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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: APR 17 2007

LIN-04-052-52656

IN RE: Applicant: [redacted]

APPLICATION: Application for Temporary Resident Status under 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, Chief
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, California Service Center. An appeal of that decision was dismissed. The Director, Nebraska Service Center 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 [redacted] (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 for temporary residence reopened and adjudicated on a *de novo* basis. 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.

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).

The applicant was deported on February 9, 1982 and on August 31, 1982. Both directors noted the applicant was outside of the United States under orders of deportation after January 1, 1982 and, therefore, did not reside continuously in the United States since such date.

With the motion to reopen prior counsel asserted the applicant was deported illegally on August 31, 1982 because he was not advised of his rights to apply for relief. Although prior counsel urged Citizenship and Immigration Services (CIS) to make a determination on these judicial proceedings, such determination falls outside of CIS jurisdiction. The claim that an order of deportation may now be reviewed or essentially appealed in this proceeding cannot be accepted. As was stated in the previous decision of the Director, Nebraska Service Center, the deportation orders of the immigration judges were subject to appeal at the time to the Board of Immigration Appeals. The applicant did not appeal such orders. It is noted that on Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, relating to each deportation, the Special Inquiry Officer (Immigration Judge) stamped the notation "Deport to Mexico – Appeal Waived."

Guidance is set forth in the Federal Register, Volume 68, No. 19 (Jan. 29, 2003) regarding the implementation of the order in *Proyecto, supra.* In section 13 of the Federal Register, it is stated:

> The Service (CIS) may decide your motion to reopen at any time after you file it, unless you indicate in your motion that you are still awaiting the results of your Freedom of Information Act (FOIA) requests. If you are still awaiting the results of your FOIA requests, the Service will not rule on your motion until you have had an opportunity to obtain and review the FOIA documents. You must submit a brief and any documents you want the Service to consider no later than six months after you have received a response to both of your FOIA requests.

In this case prior counsel received a response, dated April 2, 2003, to the FOIA request that she had filed with the Executive Office for Immigration Review (EOIR). She filed the *Proyecto* motion to reopen eight months later, on December 16, 2003. The director was not encumbered by any time restriction, and properly ruled on the motion to reopen, and subsequently on the legalization application.

On March 31, 2005, current counsel requested, pursuant to the court order in *Proyecto, supra,* an extension of time in which to acquire the audiotapes or transcripts of the deportation hearings, and a further extension of time in which to supplement his brief. In a letter dated February 2, 2007, this office advised counsel that a continuance would be granted if he established that he had attempted to acquire the tapes or transcripts by filing a FOIA request with EOIR, and had not yet received a response. In his response dated February 15, 2007, he provided evidence of having filed a FOIA request with EOIR on March 31, 2005, and stated that he had not received the tapes or transcripts.

In a response to counsel dated April 5, 2005, EOIR stated that it had received the FOIA request on that date, and that it was unable to locate any records regarding this matter. Thus, there is no pending FOIA request with EOIR, and it has been two years since counsel received such response. Furthermore, there is no reason to believe that either CIS or EOIR has any other records that relate to the applicant, including the deportation hearing audiotapes or transcripts, to release to counsel. In view of this, a continuance shall not be granted.

Counsel asks that the applicant be granted a waiver of his alleged inadmissibility for having been deported. He maintains that approval of the waiver application would also cure the lack of continuous residence resulting from the deportation.

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, namely 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. While the applicant's failure to maintain continuous residence, and his inadmissibility for having been deported and having returned without authorization, both stem from the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act.

Counsel declares that it appears illogical 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. However, there is a logical basis for making the distinction between inadmissibility and continuous residence, as the two issues are separate, and some aliens who were deported may meet the continuous residence requirement. For example, 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 that case would therefore serve a useful purpose, as the alien would then be eligible for legalization.

Counsel points out 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. Nevertheless, 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 alter 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 the Immigration and Naturalization Service to consider an approved waiver application to overcome the ground of inadmissibility and cure the failure to maintain continuous residence. While it is 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 orders 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 February 3, 1982, and on August 31, 1982, and 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.