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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: Nebraska Service Center Date: MAY 19 05

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 originally decided your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center. It is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The director denied the waiver application because the applicant cannot otherwise qualify for temporary residence, as she fails to meet the "continuous residence" provision of the legalization program. The director determined that it would serve no purpose to grant a waiver that could not enable the applicant to gain temporary residence.

In response, counsel states that, if the waiver application is granted, both the applicant's inadmissibility for having been deported, and her failure to maintain continuous residence because of the deportation, will be waived. She maintains that the application should be approved because of the applicant's many years of residence in the United States, and because of her close ties to her U.S. citizen daughter, whom she entirely supports. Counsel explains that the applicant witnessed her brother's murder in Guatemala, and would be targeted as a witness should she return to that country.

The applicant was deported from the United States on May 18, 1983. She 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 reentered the United States without authorization. She is also inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to obtain a benefit by misrepresentation. On her temporary residence application filed in 1988, the applicant indicated that she had no prior immigration record, and had not been absent from the United States since 1982. 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).

Because she was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, she is statutorily ineligible for temporary residence.

Counsel points out that Citizenship and Immigration Services (CIS) has not produced the audiotape of the deportation hearing, and asserts that she therefore has no way to challenge the validity of the deportation order. Because of that, she contends that the CIS cannot rely on the deportation to deny the applicant relief. However, the fact of the deportation is well documented in the record. Furthermore, it is not within the authority of CIS to pass judgment on deportation orders issued by immigration judges. The claim that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was appealable at the time to the Board of Immigration Appeals. It is noted that the applicant did waive her right to appeal.

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.

The general grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. An applicant's inadmissibility under section 212(a)(9)(A)(ii)(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 an entirely separate issue from the continuous residence issue discussed above. Although the applicant's failure to maintain continuous residence, and her inadmissibility for having been deported and having returned without authorization, are both predicated on the deportation, a waiver is available 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 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 1979 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 support of his decision to deny the waiver application because the applicant was otherwise ineligible for legalization, 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 those decisions relate to applications for permission to reapply for admission after deportation, the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because 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.