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

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 13 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: [redacted]

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: [redacted]

ON BEHALF OF APPLICANT:

[redacted]

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

[redacted]

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 June 24, 1987, the applicant filed a Form I-687, Application for Temporary Resident Status, pursuant to Section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225a. The director denied the application, finding that the applicant's January 25, 1987 and July 17, 1985 departures pursuant to orders of deportation meant he 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 26, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and 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. June 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.

Neither counsel nor the applicant responded to the certified denial. However, we note that in Part 3 of the Form I-290B, Notice of Appeal or Motion dated April 22, 2008, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, the Executive Office for Immigration Review (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 on September 10, 2003, USCIS fulfilled the applicant's June 19, 2003 FOIA request, and released an unstated amount of record material to the applicant. Counsel asserts that on April 1, 2008, the applicant received a partial response from the EOIR in regards to his FOIA request, but that the applicant did not receive a tape recording and/or transcript of his deportation hearing. In support, counsel submitted a letter dated September 30, 2008 by EOIR Associated General Counsel [redacted] In the letter, Ms. [redacted] indicates that the agency's April 1, 2008 response "included everything that could be found under the A numbers you have provided." Ms. [redacted] states that the agency has no additional materials relating to the applicant and that transcripts were likely not prepared in the applicant's case.

Therefore, from the documentary evidence in the record it does not appear that that the applicant ever received a tape recording and/or transcript of the 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 tape and/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 approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, on April 26, 2013, 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 January 25, 1987 and July 17, 1985 departures pursuant to orders of deportation. The director, therefore, denied the application and certified the matter to the AAO for a ruling. The AAO notes that in rendering a decision, the director noted that the proceedings which resulted in the applicant's deportation were conducted in compliance with the governing statute and regulations.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on this matter.

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 contends that the circumstances surrounding the applicant's deportations show it was defective and entered in violation of the governing statute and regulations. Counsel asserts that the applicant was ordered deported without the advice of counsel and that he was never given the opportunity to apply for voluntary departure.

Counsel states that the applicant was not afforded an opportunity to apply for voluntary departure but was instead ordered deported from the United States. The AAO notes that the applicant was not entitled to voluntary departure as a matter of law. Instead, the Attorney General was allowed, in his discretion, to permit certain aliens in deportation proceedings to depart voluntarily from the United States at their own expense if they established they had maintained good moral character for at least five years immediately preceding application for voluntary departure. INA § 244(e), 8 U.S.C. § 1254(e) (1980).

Furthermore, 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, the applicant may not establish a violation by alleging that he had a right to be informed of such relief.

Counsel next states that the applicant was not informed of his right to counsel. At the time of the applicant's deportation proceeding, section 292 of the Act provided as follows:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362.

The Attorney General promulgated 8 C.F.R. § 242.16(a) to implement former section 292 of the Act. At the time of the applicant's deportation proceedings, 8 C.F.R. § 242.16(a) provided in pertinent part:

> The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; [and] advise the respondent of the availability of free legal services programs . . . in the district where the deportation hearing is being held[.]

8 C.F.R. § 242.16(a) (1987).

We note that the statute and regulations provide that the alien respondent be notified of the right to counsel at various stages of the deportation proceeding, including in the OSC, *see* INA § 242B(a)(1)(E) (1982), and at the start of the deportation hearing itself, *see* 8 C.F.R. § 242.16(a) (1982).[2] Regarding the applicant's January 1985 deportation proceeding, the record evidence includes an Order to Show Cause (OSC) dated January 24, 1985. The OSC charges the applicant

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[2] Section 242B(a)(1)(E) of the Act provides that in deportation proceedings, written notice shall be given in person to the alien specifying that he or she may be represented by counsel and that the alien will be provided with a list of persons who may be available to represent aliens in deportation proceedings *pro bono*. The regulation at 8 C.F.R. § 242.16(a) adds that, at the commencement of the deportation hearing, the immigration judge shall advise the alien of his or her right to counsel of his or her choosing at no expense to the government, shall require the alien to state then and there whether he or she desires representation, and shall advise the alien of the availability of free legal services programs. The immigration judge shall also ascertain that the alien has received a list of such programs.

as being a native and citizen of Mexico who entered the United States without inspection in violation of former section 241(a)(2) of the Act. The OSC reflects that it was served upon the applicant on January 24, 1985, that the warnings and admonishments contained in the OSC, including the right to counsel at no expense to the government, were read to the applicant in the Spanish language, and that a list of free legal service providers was furnished to him.

With regards to the applicant's July 1985 deportation, the record reflects that the applicant was personally served with an OSC on June 6, 1985. The OSC charged the applicant with deportability pursuant to former section 241(a)(2) of the Act for having entered the United States without inspection. The record reflects that the "Notice to Respondent" section of the OSC informed the applicant of his statutory right to be represented, at no expense to the Government, by an attorney or other authorized individual qualified to represent persons before the Immigration and Naturalization Service.

