



U.S. Citizenship
and Immigration
Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **SEP 28 2006**

XSI-87-062-1121

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 decided and certified your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was originally denied by the Director, Western Regional Processing Facility. An appeal that decision was dismissed. The Director, Nebraska Service Center, granted a motion to reopen that was recently 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 application for temporary residence was then denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The decision will be affirmed.

The applicant was deported on June 14, 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 as required. In response to the certified decision, counsel reiterates her request that she be granted additional time to respond, as the Executive Office for Immigration Review (EOIR) has not yet provided her with copies of the tapes or transcripts of the applicant's deportation hearing. Earlier in these proceedings, counsel asserted that if the applicant's inadmissibility for having been deported and having reentered without authorization were to be waived, this waiver would also cure the break in continuous residence.

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).

The deportation record in this matter is well documented. Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, reveals that on June 13, 1985 the immigration judge found the applicant to be deportable, noted that the applicant waived his appeal, and ordered him to be deported to Mexico. Stamps and notations on this form indicate the applicant was indeed deported on June 14, 1985. 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 filed a Freedom of Information Act (FOIA) request with EOIR, in an attempt to acquire the transcript or tape relating to the applicant's deportation hearing. EOIR informed counsel that it had no records relating to the applicant. Counsel appealed that determination, and on April 18, 2005 the Office of Information and Privacy, Department of Justice, affirmed the decision of EOIR. It is noted that on February 22, 2005, pursuant to another FOIA request, Citizenship and Immigration Services released the material that it had relating to the applicant, including Form I-221S referred to above. There is no reason to believe that either CIS or EOIR has any other records to release to counsel that relate to the applicant.

Counsel points out that the District Court order in *Proyecto, supra*, states that the class members shall be informed of their rights to obtain immigration files, including a "tape or transcript of the prior proceeding." Guidance was set forth in the Federal Register, Volume 68, No. 19 (Jan. 29, 2003)

concerning the implementation of the order in *Proyecto, supra*. In section 13 of the Federal Register, it is stated:

The Service (CIS) may decide your motion to reopen at any time after you file it, unless you indicate in your motion that you are still awaiting the results of your FOIA requests. If you are still awaiting the results of your FOIA requests, the Service will not rule on your motion until you have had an opportunity to obtain and review the FOIA documents. You must submit a brief and any documents you want the Service to consider no later than six months after you have received a response to both of your FOIA requests.

In this case, counsel received FOIA responses from both CIS and EOIR. She appealed the response from EOIR, and received a decision on her appeal. The Director, Nebraska Service Center then properly held the matter in abeyance for an additional six months in case counsel wished to file a brief. The director then ruled on the motion to reopen. Almost two years have passed since the director first notified the applicant and counsel of the opportunity to file a motion to reopen, and to file FOIA requests. There is no other provision in the Federal Register that allows for another, *indefinite* waiting period for possible additional FOIA action before a final decision may be rendered on the application. Nor is there a provision for multiple FOIA requests to one agency once the initial request has been complied with. Counsel's request for additional time in which to respond to the certified decision is denied.

Implicit in counsel's desire to review the audiotape or transcript of the deportation hearing is the premise that the immigration judge may have somehow erred, and that CIS, in this current proceeding, has the authority to review and overrule the actions of the judge. However, it is not within the authority of CIS to pass judgment on judicial proceedings. The assertion that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was subject to appeal, at the time, to the Board of Immigration Appeals. The applicant did not appeal.

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.

General grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant's 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 to the United States without authorization may be waived. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence issue discussed above. While the applicant's failure to maintain continuous residence and his inadmissibility for having been deported and having returned without authorization both stem from the deportation, a waiver exists only for the inadmissibility.

Counsel asks why, if the above interpretation is correct, the law would allow for a waiver of inadmissibility in the case of a deported alien while providing no waiver for a lack of continuous residence, also based on a deportation. It is noted that not all aliens who were deported in the past 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.

Counsel maintains that, even though the court in *Proyecto* determined that motions to reopen should be considered, there is nothing to be gained in filing a motion to reopen if CIS still holds that deported aliens are statutorily ineligible for temporary residence. CIS reviewed its finding that there is no waiver available for aliens who failed to maintain continuous residence, and concluded it is valid. Nevertheless, there is a purpose served in the reopening of these cases, as the CIS review may lead to a determination that the evidence of a claimed deportation is insufficient.

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. 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.

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

It is noted that the applicant was arrested for Oral Copulation with Minor (Felony), section 288 of the California Penal code, on May 17, 1985. On June 5, 1985, the charges were dismissed.

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