

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

41

PUBLIC COPY



FILE: [Redacted] Office: Nebraska Service Center
XHP-87-451-3008

Date: FEB 22 2007

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 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, Western Regional Processing Facility, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant was excluded and deported from the United States on February 19, 1987. The director 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.

On appeal, counsel states that the Immigration and Naturalization Service (INS) did not provide him with a transcript of the exclusion hearing. He contends that the applicant should not have been deported, because he was eligible for legalization. Counsel also maintains that the applicant should be entitled to file Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

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).

Because of the February 19, 1987 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.

Counsel states that INS has not provided him with a transcript of the exclusion hearing. There is no transcript in the record, although the exclusion and deportation order and evidence of the implementation of that order are contained in the record. INS did provide counsel a copy of the record on December 8, 1989.

Implicit in counsel's desire to review the transcript of the exclusion hearing is the premise that the immigration judge erred, and that INS, now Citizenship and Immigration Services (CIS), has the authority in this current proceeding 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 exclusion and deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The order of the immigration judge was subject to appeal, at the time, to the Board of Immigration Appeals. The applicant did not appeal.

Counsel contends that the applicant should not have been deported because he was eligible for legalization. He points out that section 245A(e)(1)(A) of the Act, 8 U.S.C. § 1255a(e)(1)(a) states:

The Attorney General shall provide that in the case of an alien who is apprehended before the beginning of the application period described in subsection (a)(1)(A) and who can establish a prima facie case of eligibility to have his status adjusted under subsection (a) (but for the fact that he may not apply for such adjustment until the beginning of such period), until the alien has had the opportunity during the first 30 days of the application period to complete the filing of an application for adjustment, the alien may not be deported.

The applicant was excluded and deported on February 19, 1987, and the legalization application period commenced on May 5, 1987. Thus, counsel notes that the applicant was deported before he had a chance to apply for legalization, and maintains that the deportation was unlawful.

It is noted that the above law section prohibiting deportation refers to *apprehended* aliens, a term relating to aliens arrested in the United States, while the applicant was held for an exclusion hearing at the border while falsely claiming to be a United States citizen. Because the applicant was not apprehended in the United States, and because he was making a false claim and was being recommended for prosecution, it was apparently concluded by INS that he was not *prima facie* eligible for the deportation bar and legalization. At any rate, the decision of the judge to exclude and deport the applicant is not subject to review in this proceeding.

Counsel stresses that Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal, has been approved for the use of aliens applying for different benefits such as entry, immigrant visas, and adjustment, and has even been used in an after-the-fact *nunc pro tunc* fashion. Counsel contends that aliens applying for legalization also should be eligible for such relief. He points out that approval of Form I-212 effectively wipes out the prior deportation in all respects, meaning the applicant would not be viewed as having failed to maintain continuous residence.

The waiver provisions in the legalization program as set forth in section 245A of the Act are markedly different from those relating to other aliens applying for visas, entry or adjustment of status. For example, all legalization applicants are eligible to apply for waivers, without regard to possible relationship to United States citizens or lawful permanent residents. Furthermore, waiver applicants in the legalization program need not show that exceptional or extreme hardship would ensue if a waiver is not granted. Because of these and other fundamental differences, the waiver process is different in legalization and involves a separate waiver application, Form I-690.

General grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for having been excluded and deported and having returned to the United States without authorization. An alien's inadmissibility under section 212(a) of the Act, which may be waived, is an entirely separate issue from the continuous residence issue discussed above.

The applicant recently filed the Form I-690 waiver application in an attempt to overcome his inadmissibility under section 212(a)(9)(A)(i). The director denied that application, and the AAO affirmed the decision.

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)(i) of the Act as an alien who was excluded and deported and returned without permission. The applicant filed a waiver application in an effort to overcome such inadmissibility. However, the application was denied, and the decision was affirmed by the AAO.

It is noted that, in connection with the applicant's attempted reentry into the United States, he was convicted of 18 U.S.C. § 371 and 8 U.S.C. § 1325, Conspiracy to Elude Inspection, on January 12, 1987.

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. Furthermore, he is inadmissible under section 212(a)(9)(A)(i) of the Act.

ORDER: The appeal is dismissed.