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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

PHILIP COPY

[Redacted]

JUN 14 2008

FILE:

[Redacted]

Office: Nebraska Service Center

Date:

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, Western Regional Processing Facility. An appeal of that decision was dismissed.

The Director, Nebraska Service Center then granted a motion to reopen that was filed by the applicant pursuant to a class action lawsuit entitled *Proyecto San Pablo v. INS*, No. [REDACTED]. 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 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 January 25, 1985, and on July 17, 1985. Both directors noted that the applicant was outside of the United States under orders of deportation after January 1, 1982, and therefore did not reside continuously in the United States since such date.

Counsel asserts that it is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to deny temporary residence to aliens who were deported while granting temporary residence to other aliens who disregarded orders of deportation. Counsel requests that the applicant be granted a waiver of his inadmissibility for having been deported, and maintains that approval of the waiver would also cure the lack of continuous residence stemming from the deportation.

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 deportations, 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. He contends that the interpretation held by CIS is unfair and unconstitutional, 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 CIS's interpretation and application of the law to be unconstitutional.

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, 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 deportations, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act.

The district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747, [REDACTED] 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, now Citizenship and Immigration Services, to change its interpretation of the statute.

In summary, the applicant was out of the United States after January 1, 1982 under orders of deportation, and cannot be granted temporary residence for two reasons. First and foremost, 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. There is no other waiver provision, such as consent to reapply for admission into the United States after deportation, available to legalization applicants.

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, and inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

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