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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

DATE: NOV 0 6 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
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 will be affirmed. The application will be denied.

On May 4, 1988, 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 March 6, 1986 departure pursuant to an order of deportation 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 17, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status application. In a decision dated November 14, 2011, the director granted the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds.

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

[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."

> 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.

In his legal brief, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, EOIR and USCIS have failed to provide the applicant with a complete copy of files relating to his deportation proceeding, including the tape recording and/or transcript of the deportation hearing. The record reflects that the applicant's April 3, 2004 FOIA request for a copy of the record of proceedings was completed by USCIS on January 24, 2005.[2] From the documentary evidence in the record, however, it does not appear that that the applicant ever received a tape recording and/or transcript of his deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing 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 transcript and 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 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 and approved the applicant's Form I-690 waiver application. However, the director denied the applicant's Form I-687, Application for Temporary Resident Status, finding that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his March 6, 1986 departure pursuant to an order of deportation. The director therefore denied the Form I-687 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

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[redacted]

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 (3rd Cir. 2004) (same).

Here, the record reflects that in a decision dated December 1, 1983, an immigration judge granted the applicant a period of 90 days, until March 1, 1984, in which to depart the United States voluntarily. The immigration judge further ordered that, should the applicant not depart within that period, he would be deported to Nigeria. As no evidence was provided of a departure by the applicant within the 90-day period, the applicant was deported on March 6, 1986.

Counsel claims the applicant voluntarily departed the United States prior to March 1, 1984. As evidence of that departure, counsel points to the 1988 Form I-687 application, on which the applicant claimed he voluntarily departed the United States in February 1984 and traveled to Nigeria. However, from a review of the application and supporting documentation, it is noted that the applicant has never provided any proof of this trip, such as a used airline ticket. Additionally, in more recent removal proceeding, an immigration judge in a decision dated July 1, 1999 at page 3 stated the following:

> The facts are as follows. The respondent stated that he first came to the United States for a visit in 1978 and returned to Nigeria. Then he came back in 1979. He was arrested on some credit card matter which caused him to be placed in deportation proceedings. He was granted voluntary departure, but did not leave on time. Then he was finally removed from the United States, but having overstayed the period of voluntary departure, it was regarded as a deportation.

To meet his burden of proof, an applicant must provide evidence of eligibility apart from his own testimony. 8 C.F.R. § 245a.2(d)(6). Although the applicant claims to have departed voluntarily within the time permitted, the record evidence establishes he was properly deported. The record contains the Form I-294, which is dated July 23, 1984 and indicates that the applicant has been deported to Nigeria. The record also contains the Form I-205, Warrant of Deportation, which indicates that on March 6, 1986, the applicant was deported at the Washington Dulles port of departure via airline The departure was witnessed by deportation officer and the Form I-205 bears the applicant's signature and right thumb print.

In relevant part, pursuant to the terms of the *Proyecto* amended order, counsel has requested a copy of the applicant's complete deportation file, including the tape recording and/or transcript of his client's deportation proceedings. The relevant regulation in existence at the time of the applicant's deportation hearings, 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. On January 24, 2005, USCIS fulfilled the applicant's FOIA request and released a copy of the applicant's 1983 deportation proceeding. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Therefore, it appears that USCIS has 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 therefore 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 there is no evidence that the immigration court maintained a tape recording of the applicant's deportation hearing. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits.

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).

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

An issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden due to his criminal conviction record.

The record includes the Court Docket for the applicant in the Third District Court, Salt Lake County, Utah, which reflects that on [redacted] the applicant pled guilty to and was convicted of "driving without registration," a class C misdemeanor in violation of Utah Code Ann § 41-1a-1303. At the time of the applicant's conviction, Utah Code Ann § 41-1A-1303 provided that:

> (1) (a) Except as provided in Subsection (2) or Section 41-1a-211, a person may not drive or move, or an owner may not knowingly permit to be driven or moved upon any highway any vehicle of a type required to be registered in this state:
> (i) that is not properly registered or for which a certificate of title has not been issued or applied for; or
> (ii) for which the required fee has not been paid.
> (b) A violation of this Subsection (1) is a class C misdemeanor.

