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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:



Office: SAN FRANCISCO

Date: DEC 08 2008

XSF 88 505 01124

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

IN 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.

A handwritten signature in ink, appearing to be "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Western Regional Processing Facility denied the application for temporary resident status. The applicant's appeal to this denial was dismissed by the Chief, Legalization Appeals Unit or LAU (now the Administrative Appeals Office, or AAO). The applicant subsequently filed a Petition for Review of an Order of the Board of Immigration Appeals (BIA) with the United States Court of Appeals for the Ninth Circuit, San Francisco. *Allen Berthold Drevlo et al., v. Alberto Gonzales, Attorney General*, Case No. 04-75137 (filed October 8, 2004). The court remanded the matter to the Administrative Appeals Office for further consideration. The matter will be reopened, and the appeal will be sustained.

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 Immigration and Nationality Act (Act), 8 U.S.C. § 1255a(a)(2).

An alien applying for adjustment of status has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference to be drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

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 statute at section 212(a)(5)(A)(i) of the Act [formerly section 212(a)(14) of the Act] states the following in pertinent part:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The statute at section 212(a)(7)(A)(i) of the Act [formerly section 212(a)(20) of the Act] states the following in pertinent part:

Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission-

(I) who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required under the regulations issued by the Attorney General under section 211(a) [of the Act], or

(II) whose visa has been issued without compliance with the provisions of section 203 [of the Act],

is inadmissible.

Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken. Departure from the United States of a person who is the subject of deportation or removal proceedings, except for arriving aliens as defined in 8 C.F.R. § 1001.1(q), subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal, and the initial decision in the case shall be final to the same extent as though no appeal had been taken. 8 C.F.R. § 1003.4.¹

The evidence in the record demonstrates that the applicant first entered the United States without a visa as a Canadian national in August 1980. The record reflects that the applicant assumed an unlawful status by working without authorization at the Olympic Club in San Francisco, California beginning on or about September 25, 1980. The record reflects that the applicant subsequently attempted to obtain lawful status and was issued a visa for lawful permanent residence at a United States Consulate abroad as a result of the approval of a Form I-140, Petition to Classify Status of Alien on Basis of Profession or Occupation, that had been filed on his behalf by his employers at the Olympic Club.

¹ The Ninth Circuit Court of Appeals in *Martinez-DeBojorquez v. Ashcroft*, 365 F.3d 800 (9th Cir. 2004) ruled that the alien did not forfeit or withdraw her appeal of a BIA Decision upon departure from the United States because she was not informed of the consequences of a departure during the pendency of the appeal. A discussion of this case in the context of the current proceedings appears below.

The record reflects that the applicant was placed into removal proceedings and in a decision issued on July 31, 1986, the Immigration Judge determined that the applicant was removable as a result of his entry into this country on September 25, 1982 without a valid job offer from his employer, Olympic Club. The Immigration Judge concluded that the applicant was inadmissible to the United States under sections 212(a)(5)(A)(i) and 212(a)(7)(A)(i) of the Act because the applicant did not possess either a valid labor certificate or a valid entry document when he entered this country on September 25, 1982. The Immigration Judge specifically ruled that the applicant was not inadmissible pursuant to section 212(a)(6)(C) of the Act [formerly section 212(a)(19) of the Act] for fraud or misrepresentation of a material fact arising from his entry. The Immigration Judge granted the applicant voluntary departure until November 1, 1986 with an alternate order of deportation if the grant of voluntary departure had not been complied with by such date. The record shows that the applicant subsequently appealed the decision of the Immigration Judge to the BIA. These proceedings were subsequently held in abeyance by the BIA on February 26, 1988 based upon a request by the Immigration and Naturalization Service or the Service (now Citizenship and Immigration Services or CIS) in order to allow the applicant to apply for temporary residence pursuant to the provisions of section 245A of the Act. The record demonstrates that the applicant filed a corresponding Form I-687 application on May 4, 1988.

