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

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: Nebraska Service Center Date: MAR 31 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 denied by the Director, Northern Regional Processing Facility. 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 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 found to have effected his deportation on November 4, 1985, after having failed to depart voluntarily. 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.

Counsel has not responded to the recent certified denial. With the request to reopen, he maintained that the applicant departed the United States voluntarily on November 4, 1985 after having been told by a deportation officer that a departure on that date would be considered a voluntary departure. Counsel stated that the applicant had assured the officer that he would depart on November 4, had shown the officer a ticket for that date, and yet when the officer extended the voluntary departure period through that date, pursuant to the applicant's request, the officer erred in noting in the file that he extended it only through November 3.

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).

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.

In proceedings on August 1, 1985, the immigration judge at Chicago ordered that the applicant be deported to Mexico, unless he departed the United States by November 1, 1985. On October 31, the period of voluntary departure was extended through November 3, based on the applicant's presentation of a plane ticket showing he would depart on November 2. However, the applicant departed on November 4. Therefore, he "self-deported" pursuant to former 8 C.F.R. § 243.5, now 8 C.F.R. § 241.7. That

regulation states that any alien who departed the United States while an order of deportation was outstanding is considered to have been deported in pursuance of law, except that an alien who departed before the expiration of the voluntary departure time granted in connection with an alternate order of deportation is not considered to have been deported.

Counsel has stated that, when the applicant came to the immigration office on October 31 and requested an extension of voluntary departure, he presented a ticket for a November 4 departure, and that the officer simply erred in noting in the file that the voluntary departure period was extended only to November 3. Counsel has provided a photocopy of such November 4 ticket. Nevertheless, the record also contains a copy of a ticket for November 2, and the deportation officer's notes indicating that the applicant appeared on October 31 with a ticket for November 2, and that the officer granted the extension of voluntary departure to November 3, 1985. The record supports the director's finding that the applicant simply did not depart on or before November 3, the last day of the voluntary departure period. Therefore, he effected his deportation. Because of that, he cannot be found to have resided continuously in the United States for the requisite period. On that basis, he is statutorily ineligible for temporary residence.

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 4, 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.