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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: OCT 23 2006

XAH-87-013-7035

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, Chief
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. 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 January 8, 1982. Both directors 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.

Neither counsel nor the applicant has responded to the certified decision. Earlier, counsel requested that the applicant be granted a waiver of his inadmissibility for having been deported, and asserted 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. § 1255a(g)(2)(B)(i).

Because of the 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'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, 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 predicated on the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

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 contends 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.

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.

The applicant was out of the United States after January 1, 1982 under an order of deportation, and cannot be granted temporary residence for four 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. He is also inadmissible under section 212(a)(6)(C)(1) of the Act, 8 U.S.C. § 1182(a)(6)(C)(1), for having attempted to acquire a benefit and entry by misrepresentation. He falsely claimed on his 1987 temporary residence application to have no prior record with the Immigration and Naturalization Service, and to have not been absent from the United States since January 1, 1982. In addition, he attempted to enter the United States on April 3, 2000 with a counterfeit Form I-551, Permanent Resident Card. Finally, subsequent to the filing of this temporary residence application, the applicant was removed from the United States on January 11, 2000 and on April 3, 2000. He is therefore inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). These grounds 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 January 8, 1982, 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 sections 212(a)(9)(A)(ii)(II), 212(a)(6)(C)(1), and 212(a)(9)(A)(i) of the Act.

It is also noted that the applicant was convicted of 8 U.S.C. § 1325, Illegal Entry, in October 1986, and sentenced to 45 days confinement. On June 12, 1979, he was initially charged with Attempted Entry With Document of Another Alien, 18 U.S.C. § 1546. However, prosecution was declined. Furthermore, on January 1, 1982 he was initially charged with Illegal Entry and Alien Smuggling, 8 U.S.C. § 1327, but there is no evidence he was prosecuted. Additionally, when the applicant was removed from the United States on January 11, 2000, it was stated on Form I-213 that he had made a false claim to United States citizenship. However, a memorandum in the file indicates the applicant had stated that he had lost his Form I-551 in Mexico.

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