

identifying data deleted to  
prevent clearly unwarranted

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



23

FILE:



Office: Nebraska Service Center

Date:

4/17

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, Director  
Administrative Appeals Office

**DISCUSSION:** The application for temporary resident status (legalization) was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The decision will be affirmed.

The application was originally denied by the Director, Western Regional Processing Facility. An appeal of 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 applicant was deported on November 28, 1984. 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.

Counsel has not contested the fact of the deportation. However, he maintains that the failure to maintain continuous residence may be waived.

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 deportation, the applicant 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, a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act. 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 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)(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.

The question has arisen as to 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 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. Nevertheless, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9<sup>th</sup> Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel INS to change its interpretation of the statute

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.

In addition, according to the applicant, he remained out of the United States for about three months after the deportation. Thus, he exceeded the 45-day maximum allowance for absences set forth in 8 C.F.R. § 245a.1(c)(1)(i). Unless an emergent reason delayed his return, he is ineligible for temporary residence on this basis as well.

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