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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 25 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

cc: Gibbs, Houston, Pauw
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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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 April 26, 1984 departure pursuant to a deportation order 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 March 29, 2013, the director granted the applicant's motion and reopened the Form I-687 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 Naturalization 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 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.

[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."

In his legal brief, counsel for the applicant states that, even though he received a tape recording from the Executive Office for Immigration Review (EOIR) in response to a Freedom of Information Act (FOIA) request, the tape does not relate to the applicant's April 26, 1984 deportation hearing. Counsel claims that one side of the tape is completely indiscernible and the other side contains a recording of a group deportation hearing conducted in Florence, Arizona, on December 17, 1986. In a letter dated June 27, 2008, EOIR Associate General Counsel acknowledged the inadequacy and deficiencies of the tape recording but noted that it was the only tape the agency possessed associated with the applicant's deportation proceeding.

Further, it does not appear that that the applicant ever received the correct tape recording or a transcript of the deportation hearing. EOIR Associate General Counsel noted that transcripts are prepared only if there is an appeal to the Board of Immigration Appeals and, since there was no appeal in the applicant's case, no transcript of the applicant's April 26, 1984 hearing was prepared. The applicant's physical file (currently in the possession of the AAO) contains no other tape recording or hearing transcript. As a result of the missing transcript and indiscernible tape recording, however, the applicant's complete file is unavailable.

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his order of deportation either: was 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 granted the applicant's Motion to Reopen. Also, the director approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The director therefore denied the application and certified the matter to the AAO for a ruling. In rendering a decision, the director did not address whether the applicant was provided with a complete copy of his deportation file nor did the director discuss whether the applicant submitted *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or resulted in a gross miscarriage of justice, as required by the amended *Proyecto* order.

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 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 states that the evidence and circumstances surrounding the applicant's April 26, 1984 deportation order shows that it was defective and entered in violation of the statute, regulations, and due process. The record reflects that the applicant was served with an Order to Show Cause on April 20, 1984 and requested a prompt hearing, which was held on April 26, 1984. In a sworn statement dated August 27, 2008, the applicant states that the immigration judge who presided over his April 26, 1984 deportation hearing did not advise him of his statutory right to an attorney, the opportunity to request voluntary departure, or of his regulatory right to file an appeal with the Board. The applicant states that the deportation hearing lasted "just a few minutes," and that he was ordered deported without advising him that he could appeal the judge's decision. However, the April 26, 1984 deportation order reflects that the applicant waived his right to an appeal. As such, the applicant's contention is contradicted by the documentary evidence in the record and is insufficient to establish a prima facie showing pursuant to the 2007 *Proyecto* order.

Counsel further states that the applicant's deportation proceedings were conducted in violation of the applicable law and regulations as the presiding immigration judge did not advise the applicant of his right to apply for voluntary departure. 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. § 240.11(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 may not establish a violation by alleging that the applicant had a right to be informed of such relief.

The applicant's A-file contains the following: an order to show cause, a deportation order, and an executed warrant of deportation. Given the lack of a tape recording or transcript of the deportation hearing, the only available documentation of the April 26, 1984 hearing is the deportation order issued against the applicant on that same day for having entered without inspection and the applicant's sworn statement. The record indicates that the applicant was advised of his right to obtain representation, as required by section 242B(b) of the Act in effect on the date of the hearing. *See also* former INA § 292. The order to show cause is stamped to indicate that the court provided the applicant with a list of free legal service providers.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, the court order occurred in violation of the governing regulations because the court failed to record or maintain a recording of the deportation hearing. The relevant regulation in existence at the time of

the applicant's deportation hearing in 1984, 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." 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 of the applicant's April 1984 deportation hearing.

On November 16, 2007, the applicant received an audio cassette tape from the EOIR, purportedly relating to his April 1984 deportation hearing. One side of the tape is indiscernible. The other side relates to a group deportation hearing convened in Arizona, on December 17, 1986. In a letter dated June 27, 2008, EOIR Associate General Counsel acknowledged the deficiencies of the tape recording and indicated that the agency could not verify if the recordings in the tape belonged to the applicant. Therefore, documentary evidence in the record indicates that the tape recording EOIR provided the applicant was partially inaudible and partially irrelevant to the applicant. 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.

In light of the foregoing, 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 because there is no evidence that the immigration court maintained a recording of the deportation hearing. 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).

In this case, documentary evidence in the record reflects that the applicant has been residing in the United States unlawfully since at least June 1980. In support of his Form I-687 legalization

application, the applicant submitted substantial evidence dated during the requisite period in the form of tax records, pay stubs, employee attendance records, employment verification letters, bank statements and correspondence, copies of the applicant's California driver's license, a witness affidavit, and a landlord statement indicating that the applicant resided at a property in Oregon from February 1982 to July 1987. 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 residence in the United States for the requisite period.

The record shows that on April 12, 1987, the applicant was arrested and charged with second degree theft in violation of section 164.045 of the Oregon Revised Statutes (ORS). On October 9, 1987, the District Court in Oregon, dismissed this charge. The record also shows that on May 10, 1987, the applicant was arrested and charged with second degree assault in violation of section 163.175 of the ORS. However, this second degree assault charge was dismissed by the District Court in , Oregon on October 21, 1987. Furthermore, the record shows that on August 24, 1992, the applicant was arrested and charged with unlawfully obtaining or using food stamps in violation of ORS § 411.840. On January 29, 1998, the Circuit Court dismissed this charge.

Nevertheless, the record reflects that on June 26, 1957, the applicant was arrested and charged with illegal entry, a misdemeanor in violation of 8 U.S.C. § 1325. The applicant was convicted for this offense, was sentenced to imprisonment for two months, and was subsequently deported to Mexico on September 23, 1957. The record further reflects that on March 20, 1996, the applicant was charged with third degree theft in violation of section 164.043 of the ORS. On July 31, 1996, the applicant was convicted in the Oregon District Court of violating ORS § 164.043, third degree theft, a misdemeanor. For this offense, the applicant was placed on probation for a period of one year and was fined $150. Since the applicant has only been convicted of two misdemeanors, the section 245A(a)(4)(B) ground of ineligibility relating to a conviction for a felony or three misdemeanors does not apply. As such, the applicant remains eligible for temporary residence status.

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