U.S. Department of Homeland Security
U. S. Citizenship and Immigration Servic
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 0 7 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

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

FILE:

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687). In a separate action, the director certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

The applicant filed an Application for Temporary Resident Status pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1225a. The director denied the application, finding the applicant's February 9, 1982 and August 31, 1982 departures pursuant to deportation orders meant the applicant failed to maintain the required continuous residence. *See* Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).[1]

On April 23, 2013, the director granted the applicant's motion and reopened the Form I-687 and Form I-690 applications. The director approved the Form I-690 waiver application.

This matter has a complex procedural history. In *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001), the U.S. District Court for the District of Arizona held that the legacy Immigration and Nationalization Service (legacy INS) violated the due process rights of a class of applicants for legalization under the Immigration Reform and Control Act of 1986 (IRCA) when it denied those applicants access to their complete deportation or exclusion files and prevented them from seeking waivers to "cure" prior deportations or exclusions. On March 27, 2001, the court ordered the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) to reopen legalization applications filed by class members and (1) accept waiver applications submitted by class members and adjudicate them in the same manner as waiver applications filed by other legalization applicants were adjudicated; and (2) prior to making a decision on a reopened legalization application, provide the applicant with complete copies of prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court, to enable the applicant to bring a collateral challenge to the deportation order, if appropriate. Subsequently, in *Proyecto San Pablo v. Dept of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007), the court reiterated its March 27, 2001 holding and ruled that, if the entire record cannot be located by the defendants, the following burden of proof will apply:

> A legalization applicant who may be denied on the basis of 8 U.S.C. 1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must make a *prima facie* showing that the prior deportation or exclusion order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. If the applicant makes such a showing, then CIS has the burden of coming forward with a copy of the tape and/or transcript of the prior deportation or exclusion hearing . . . If

[1] The section provides that "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 the United States as a result of a departure under an order of deportation."

> CIS does not produce such evidence from the prior deportation or exclusion file, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

In his May 21, 2013 legal brief, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. The record reflects that in a letter dated February 19, 2008, EOIR Associate General Counsel noted that after a "thorough manual search of files in El Centro and nearby Immigration Courts," the agency was unable to locate any file under the alien numbers counsel provided. A review of the record indicates that USCIS fulfilled counsel's September 12, 1996 FOIA request on October 28, 1996 by providing 69 pages of documentation to the applicant. Further, USCIS fulfilled counsel's February 24, 2004 FOIA request on March 5, 2004 by providing copies of the applicant's deportation record.

However, the record does not indicate that the applicant ever received a copy of the tape recordings and/or the transcripts of his deportation hearings.[2] The applicant's physical file (currently in the possession of the AAO) contains no such tape and/or transcripts. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with a copy of his legalization file as it currently exists.

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his deportation order was either: the result of proceedings not in compliance with the governing law or regulations; or occurred in violation of due process; or was otherwise unlawful or involved a gross miscarriage of justice.

In this case, the director found the applicant failed to submit *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, occurred in violation of due process, or involved a gross miscarriage of justice. The director noted the charging document and notice of hearing, the notice of appeal rights, and a list of free legal service providers as evidence that the deportation was in compliance with the governing statute and regulations. The director further found that the applicant's February 9, 1982 deportation meant he failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act, 8 U.S.C. § 1255a(a)(2)(A). The director therefore denied the application and certified the matter to the AAO for a ruling.

The standard for establishing a *prima facie* case means the evidence reveals a reasonable likelihood that requirements have been satisfied. *See Fernandez v. Gonzales*, 439 F.3d 592, n.6 (9th Cir. 2006) (*citing Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir.2003) (citations omitted)). A reasonable likelihood means showing a realistic chance that the petitioner can establish the issue in

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[2] The Service did provide the applicant with a copy of his OSC.

question at a later time. *Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (discussing the *prima facie* standard in the context of motions to reopen).

In applying these standards, the Board of Immigration Appeals (Board) and most Circuits employ a balancing test and weigh all evidence for and against in determining whether a *prima facie* case has been made. *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (discussing the issue in the context of a motion to reopen); *Wang v. BIA*, 437 F.3d 270, 276 (2d Cir. 2006) (same); *Matter of J-W-S-*, 24 I&N Dec. 185, 191-92; *Matter of C-C*, 23 I&N Dec. 899, 902-03 (BIA 2006) (same); *Guo v. Ashcroft*, 386 F.3d 556, 564-66 (3d Cir. 2004) (same).

Counsel for the applicant contends that the documentary evidence and the circumstances surrounding the applicant's February 9, 1982 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations.

