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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: OCT 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
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 April 28, 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 September 9, 1986 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 Immigration and Nationality Act, 8 U.S.C. § 1255a(g)(2)(b)(i).[1]

On March 27, 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. 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.

At the outset, the AAO notes that in a June 14, 2013 legal brief, counsel for the applicant acknowledged receipt of the tape recording of the applicant's 1978 deportation hearing held in Illinois. The record reflects that counsel submitted a copy of the cassette tape recordings to USCIS as evidence in support of his application for status as a temporary resident pursuant to the *Proyecto* amended order. Therefore, it can be determined that the applicant received the tape recording of his deportation proceeding. The applicant's physical file (currently in the possession of the AAO) contains two cassette tape recordings. Furthermore, the record reflects that on August 23, 1993, legacy INS fulfilled the applicant's Freedom of Information Act Request (FOIA), number and released the requested record material to the applicant. As a result, USCIS has complied with the District Court's order in that the applicant has been provided with complete copies of prior deportation files, including copies of tape recordings of the hearing before the immigration court.

Under the terms of the 2007 *Proyecto* amended order, the AAO's consideration of whether an applicant has made a *prima facie* showing that proceedings were not conducted in accordance with the law applies only in cases where the entire deportation record cannot be located. As the applicant has been provided with a complete copy of his deportation file, the AAO does not have the authority to determine whether the applicant has made a *prima facie* showing that the prior deportation 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. Consequently, we will not consider counsel's arguments regarding the immigration judge's obligation to inform the applicant of his eligibility for relief from deportation as it is not within the authority of the AAO to pass judgment on prior proceedings falling outside of its jurisdiction. The applicant may request the Immigration Court to take *sua sponte*, affirmative action under 8 C.F.R. § 1003.23(b)(1). The relevant portion of 8 C.F.R. § 1003.23(b)(1) provides that "[a]n Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." In addition, with the USCIS and the Executive Office for Immigration Review (EOIR) having provided the applicant with a copy of the tape recordings of his deportation hearings, the applicant may request judicial review and challenge the underlying deportation order pursuant to section 245A(f)(4) of the Immigration Reform and Control Act of 1986.

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. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act.

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

In deportation proceedings on September 7, 1978, the immigration judge granted the applicant the privilege of voluntarily departing the United States on or before November 7, 1978 in lieu of deportation. In the decision, the immigration judge further ordered that, should the applicant not depart within that period, an order of deportation would immediately and automatically become effective without further notice to the applicant. The applicant's period of voluntary departure was extended to March 10, 1979. As the applicant failed to depart from the United States voluntarily within the period granted by the immigration judge, the voluntary departure privilege was withdrawn and the applicant was ordered deported from the United States to Mexico. In support, the record contains the Form I-294 addressed to the applicant and dated May 30, 1984, which notified the applicant that he had been ordered deported to Mexico. The record also includes the Warrant of Deportation, Form I-205, which is dated May 31, 1984 and states the applicant is subject to deportation under section 241(a)(2) of the Immigration and Nationality Act.

As the documentary evidence in the record reflects that the applicant departed the United States on September 9, 1986, he departed the United States under an outstanding order of deportation. Consequently, the applicant "self-deported" pursuant to the regulations in effect at the time. *See* former 8 C.F.R. § 243.5 (1986) ("Any alien who has departed from the United States while an order of deportation is outstanding shall be considered to have been deported in pursuance of law, except that an alien who departed before the expiration of the voluntary departure time granted in connection with an alternate order of deportation shall not be considered to have been so deported.") Therefore, the record evidence establishes that the applicant did not reside continuously in the United States for the requisite period. On that basis, the applicant is statutorily ineligible for temporary residence status.

Though relief is provided in the Act for absences based on factors related to emergencies and absences approved under the advance parole provisions, it was not congressional intent to provide relief for absences during an order of deportation. In addition, general grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant's inadmissibility under section 212(a)(9)(A)(ii) for having been deported and having returned to the United States without authorization has been waived. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence requirement issue discussed above. Although the applicant's failure to maintain continuous residence and his inadmissibility for having been deported and having returned without authorization are both based on the deportation, a waiver is possible only for the inadmissibility.

There is no authority in the Act given to the Attorney General, now the Director, USCIS, to waive the statutory requirement of continuous residence in the United States. The Congress may have intended applicable waivers to be granted liberally in support of the legalization program. However, the clear intent of Congress was to deny legalization benefits to applicants who did not maintain their continuous residence in the United States because they were deported outside the United States.

As previously determined by the director, due to the applicant's self-deportation on September 9, 1986, he lacks the necessary continuous presence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the petition.

ORDER: The director's March 27, 2013 decision is affirmed. The Form I-687 application is denied.