U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 13 2006

XPH-88-155-1073

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 your case. If your appeal was sustained, or if your case was remanded for further action, you will be contacted. If your appeal was dismissed, you no longer have a case pending before this office, and you are not entitled to file a motion to reopen or reconsider your case.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant was deported on May 30, 1984 and on June 11, 1984. The director noted 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.

On appeal, counsel indicates that the copy of the record he received did not contain evidence of deportations. He points out that there was no apparent disposition of the applicant's waiver application that had been filed ten years earlier. Finally, counsel refers to *Proyecto San Pablo v. Immigration and Naturalization Service,* 784 F. Supp. 738 (D. Ariz. 1991), a class-action lawsuit in which the court ruled in favor of applicants.

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. § 1255a(g)(2)(B)(i).

As stated above, the applicant was deported twice within 12 days. It appears the officer of the Immigration and Naturalization Service who deported the applicant the second time was not aware that he had already been deported. Regardless, because of the deportations, the applicant did not reside continuously in the United States as required. While counsel indicated on appeal that he had not been provided with evidence of the deportations, the director sent copies of the executed warrants of deportation to him subsequent to the 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.

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. The applicant is inadmissible 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 authorization. An alien's inadmissibility under section 212(a) of the Act, which may be waived, is an entirely separate issue from the continuous residence issue discussed above.

On July 22, 1988 the applicant filed a waiver application in an effort to overcome his inadmissibility. There is no indication on the application as to whether it was approved, and the record contains no notice of approval or denial. While one computer printout reflects approval of the application, another reflects denial. In light of these factors, it is concluded that the director did not render a decision on such

application. However, even had he granted the waiver, the applicant would remain ineligible for temporary resident status due to his failure to reside continuously in the United States.

Counsel stresses that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) 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.

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 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.

It is noted that the applicant was convicted of Driving While Intoxicated While License Suspended, Cancelled, Revoked or Refused, a class 5 felony under the Arizona Revised Statutes, sections 13-701, 702, 801, 28-692, 692.02, 444 and 445. He is thus ineligible for temporary residence under section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B), which states that aliens are ineligible if convicted of a felony or three or more misdemeanors in the United States. On July 11, 1988, the judgement of guilt was vacated, and the charges were dismissed. However, under the current statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Any subsequent action that overturns a state conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Therefore, the applicant remains ineligible for temporary residence due to the felony conviction.

ORDER: The appeal is dismissed. The waiver application shall be adjudicated by the director having jurisdiction.