U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 08 2006

IN RE: Applicant: [redacted]

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:

[redacted]

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility was denied by the Director, Nebraska Service Center, and 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 reasoned that there would be no purpose in granting a waiver that could not assist the applicant in gaining temporary residence.

In rebuttal, counsel stresses that the waiver application should be granted pursuant to *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988). He discusses the humanitarian factors that are present regarding the applicant's son. He also contends that, if the application is approved, both the applicant's inadmissibility for having been deported and his failure to maintain continuous residence due to the deportation will be waived.

The applicant was deported from the United States on July 22, 1982. This action is reflected by the numerous stamps of the special inquiry officer (immigration judge) and the district director on Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien. Although counsel states that he has never received the audiotape of the deportation hearing, or a transcript of it, there is no doubt as to the fact of the deportation. The applicant 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 returned to the United States without authorization.

On his application for temporary residence (legalization) filed on April 18, 1988, the applicant stated that he had no prior immigration record. Also, although he was directed to list all absences from the United States that took place after January 1, 1982, he did not show the absence based on the July 22, 1982 deportation. Furthermore, he indicated that he had never been arrested or convicted, although he was convicted of Illegal Entry on June 21, 1982. Therefore, he is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), as an alien who, by willfully misrepresenting a material fact, sought to procure an immigration benefit.

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.

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).

As a result of the deportation, the applicant did not reside continuously in the United States for the requisite period. He is therefore statutorily ineligible for temporary residence on that basis.

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. While 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 grounds of 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 and yet provide no waiver for a lack of continuous residence, also based on a deportation. Clearly, not all aliens who were deported in the past failed 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.

Counsel points out 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. However, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999) the court of appeals held that the district court lacked jurisdiction to compel the Immigration and Naturalization Service to change its interpretation of the statute.

Counsel is correct in stating that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well. Nevertheless, for the reasons stated above, we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Regarding waivers of grounds of inadmissibility, counsel correctly points to *Matter of P--*, 19 I&N Dec. 823 (Comm. 1988), in which it was stated that denials of legalization on the basis of the waivable exclusions should only occur when the applicant is also ineligible for legalization on other grounds. Counsel focuses on the unarguable humanitarian factors concerning the applicant's son, who suffers from spina bifada, and on the applicant's residence in the United States for almost three decades. However, the director's denial of the waiver application, because the applicant cannot otherwise qualify for legalization due to his failure to meet the "continuous residence" provision of the legalization program, is not inconsistent with *Matter of P--, supra*.

In support of his decision to deny the waiver application, 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 both decisions relate to applications for permission to reapply for admission after deportation filed by aliens long before the legalization program, the decisions are on point and relevant to the current proceedings. In

each case the Regional Commissioner clearly found that no purpose would be served in granting an application when 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.