



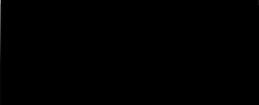
U.S. Citizenship
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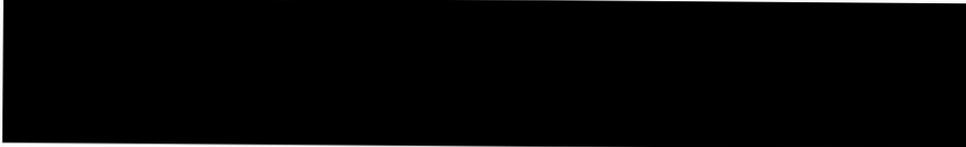
Office: Nebraska Service Center

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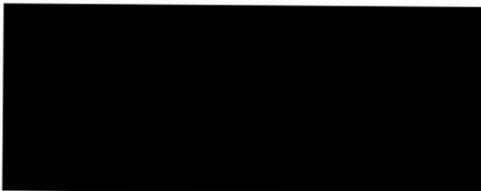
Applicant:



APPLICATION:

Application for Temporary Resident Status under 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Northern 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 for temporary residence reopened and adjudicated on a *de novo* basis. 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 March 6, 1986. Both directors noted 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 counsel has submitted a rebuttal to the certified denial. Earlier in these proceedings, counsel asserted the applicant did reside continuously in the United States because he had not been deported. Counsel stated the applicant left the United States during the period of voluntary departure and, therefore, the subsequent removal of the applicant did not constitute a deportation. In the alternative, counsel requested that the applicant be granted a waiver of his alleged inadmissibility for having been deported. Counsel explained the applicant has lived in the United States since 1981 and has a United States citizen daughter. Counsel contended that approval of the waiver application would also cure the lack of continuous residence resulting 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).

The immigration judge, in a decision dated December 1, 1983, granted the applicant a period of 90 days, until March 1, 1984, in which to depart the United States voluntarily. The judge further ordered that, should the applicant not depart within that period, he would be deported to Nigeria. As no evidence was provided of a departure by the applicant within the 90-day period, the applicant was deported on March 6, 1986.

Counsel claims the applicant voluntarily departed the United States prior to March 1, 1984. As evidence of that departure, counsel points to the 1988 application for temporary residence, on which the applicant claimed he left the United States in February 1984 and traveled to Nigeria. Counsel also refers to the fact that the applicant made this claim in a statement filed on October 10, 1989. It is noted that the applicant has never provided any proof of this trip, such as passport stamps or a used airline ticket. In addition, in more recent deportation proceedings, an immigration judge in a decision dated July 1, 1999 at page 3 stated the following:

The facts are as follows. The respondent stated that he first came to the United States for a visit in 1978 and returned home to Nigeria. Then he came back in 1979. He was arrested on some credit card matter which caused him to be placed in deportation proceedings. He was granted

voluntary departure, but did not leave on time. Then he was finally removed from the United States, but having overstayed the period of voluntary departure, it was regarded as a deportation.

To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. 8 C.F.R. § 245a.2(d)(6). Although the applicant claims to have departed voluntarily within the time permitted, he has furnished no evidence of such departure. It is concluded that he did not depart voluntarily and, because of that, he was properly deported. As the applicant was deported, he did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

Counsel's assertion that a lack of continuous residence in such circumstances 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.

Counsel maintains that it appears disingenuous 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 opines 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. For example, 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, now Citizenship and Immigration Services, to alter 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 the Immigration and Naturalization Service to consider an approved waiver application to overcome the ground of inadmissibility and cure the failure to maintain continuous residence. Although it is true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are also, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

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, 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.

The applicant was deported on March 6, 1986 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.

The applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), which relates to aliens who attempted to acquire immigration benefits by fraud or misrepresentation. On Form I-538, Application for Extension of Stay, School Transfer, Permission to Accept or Continue Employment, or Practical Training, filed on September 29, 1982, the applicant claimed false rental expenses in order to better qualify for permission to engage in employment.

The record reveals the following arrest and administrative charges:

1. The applicant was arrested for *Attempted Theft* by the Chicago Police Department on January 14, 1986. The next day, he was arrested, or went into the custody of the United States Marshall, for *Credit Card Fraud*. The dispositions of these charges are unknown.
2. He was arrested by the United States Secret Service or the United States Social Security Administration in Charlotte, North Carolina for *False Representation of a Social Security Number* on February 24, 1986. This charge was dismissed.

While it is not clear that the applicant is ineligible for temporary residence on account of criminality, he remains ineligible due to his failure to reside continuously in the United States, and due to his inadmissibility.

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