Counsel asserts that the applicant was not informed of his right to have an attorney represent him during the deportation proceeding. The version of the Act in effect at the time of the applicant's deportation hearing provided that an alien receive notice of his or her statutory right to be represented by counsel at no expense to the government. *See* former INA § 242B(b); *see also* former INA § 292. Also, the regulation in effect at the time of the applicant's hearing provided that an alien may be represented by counsel. *See* 8 C.F.R. § 242.10 (1984) ("The respondent may be represented at the hearing by an attorney or other representative qualified under part 292 of this chapter.") The record reflects that the Order to Show Cause (OSC) served upon the applicant on February 3, 1982 provides that aliens in deportation proceedings may be represented, at no cost to the government, by an attorney or other individual authorized to and qualified to represent persons before the Immigration and Naturalization Service. Additionally, the Record of Deportable Alien (Form I-213) included in the record is stamped to indicate that legacy INS officers provided the applicant with a list of free legal service providers. As such, counsel's assertion with respect to the duty to inform the applicant of his right to counsel is discounted by the documentary evidence in the record.

Counsel next states that the applicant was not informed of his right to apply for voluntary departure, which he contends violated the regulation at former 8 C.F.R. § 242.17 (1984). However, the Board has noted that the regulations in effect before the passage of the 1996 amendments to the Act requiring immigration judges to inform aliens of apparent eligibility for relief did not include voluntary departure. *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999) (citing former 8 C.F.R. § 242.17(a), which required immigration judges "to inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in *this paragraph* and . . . afford the respondent an opportunity to make application therefor during the hearing" (emphasis added)). The Board further noted that the opportunity to apply for voluntary departure was described in former 8 C.F.R. § 242.17(b), which contained no notification requirement. *Id.* In contrast, the current regulations require immigration judges to inform the respondent of apparent eligibility for all "benefits enumerated in this *chapter*," which includes

voluntary departure. 8 C.F.R. § 1240.11(a)(2) (emphasis added). As the regulations in effect at the time of the applicant's deportation hearing required no duty to inform an alien of voluntary departure as a form of relief, counsel does not establish a violation of the governing regulations by claiming that the applicant had a right to be informed of such relief.

It is further stated that the applicant was not informed of his right to appeal the decision of the immigration judge, which counsel asserts constitutes a violation of the regulation at former 8 C.F.R. § 242.16(a). Counsel also asserts that no one informed the applicant of the charges against him and that he was not given an opportunity to respond to the charges. In a sworn statement dated May 18, 2013, the applicant states that at the time of his deportation proceeding he was not informed that he could appeal the decision of the immigration judge. The regulation in effect at the time of the applicant's deportation proceeding provided that the immigration judge advise the applicant of his right to appeal the decision. *See* 8 C.F.R. § 242.16(a) ("The Immigration Judge shall . . . ascertain that the respondent has received . . . a copy of Form I-618, Written Notice of Appeal Rights. . . .") Here, the Application for Order to Show Cause (Form I-265) shows that on February 3, 1982, the applicant was served with Notice of Appeal Rights (Form I-618) and a list of free legal service providers.

The applicant asserts in his sworn statement that he was pressured to expedite the date of his hearing at the time the OSC was served upon him, and that his August 1982 hearing was a "mass deportation hearing" which took place "in a large room with other men who were also in deportation proceedings." The applicant further asserts that during the hearing, the immigration judge only inquired about those respondents who had United States citizen spouses or children and that he was not informed of any form of relief from deportation. Former section 242(b) of the Act provided that an alien be informed of the nature of the charges against him, and given a reasonable opportunity to examine the evidence against him and present evidence on his own behalf.

Here, with the tape recording and hearing transcripts being unavailable, the AAO is unable to ascertain whether the applicant's deportation proceeding complied with the regulatory requirements set forth at former 8 C.F.R. § 242.16(a). From a review of the documentary evidence in the record relating to the applicant's deportation proceedings, the AAO cannot determine whether the applicant was read the factual allegations and the charges in the OSC and if they were explained in nontechnical language; or if the applicant pled to the OSC by stating his admission or denial of the allegations and charges contained therein.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, the deportation order occurred in violation of the governing regulations because there is no evidence that the court maintained a recording of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing in 1982, 8 C.F.R. § 242.15, indicated that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer." Counsel has repeatedly requested a copy of the tape recording and/or transcript of the hearing. It is likely that the hearing was recorded, and possible

that it was included among other hearings on one tape (as we understand was frequently the case); however, EOIR and USCIS searches have not produced a copy of the recording. Legacy INS released 69 pages of record material to the applicant on October 28, 1996. On March 5, 2004, USCIS provided the applicant with copies of his deportation record. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. It appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all available records relating to his deportation proceedings. While the applicant does not appear to be statutorily eligible for legalization without the special rules of construction set out by the court in the *Proyecto* amended order and the outstanding deportation order appears valid under current ninth circuit case law (and has apparently never been challenged to EOIR or to the Court of Appeals), we are obliged to follow, to the letter, the 2007 amended *Proyecto* order. We find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations. As a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order the AAO is constrained to find that the applicant has overcome the particular basis of the denial cited by the director.