Additionally, Utah law indicates that for a class C misdemeanor, a person may be sentenced to imprisonment for a term not exceeding 90 days. *See* Utah Code Ann. § 76-3-204(3), enacted by Chapter 196, 1973 General Session. Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's December 5, 1994 conviction for driving without registration, in violation of Utah Code Ann § 41-1a-1303, qualifies as a misdemeanor.

The applicant has other criminal convictions. The applicant's Court Docket also reflects that on [redacted] the applicant pled guilty to and was convicted of "failure to appear on citation," a class B misdemeanor in violation of Utah Code Ann § 77-7-22. For this offense, the applicant was fined $47.00. Utah Code Ann. § 77-7-22 provides, in pertinent part, that: "[a]ny person who willfully fails to appear before a court pursuant to a citation [] is guilty of a class B misdemeanor, regardless of the disposition of the charge upon which he was originally cited." Additionally, Utah

Code Ann § 76-3-204(2) provides that for a class B misdemeanor, a person may be sentenced to imprisonment for a term not exceeding six months. Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's conviction for failure to appear before a court pursuant to a citation, in violation of Utah Code Ann § 41-1a-1303, qualifies as a misdemeanor.

The record further reflects that on June 2, 1999, the applicant pled guilty in the Third District Court in Utah to the following offense: operate a private club in city without a license, in violation of Utah Code Ann § 5-50-020, a class B misdemeanor punishable by up to six months in jail. The district court held the applicant's guilty plea in abeyance and ordered the applicant be placed in probation for six months and pay $100.00 in court costs. The record reflects that on the district court dismissed the charge after finding that the applicant successfully met the requirements prescribed by the court.

Section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), defines "conviction" for immigration purposes as:

> A formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

In *U.S. v. Zanudio*, 314 F.3d 517 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that a guilty plea held in abeyance entered in a Utah state court satisfies the 8 U.S.C. § 1101(a)(48)(A) definition of a "conviction." 314 F.3d at 521-522. Additionally, in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), the Board held that under the statutory definition of "conviction" provided in section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Here, the statutory requirement of a conviction was met when the applicant entered a guilty plea and the district court imposed a penalty in the form of probation and court costs. Accordingly, the applicant has been convicted of a misdemeanor for immigration purposes.

Utah law indicates that for a class B misdemeanor, a person may be sentenced to imprisonment for a term not exceeding six months. *See* Utah Code Ann. § 76-3-204(3), enacted by Chapter 196, 1973 General Session. Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's June 2, 1999 conviction for operating a business without a license, in violation of Utah Code Ann § 5-50-020, qualifies as a misdemeanor.

Therefore, for immigration purposes, the applicant stands convicted of: driving without registration, a class C misdemeanor under Utah Code Ann § 41-1A-1303; failure to appear before a court pursuant to a citation, a class B misdemeanors in violation the Utah Code Ann § 77-7-22; and operate a private club in the city without a license, a class B misdemeanor in violation of Utah Code Ann § 5-50-020. As the applicant has been convicted of three misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act. *See also* 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.[3]

ORDER: The director's April 17, 2013 decision is affirmed. The Form I-687 application is denied.

[3] The applicant's FBI rap sheet report reflects that on January 14, 1986, the applicant was arrested and charged with attempted theft in Chicago, Illinois. The applicant submitted a certified statement of conviction, which reflects that on January 15, 1986, the attempted theft charge was dismissed and, therefore, will not be considered. The FBI rap sheet further reflects that on February 24, 1986, the applicant was arrested in Charlotte, North Carolina, for "false representation of a social security number." The record evidence indicates that this charge was dismissed and, consequently, will not be considered.