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

U.S. Citizenship and Immigration Services

(b)(6)

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

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 May 13, 1983 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 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 CIS does not produce such evidence from the prior deportation or exclusion file,

[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."

then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

Documentary evidence in the record reflects that USCIS complied with the applicant's Freedom of Information Act (FOIA) request on July 15, 2005 and provided the applicant with 91 pages of record material. The record does not indicate, however, that the applicant ever received a tape recording and/or transcript of his deportation hearing. The applicant's physical file (currently in the possession of the AAO) contains no such tape or transcript. 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. As a result of the missing tape or transcript, 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 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 granted the applicant's Motion to Reopen and the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. However, 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, or occurred in violation of due process, or involved a gross miscarriage of justice. The director, therefore, denied the Form I-687 temporary residence 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 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).

In a decision dated March 29, 2013, the director found that the applicant did not make the necessary *prima facie* showing because evidence in the record establishes that his May 13, 1983 deportation was conducted in accordance with governing law and regulations. In support, the Service Center indicates that the record includes: an Order to Show Cause; the decision of the

immigration judge ordering the applicant deported to Mexico; and a warrant of deportation which reflects that the applicant was deported pursuant to a previously issued order. Consequently, the director denied the applicant's temporary resident application and certified the case to the AAO for review.

Upon certification to the AAO, the applicant submitted an affidavit dated April 23, 2013, stating:

> The decision of the Immigration Judge dated May 12, 1983 states that the "Respondent has made no application for relief of deportation." That statement is not correct. I asked the Immigration Judge to grant me voluntary departure. I was not represented by an attorney at the time of the deportation hearing.

Regarding the Order to Show Cause served upon the applicant on May 11, 1983, the AAO notes that the document does not indicate whether the notice of rights section was read to the applicant in a language that he understands. However, the regulations do not require the translation of the Order to Show Cause into the respondent's native language. The Act presumed that the alien was on notice of the information contained in the Order to Show Cause and notice of hearing upon proper service in the English language. *See* former 8 U.S.C. § 1229(a)(1); former 8 C.F.R. §§ 242.1(b) and (c); *see also Khan v. Ashcroft*, 374 F.3d 825, 830 (9th Cir. 2004) ("We hold that the INS did not violate petitioner's due process rights by failing to provide notice in petitioner's native language where, as here, he had actual notice and was personally served with notice at a hearing.")

The director's decision next references the May 12, 1983 decision of the immigration judge. In his decision, the immigration judge indicates that the applicant made no application for relief from deportation and ordered the applicant deported to Mexico. However, from documentation in the record consisting of the applicant's affidavit and a 1989 letter from the applicant's former counsel to the Legalization Appeal Unit, it would appear that the immigration judge denied voluntary departure due to the applicant not having the financial means with which to post an immigration bond. However, as the applicant's physical file does not contain the tape recording and/or transcripts of the May 12, 1983 deportation hearing, the AAO is unable to determine whether the applicant requested voluntary departure, the specific grounds upon which the immigration judge denied the applicant's request for voluntary departure and instead entered a deportation order, or whether the applicant made no application for relief from deportation.

With the tape recording and/or transcript being unavailable, the only documentation of the May 12, 1983 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 does not include other documentation suggesting that the applicant made no application for relief from removal. However, we note that the version of the Act in effect at the time of the applicant's deportation provided that an alien who entered without inspection remained eligible to voluntarily depart the United States. *See* former INA § 244(e); former 8 C.F.R. § 242.17(b) ("The respondent may apply to the special inquiry officer for voluntary departure in lieu of deportation pursuant to section

244(e) of the Act and part 244 of this chapter."); former 8 C.F.R. § 244.1 (stating that an immigration judge may grant a voluntary departure request to an alien who has not been convicted of an aggravated felony and who is willing and has the means with which to depart promptly from the United States). However, the objective evidence indicates that the applicant was ordered deported to Mexico on his first appearance before an immigration judge.

In relevant part, under the terms of the *Proyecto* amended order, counsel has requested a copy of the tape recording and/or transcript of the applicant's deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing in 1983, 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. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. However, counsel acknowledges receiving record material from USCIS. 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 outstanding deportation order appears valid under 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. When balancing the evidence in the record, including the applicant's sworn statement and the absence of the tape recording and/or transcript of the applicant's May 12, 1983 hearing to contradict the applicant's claims, we find the evidence sufficient to outweigh the contradicting documents. 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 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 for temporary resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in the Act. Section 245A(a)(4)(A), 8 U.S.C. § 1255a(a)(4)(A).

In this case, documentary evidence in the record indicates that the applicant has been residing in the United States unlawfully since November 1981. In support of his Form I-687 legalization application, the applicant submitted evidence in the form of witness affidavits and letters, medical records, earnings statements, three employment verification and reference letters, a small claims court judgment, and California Department of Motor Vehicles records, 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 residence in the United States for the requisite period.

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 on humanitarian grounds. He has established his eligibility for temporary resident status under section 245A of the Act. Consequently, the applicant's Form I-687 application will be approved.

ORDER: The director's decision denying the applicant's Form I-687 application is withdrawn. The application is approved.