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 245(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 the United States under an order of deportation. Section 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i).

The applicant has the burden of proving by a preponderance of the evidence that he or she has resided in the United States for the requisite periods, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status. The inference drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

An alien who applies for adjustment to temporary resident status must also establish that he or she is admissible to the United States as an immigrant, and has not been convicted of any felony, or three or more misdemeanors. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B).

In addition, an applicant is inadmissible, and therefore ineligible for temporary resident status, if he or she, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under the Act. Section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). Any alien who falsely represents, or has falsely represented, him or herself to be a United States citizen for any purpose or benefit under the Act or any other federal or state law is also inadmissible. Section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii).

In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of a school certificate of completion, W-2 forms, employment verification letters, and a copy of an Arizona-issued driver's license, all dated during the requisite period. The contemporaneous documents submitted by the applicant are credible. Upon review, the AAO finds that the documents furnished in this case may be accorded sufficient evidentiary weight to meet the applicant's burden of proof of establishing his continuous unlawful residence in the United States for the requisite period.

The record reflects, however, that the applicant twice asserted U.S. citizenship upon apprehension by immigration officers. The record of proceedings includes a Record of Deportable Alien (Form I-213) dated February 3, 1982 and prepared by an immigration officer. The Form I-213 provides that the applicant was encountered on January 28, 1982, at the in Phoenix, Arizona during an Area Control Operation. The Form I-213 further provides that upon questioning by immigration officials, the applicant "made a strong verbal false claim to United States Citizenship." The applicant's name and date of birth were checked through the Vital Statistics database and there was no record found of his birth in the United States. On February 3, 1983, immigration officers apprehended the applicant at his place of residence, at which time he admitted alienage. The Form I-213 reflects that the applicant entered the United States without inspection near Nogales, Arizona in February 1979.

The record includes a second Record of Deportable Alien (Form I-213), dated August 26, 1982 and prepared upon the applicant's apprehension at his then place of employment, the in Phoenix, Arizona. This Form I-213 provides that the applicant at first made a strong claim to birth in the United States. However, upon being confronted by immigration officers, the applicant stated that he was born in Mexico. In a memorandum for file dated August 26, 1982, the United States Attorney declined to prosecute the applicant under 18 U.S.C. § 911 for having falsely and willfully represented himself to be a United States citizen.

Based on the above, the record reflects that on two separate occasions the applicant stated to immigration officers that he was born in the United States upon apprehension. Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
>
> (ii) Falsely claiming citizenship. –
>
> (I) In General –

> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

The provisions of Section 212(a)(6)(C)(ii) relating to false claims to U.S. citizenship were added to the Act as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form 1-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. However, if the false claim was made prior to the enactment of IIRIRA, September 30, 1996, it is treated as misrepresentation under section 212(a)(6)(C)(i) of the Act and the alien is eligible to apply for a waiver under section 212(i). *See Memorandum by Lori Scialabba, Associate Director, RAIO, Donald Neufeld, Associate Director, Domestic Operations Directorate, Pearl Chang, Acting Chief, Policy and Strategy, dated March 3, 2009.*

> In considering a case where a false claim to U.S. citizenship has been made, Service [USCIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30, 1996. If the false claim was made before the enactment of IIRIRA, Service [USCIS] officers should then determine whether (l) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.

In this case, the record contains the applicant's admissions to immigration officers, as reflected in the narrative section of the I-213 forms. Upon review of the two Form I-213 and its contents, the AAO finds the forms sufficiently reliable so as to serve as contemporaneous documents of the admissions made by the applicant. For instance, both records were prepared on the same day the applicant was apprehended; the information contained in the forms is detailed; and the document bears the signature of the immigration agents in charge of the applicant's apprehension. *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999) (noting that a Form I-213 is reliable where the information on the form is detailed and there is nothing facially deficient about the document). It is well-established that absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and inadmissibility. *Matter of Gomez-Gomez*, 23 I&N Dec. 522, 524 (BIA 2002); *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988); *Matter of Mejia*, 16 I&N Dec. 6, 8 (BIA 1976). Here, no countervailing evidence or evidence directly

contesting the particulars of the Forms I-213 was introduced. Likewise, no claim was made that the information on the Forms I-213 was obtained through coercion or duress. As such, we perceive no basis for discounting the information contained in the Form I-213 establishing that the applicant made false claims to U.S. citizenship status upon being questioned by immigration officers. However, we note that the director approved the applicant's waiver application, therefore, he is admissible.

Therefore, the AAO finds that the applicant has met his burden of proof of establishing his eligibility for temporary resident status under section 245A of the Act. The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved. He has established his eligibility for temporary resident status under section 245A of the Act.

ORDER: The director's decision denying the applicant's Form I-687 application is withdrawn. The applicant has established his eligibility for temporary resident status under section 245A of the Act. The application is approved.