The applicant's testimony and evidence contained in the record reflect that he departed the United States to travel to Canada for the funerals of his in-laws and returned to this country within ten days in July of 1987. In a decision issued on January 12, 1990, the director of the Western Regional Processing Facility determined that the applicant's departure from this country during the pendency of his appeal to the BIA of Immigration Judge's alternate order of deportation constituted a withdrawal of the appeal, and the initial decision of the Immigration Judge became final to the same extent as though no appeal had been taken pursuant to 8 C.F.R. § 1003.4. The director concluded that the applicant's departure under an alternate order of deportation from this country in July 1987 constituted a self-deport. Consequently, the director determined that the applicant was ineligible to adjust to temporary residence because he failed to maintain continuous residence in the United States for the requisite period and denied the Form I-687 application. The applicant appealed this decision to the LAU. The chief of the LAU dismissed the appeal on February 6, 1998, concurring with the prior determination that the applicant's departure from this country in July 1987 constituted a self-deport and that he was ineligible to adjust to temporary residence because such departure broke his continuous residence in the United States for the period in question.

The Ninth Circuit Court of Appeals remanded the case in order for the AAO to reconsider its prior dismissal of the applicant's appeal in light of the decision reached in *Martinez-DeBojorquez v. Ashcroft*, 365 F.3d 800 (9th Cir. 2004). This decision involves an alien as plaintiff who appealed an Immigration Judge's order of deportation to the BIA but departed the United States while the appeal was pending. While such an absence is considered to be a withdrawal of the appeal under 8 C.F.R. § 1003.4, the court in *Martinez-DeBojorquez* ruled that the plaintiff did not forfeit or withdraw her appeal to an order of removal because she was never

informed of the consequences of a departure from this country during the pendency of the appeal. The court determined that this failure to warn the plaintiff was a violation of her due process rights under the circumstances including the plaintiff's length of residence in this country, the lengthy appeal period, and the duration and purpose of her brief absences from the United States.

The present record contains the transcripts of removal proceedings instituted against the applicant that formed the basis of the decision issued by the Immigration Judge on July 31, 1986. A review of these transcripts reveals no testimony or evidence demonstrating that the applicant was warned of the consequences of a departure from the United States during the pendency of his appeal to the Immigration Judge's alternate order of deportation. The applicant's subsequent testimony that the attorney who represented him in these removal proceedings failed to inform him of the implications of a departure from this country during the pendency of the appeal and that he would have never left the United States had he been aware of the consequences appears to be credible. The applicant's brief and single absence from this country occurred when he departed the United States to travel to Canada for the funerals of his in-laws and subsequently returned to this country within ten days in July of 1987. Following the Ninth Circuit's decision in *Martinez-DeBojorquez*, the applicant will not be considered to have withdrawn his appeal to the alternate order of deportation when he departed the United States.

The prior dismissal of the applicant's appeal is withdrawn. The applicant has maintained continuous residence in the United States from prior to January 1, 1982 to May 4, 1988 as required for eligibility for temporary resident status under section 245A of the Act.² Nevertheless, it must be noted that the prior decisions and findings of both the director of the Western Regional Processing Facility and the chief of the LAU in these proceedings are in concurrence with the applicable regulations, statutes, and case law as interpreted in every jurisdiction in the United States including the Ninth Circuit, up until the Ninth Circuit issued its decision in *Martinez-DeBojorquez*. As no other jurisdiction has adopted a similar position to that reached by the Ninth Circuit in *Martinez-DeBojorquez*, such holding would apply only to a case arising within the Ninth Circuit with substantially the same unique facts and circumstances as put forth within the present case.

Although the Immigration Judge previously found that the applicant was inadmissible to the United States under sections 212(a)(5)(A)(i) and 212(a)(7)(A)(i) of the Act because he did not possess either a valid labor certificate or a valid entry document when he entered this country on September 25, 1982, these grounds of inadmissibility do not apply to applicants for temporary

² The prior decisions and findings of both the director of the Western Regional Processing Facility and the chief of the LAU in these proceedings are in concurrence with the applicable regulations, statutes, and case law as interpreted in every jurisdiction in the United States including the Ninth Circuit, up until the Ninth Circuit issued its decision in *Martinez-DeBojorquez*. No other jurisdiction has adopted a similar position to that reached by the Ninth Circuit in *Martinez-DeBojorquez*. Such holding applies to this case arising within the Ninth Circuit with substantially the same unique facts and circumstances as put forth within the *Martinez-DeBojorquez* case.

residence under section 245A of the Act pursuant to 8 C.F.R. § 245a.2(k)(1). No other grounds of ineligibility are known to exist.

Accordingly, the applicant's appeal will be sustained. The adjudication of the application for temporary resident status shall be continued by the appropriate office.

ORDER: The appeal is sustained.