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

U.S. Citizenship
and Immigration
Services

[redacted]

L3

FILE: [redacted] Office: Nebraska Service Center Date: MAR 3 2005

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:

[redacted]

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 held in abeyance by the Director, Western Regional Processing Facility. 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 6, 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. Neither the applicant nor counsel has contested the fact of the deportation, or responded to the certified denial.

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. On that basis, he is statutorily ineligible for temporary residence.

Relief is provided in the Act for absences based on factors other than deportation, specifically 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.

Additionally, an alien shall be regarded as having resided continuously in the United States if at the time of filing an application for temporary resident status, no single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982, through the date the application is filed, unless the alien can establish that due to emergent reasons the return to the United States could not be accomplished within the time period allowed, the alien was maintaining residence in the United States, and the departure was not based on an order of deportation. 8 C.F.R. § 245a.1(c).

Counsel has indicated that the applicant recollects reentering the United States in late December 1985. As he was deported on November 6, he may well have been absent from the United States for a period of over 45

days. No claim that an "emergent reason" delayed his return to the United States has been made, although this point was not addressed by the director in the recent decision and need not be pursued further here.

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) 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. 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 possible 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 1980 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.

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) 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 on November 6, 1985, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence.

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