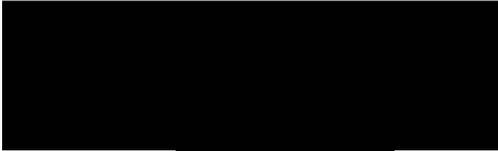




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
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FILE: [Redacted]
XSD-88-149-2037

Office: NEBRASKA SERVICE CENTER

Date: MAY 26 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 application for temporary resident status (legalization) was denied by the Director, Western Regional Processing Facility. 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 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.

The applicant was deported on April 12, 1985. 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 rebuttal, counsel asserts there is no evidence that the applicant was removed from the United States. She also alleges no alien has obtained relief under the *Proyecto San Pablo* decision. Additionally, counsel requests oral argument, in order to clearly define the issues and the evidence presented.

With regard to the request for oral argument, such a request must set forth specific facts explaining why such argument is necessary to supplement the appeal. 8 C.F.R. § 103.3(b). Oral argument will be denied in any case where the appeal is found to be frivolous, where oral argument will serve no useful purpose, or where written material or representations will appropriately serve the interests of the applicant. Counsel's request does not adequately set forth an explanation of why oral argument is necessary. Nor does it establish that the material submitted will not appropriately serve the interests of the applicant. Accordingly, the request for oral argument is denied.

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. § 1255a(g)(2)(B)(i).

Counsel has been provided with a copy of the Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, which is contained in the record. On it is the stamped, signed April 12, 1985 order of the Special Inquiry Officer, ordering the applicant to be deported to Mexico. The form also contains the stamped and signed notations of the District Director, San Diego, demonstrating the warrant of deportation was executed on that date. While counsel maintains that the order does not verify the applicant's departure from the United States, such is not the case. Counsel points out that the Executive Office of Immigration Review responded to a Freedom of Information Act request by indicating that it had no records of a removal order in this case. Regardless, that does not negate the fact that Form I-221S demonstrates that the Special Inquiry Officer ordered the deportation and that the district director carried out the order.

Counsel declares that the rationale put forth by the director in the certified denial contradicts a reason for denial stated by a legalization officer in her notes of July 27, 1988, which were recorded right after she interviewed the applicant regarding his eligibility for temporary residence. The notes reflect the officer concluded that, because the applicant provided only affidavits as evidence, he did not appear to have been continuously present in the United States since January 1, 1982. Counsel has not made clear why the officer's focus on affidavits as evidence of residence should be viewed as contradicting the director's conclusion that the applicant is ineligible for status because of the deportation. Further, the interviewing officer's notes are not dispositive.

Because of the deportation, the applicant did not reside continuously in the United States as required. 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 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 is inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien who was deported and returned without permission. 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. 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. No waiver application has been filed in this matter.

Counsel alleges the director did not conduct a full and fair review of the applicant's motion to reopen. She avers Citizenship and Immigration Services (CIS) has conducted only cursory reviews of the motions filed under the *Proyecto* decision, and has not granted relief to any alien. In support of this contention she furnishes a letter dated December 19, 2005 from the Director, Office of Human Relations of Santa Clara County, California, to the presiding judge in *Proyecto*. In his letter the director indicates that it is his understanding that no case filed under *Proyecto* has resulted in a favorable decision by CIS.

It must be emphasized that each application filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). The Director, Nebraska Service Center did not conduct a cursory review of this matter. In his decision the director accurately set forth the facts of this applicant's individual situation, and applied the law appropriately.

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 has not filed a waiver application. Even if he had, and it was granted, he would remain ineligible for temporary residence due to his failure to maintain continuous residence.

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