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

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[redacted]

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

XPH-88-176-2097

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. It is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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. The director noted the applicant was outside of the United States pursuant to the August 31, 1982 deportation and, therefore, did not reside continuously in the United States since such date.

On appeal, prior counsel contended that the applicant was deported illegally on August 31, 1982 because he was not advised of his rights to apply for relief. He asserted that the reliance of Citizenship and Immigration Services (CIS) on a deportation that was conducted in violation of law would deprive the applicant of fundamental constitutional and regulatory protections afforded him under the law. Although prior counsel stated on March 26, 1999 that a brief would be filed, none has been received. Current counsel, in a related waiver application filing, echoes prior counsel's concerns regarding the deportation.

The contention that the immigration judge erred, *and that CIS has the authority in this current proceeding to review and overrule the actions of the judge*, cannot be accepted. It is not within the authority of CIS to pass judgment on judicial proceedings. The orders of the immigration judges were subject to appeal, at the time, to the Board of Immigration Appeals. The applicant did not appeal. 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."

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

Counsel's contention 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, 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.

Counsel maintains that it appears disingenuous 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 not all aliens who were deported fail to 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 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 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. Although it is true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are also, 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.