

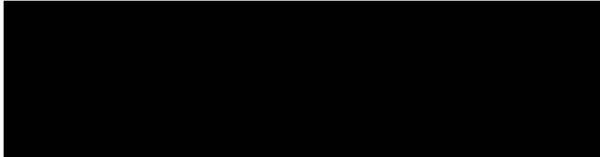


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

L8

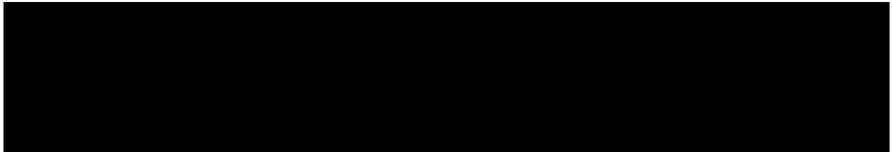


FILE: [REDACTED] Office: Nebraska Service Center

Date: NOV 03 2006

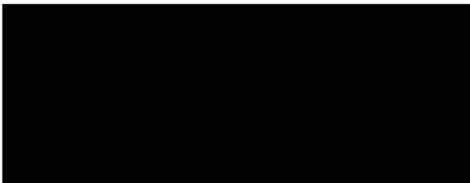
LIN-05-082-50187

IN RE: Applicant:



APPLICATION: Application for Waiver of Inadmissibility 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 originally decided your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center. It is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The director denied the waiver application because the applicant was otherwise ineligible for temporary residence in the legalization program. The director found that it would serve no purpose to grant a waiver that could not enable the applicant to obtain temporary residence.

Neither the applicant nor counsel has responded to the certified denial. Earlier, counsel asserted the applicant was not inadmissible because he had not been deported. Counsel averred the applicant left the United States during the period of voluntary departure and, therefore, the later removal of the applicant did not constitute a deportation. Conversely, counsel requested that the applicant be granted a waiver of his alleged inadmissibility for having been deported. Counsel pointed out 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 remedy the lack of continuous residence stemming from the deportation.

The applicant was deported on March 6, 1986. He is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), which relates to aliens who were deported and reentered the United States without authorization. Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), such inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest

The applicant has resided in the United States since 1979. Nevertheless, the director denied the waiver application because the applicant cannot otherwise qualify for temporary residence, as he fails to meet the "continuous residence" provision of the legalization program.

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).

In a decision dated December 1, 1983, the immigration judge 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 departed voluntarily 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. However, the applicant has never provided any proof of this departure, such as passport stamps or a used airline ticket. Further, as the Director, Nebraska

Service Center pointed out, in more recent deportation proceedings, the 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). While the applicant claims to have departed voluntarily within the time permitted, he has provided no evidence of such departure. It is concluded that he did not depart voluntarily and, because of that, he was properly deported. As he was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

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.

The 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. An applicant's inadmissibility under section 212(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 an entirely separate issue from the continuous residence issue discussed above. Although the applicant's failure to maintain continuous residence, and his inadmissibility for having been deported and having returned without authorization, are both based on the deportation, a waiver is available only for the inadmissibility.

Counsel opines it would make no sense for the law to allow for a waiver of inadmissibility in the case of a deported alien and yet provide no waiver for a lack of continuous residence, also based on the same deportation. As stated above, the issues are different, and not all aliens who were deported in the past fail to meet the continuous residence requirement. As an example, an alien who was deported in 1979 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. Accordingly, an alien who has been deported may be eligible for a waiver, but must still establish that he has met the continuous residence requirement as a separate eligibility criterion.

Counsel explains 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. Nonetheless, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999) the court of appeals ruled that

the district court lacked jurisdiction to compel the Immigration and Naturalization Service (INS), now Citizenship and Immigration Services, to change 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 INS to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. While it is true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Concerning waivers of grounds of inadmissibility, counsel cites H.R. Rep. No. 98-115, 98th Cong. 1st Sess., 69-70, in which it was stated that, normally, denials of legalization on the basis of the waivable exclusions should only occur when the applicant is also ineligible for legalization on other grounds. The director's denial of the waiver application, because the applicant cannot otherwise qualify for legalization due to the "continuous residence" provision of the legalization program, is not inconsistent with that statement.

In support of his decision to deny the waiver application because the applicant is otherwise ineligible for legalization, the director cited *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) and *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). While those decisions relate to applications for permission to reapply for admission after deportation, the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because the alien was ineligible for the overall benefit of lawful residence.

It is concluded that the director's decision to deny the waiver application because no purpose would be served in granting it was proper, logical and legally sound. Therefore, it shall remain undisturbed.

ORDER: The decision is affirmed, and the application remains denied.