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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: Nebraska Service Center

Date: **AUG 19 2005**

IN RE:

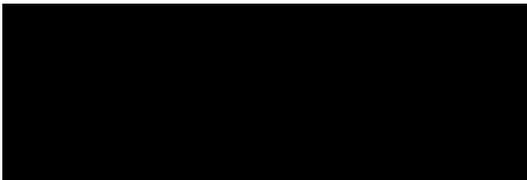
Applicant:



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 approved by the Director, Western Regional Processing Facility. However, that director subsequently terminated the applicant's temporary resident status. The applicant appealed, and the Director, Western Service Center then reopened the matter. That director later terminated the applicant's status, but subsequently reopened the matter due to ongoing litigation. Finally, the Director, California Service Center terminated the applicant's status. An appeal of that decision has been 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 status was terminated because he had been outside of the United States after January 1, 1982 under an order of deportation to have his application reopened. The Director, Nebraska Service Center has now denied the application, and certified his decision to the Administrative Appeals Office (AAO). The decision will be affirmed.

The applicant was deported on November 13, 1986. The 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.

No response has been received to the certified denial. Earlier, counsel stated it is unfair to deny temporary residence to aliens who were deported while granting temporary residence to other aliens who disregarded orders of deportation. She contended the prior approval of the waiver of inadmissibility also should cure the lack of continuous residence stemming from the deportation. Counsel further pointed out that Congress intended that the legalization program would be implemented in a liberal and generous manner.

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 states that the above section of law, as interpreted by Citizenship and Immigration Services (CIS), punishes aliens who complied with deportation orders, and rewards those who disobeyed such orders. She contends that the interpretation held by CIS is unfair, and could not be consistent with congressional intent. However, the law clearly states that those aliens who were *outside of the United States* under an order of deportation did not maintain continuous residence. Counsel has not cited any judicial ruling that finds that section of law to be unconstitutional, or CIS's interpretation and application of the law to be incorrect.

Counsel points out that the applicant's inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having been deported and having returned to the United States without permission, was waived by the Director, Western Regional Processing Facility. However, her assertion that the lack of continuous residence should be considered to have been waived in the same process is unpersuasive. Congress set forth, at section 245A(d)(2) of the Act, 8 U.S.C. § 1255a(d)(2), a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act, 8 U.S.C. § 1182(a). 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 that were prolonged because of 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 predicated on the deportation, a waiver is possible, and has been granted, only for the inadmissibility.

Counsel maintains that it is not logical to conclude that the law allows for a waiver of inadmissibility in the case of a deported alien, and yet provides no waiver for a lack of continuous residence, also based on the same deportation. Counsel argues that such an interpretation renders a waiver of inadmissibility meaningless. However, there is a logical basis for making the distinction between inadmissibility and continuous residence, as the two issues are separate, and not all aliens who were deported fail to meet the continuous residence requirement. 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. A waiver of inadmissibility in such case would therefore serve a useful purpose, as the alien would then be eligible for legalization.

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 because he failed to maintain continuous residence. There is no waiver available. Therefore, he is ineligible for temporary residence.

ORDER: The director's decision is affirmed. This decision constitutes a final notice of ineligibility for temporary resident status. The Director, Nebraska Service Center shall adjudicate the application for adjustment to permanent resident status.