However, as the tape recording of the applicant's deportation hearing is unavailable, the AAO is unable to determine whether the immigration judge advised the applicant of his right to counsel at the commencement of the deportation hearing. 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 immigration court maintained a recording of the applicant's deportation hearings. 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." Counsel has repeatedly requested a copy of the tape recording and/or transcript of the applicant's deportation hearings. 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. Further, the EOIR Associate General Counsel informed the applicant that it could not locate a cassette tape of the applicant's hearings and that hearing transcripts were likely not prepared in the applicant's case. Therefore, it appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all records relating to his deportation proceeding. 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 applicant's deportation hearings were recorded. 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).

Furthermore, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"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).

Here, a review of the record reveals that the applicant has several arrests and criminal convictions. On October 8, 2013, the AAO issued a Notice of Intent to Deny (NOID) the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested the applicant provide full criminal dispositions regarding the following matters, among others:

- The record contains an FBI rap sheet which shows that on December 6, 1979, you were convicted in San Diego, California of exhibiting a firearm, a misdemeanor in violation of section 417 of the California Penal Code. (Agency case number [redacted] For this

offense, the applicant was sentenced to three days in jail, was fined, and was placed in probation for a period of 36 months.

- The FBI rap sheet further shows that on June 7, 1985, the applicant was convicted in the United States District Court for the Southern District of California of illegal entry, a misdemeanor in violation of 8 U.S.C. § 1325. For this offense, the applicant was sentenced to 40 days imprisonment and was ordered to pay a $25.00 assessment.

- Additionally, in a legal brief dated October 4, 2010 counsel for the applicant asserts that on November 6, 1995 the applicant was charged with driving under the influence of alcohol in San Diego, California, a misdemeanor in violation of section 23152 of the California Vehicle Code. Though counsel states that the applicant pled guilty to the charge and was sentenced to 14 days imprisonment and three years of probation, counsel did not submit the relevant conviction record.

The applicant, through counsel, submitted documentary evidence in response to the NOID. The record reflects that on that on December 6, 1979, the applicant was convicted in San Diego, California of exhibiting a firearm, a misdemeanor in violation of section 417 of the California Penal Code. For this offense, the applicant was sentenced to three days in jail, was fined, and was placed in probation for a period of 36 months. Section 417 of the California Penal Code provides, in pertinent part, that:

> Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry, or threatening manner, or who in any manner, unlawfully uses a firearm in any fight or quarrel is punishable as follows:
>
> (A) If the violation occurs in a public place and the firearm is a pistol, revolver, or other firearm capable of being concealed upon the person, by imprisonment in a county jail for not less than three months and not more than one year, by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment.
>
> (B) In all cases other than that set forth in subparagraph (A), a misdemeanor, punishable by imprisonment in a county jail for not less than three months.

Additionally, section 19 of the California Penal Code provides that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's December 6, 1979 conviction for exhibiting a firearm, in violation of section 417 of the California Penal Code qualifies as a misdemeanor.

Regarding the applicant's June 7, 1985 conviction, the record includes the Record of Proceedings and Judgment by the United States District Court for the Southern District of California. It reflects that on June 7, 1985, the applicant pled guilty to and was convicted of misdemeanor illegal entry into the United States in violation of 8 U.S.C. § 1325. The Record of Proceedings and Judgment further reflects that the applicant was sentenced to 40 days imprisonment and was ordered to pay a $25.00 assessment.

The relevant statutory provision, 8 U.S.C. § 1325, provides, in pertinent part, that: "[a]ny alien who enters or attempts to enter the United States at any time or place other than as designated by immigration officers, . . . , shall, . . . , be fined under Title 18 or imprisoned not more than 6 months." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's June 7, 1985 illegal entry conviction in violation of 8 U.S.C. § 1325 constitutes the applicant's second misdemeanor conviction.

With regards to the applicant being charged with driving under the influence of alcohol in San Diego, California on November 6, 1995, counsel submitted the relevant California Department of Motor Vehicles Record. It reflects that on February 2, 1996, the applicant was convicted of driving under the influence of alcohol, with a blood alcohol level of more than 0.08 percent, a misdemeanor in violation of section 23152(b) of the California Vehicle Code. (Docket number For this offense, the applicant was placed on probation for a period of three years.

Section 23152 of the California Vehicle Code provides, in pertinent part, that:

> (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

Additionally, section 19 of the California Penal Code provides that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars ($1,000), or by both." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's conviction for driving under the influence of alcohol in violation of the California Vehicle Code qualifies as his third misdemeanor conviction.

Therefore, for immigration purposes, the applicant stands convicted of three misdemeanors: exhibiting a firearm, illegal entry, and driving under the influence of alcohol. 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.

ORDER: The director's April 26, 2013 decision is affirmed. The Form I-687 application is denied.