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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

L 1

FILE: [redacted] Office: Nebraska Service Center Date: JAN 12 2006

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. Two appeals of that decision were dismissed.

The Director, Nebraska Service Center then approved a motion to reopen that was 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 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 April 1, 1985. 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.

Neither counsel nor the applicant has responded to the certified denial. Earlier, counsel explained that he still had not been provided with a copy of the order of the immigration judge, or a tape or transcript of the deportation hearing. He questioned whether an actual deportation hearing, as opposed to a bond reduction hearing, took place. Counsel pointed out that, if there was no order of deportation, there was no departure from the United States under an order of deportation. He further asserted that, even if it were to be concluded that there was a deportation hearing, the applicant appeared with numerous other aliens in a patently unfair mass hearing. Counsel also contended that the applicant was not advised as to his right to legal counsel, or to appeal the judge's decision.

While counsel contends that the deportation was unlawful for these reasons, in the alternative, he requests that the applicant be granted a waiver of his inadmissibility for having been deported, and avers 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 April 1, 1985 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 points out that Citizenship and Immigration Services (CIS) still has not sent him a copy of the audiotape or transcript of the deportation hearing, or a copy of the judge's deportation order. He requests that the copies be sent, and that he then be given an extension of time in which to respond further.

On May 4, 1998 the Immigration and Naturalization Service (INS) sent the applicant copies of his current file, [redacted] and his prior file that reflected the deportation, [redacted] Additionally, CIS sent

counsel copies of both files on January 18, 2005. CIS informed counsel of his right to appeal the determination under the Freedom of Information Act (FOIA) as to which documents were released, but there is no indication that the applicant or counsel has done so. It is also noted that there is no indication that the applicant or counsel filed a FOIA request with the Executive Office for Immigration Review (EOIR), although the instructions given to *Proyecto* applicants advised them to contact EOIR if they wanted to obtain copies of deportation records from the immigration court. For these reasons, counsel's request for additional time is denied.

Counsel maintains the transcript of the deportation hearing would demonstrate that the immigration judge erred in holding a mass hearing, and in failing to advise the applicant of his right to counsel and right to appeal, and that CIS, in this current proceeding, has the authority to review and overrule the actions of the judge. However, it is not within the jurisdiction of CIS to pass judgment on judicial proceedings. The contention that the finding of deportability may now be reviewed or appealed in this proceeding cannot be accepted.

Counsel asserts that he has not received a copy of the judge's deportation order. The AAO concedes that the judge's order is not in the record. However, other documents make it clear that the judge ordered the applicant deported should he not depart voluntarily. The INS trial attorney's notes from November 14, 1984 reveal that on that date the judge granted voluntary departure to the applicant to December 14, 1984. It is noted that this means he granted an alternate order of deportation, ordering the applicant deported should he not depart voluntarily within 30 days. Upon finding the applicant deportable, the judge had the authority under 8 C.F.R. § 242.18(c), in effect at that time, to issue either a direct order of deportation, or an alternate order of deportation, which allowed the applicant the opportunity to depart voluntarily before a certain date in lieu of an eventual deportation.

In a memorandum dated February 21, 1985, another judge in the same office explained that, after reviewing the hearing tape, he found that the deportation case of the applicant was heard on its merits on November 4, 1984, the applicant was granted voluntary departure to Mexico, and that the applicant reserved appeal but never filed an appeal. A hand-written note on that memo states: "V/D (voluntary departure) to 12/14/84." Because many aliens are commonly granted 30 days of voluntary departure, it is concluded that the judge's reference to November 4, 1984 was a clerical error, and that November 14, 1984 was the correct date of the hearing.

Finally, on Form EOIR-1 dated November 14, 1984, the judge who conducted the deportation hearing indicated that he denied the applicant's request for a change in his custody status, and that the applicant waived his right to appeal.

In view of these documents, there is no question that a deportation hearing was held on November 14, 1994, and that the applicant was ordered deported should he not depart within 30 days. He clearly did not depart voluntarily, and was deported on April 1, 1985. Based on this, the AAO finds that he failed to maintain continuous residence for legalization purposes.

Counsel's assertion that the lack of continuous residence in this situation may be waived is unpersuasive. Congress established, 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, specifically 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. 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 under section 212(a)(9)(A)(ii)(II) of the Act.

Counsel maintains that it is illogical to conclude that the law allows for a waiver of inadmissibility in the case of a deported alien, and yet fails to provide a waiver for a lack of continuous residence, also based on the same deportation. Counsel states that such an interpretation renders a waiver of inadmissibility meaningless. Nevertheless, 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 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. A waiver of inadmissibility in such case would therefore serve a meaningful purpose, as the alien would then be eligible for legalization.

Counsel stresses that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) found 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 require INS, now CIS, to change its interpretation of the statute.

The July 31, 2001 letter submitted by counsel from the United States Senate Committee on the Judiciary is noted. The senators urged INS to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. Although it is certainly true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

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. 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 on April 1, 1985, 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.