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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 1 1 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 his 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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

On August 29, 1987, 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 February 24, 1983 and March 31, 1983 departures pursuant to deportation orders 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 19, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status 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.

Neither counsel nor the applicant responded to the certified denial. However, the record reflects that counsel has repeatedly requested complete copies of the applicant's prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court. On January 16, 1990, legacy INS fulfilled the applicant's Freedom of Information Act (FOIA) request, number , and released pages of record material in its entirety to the applicant. Moreover, on December 5, 1994, legacy INS fulfilled the applicant's FOIA request, number , and released pages of record material to the applicant. On February 15, 1999, legacy INS fulfilled the applicant's August 23, 1998 FOIA request, number and released pages of record material to the applicant. Furthermore, on June 12, 2002, legacy INS fulfilled a fourth FOIA request, number , and released pages of record material to the applicant. On December 18, 2003, the Nebraska Service Center provided the applicant with a certified copy of documentation of the applicant's February 24, 1983 deportation.

However, from the documentary evidence in the record it does not appear that that the applicant ever received a tape recording or a transcript of the deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain the tape recording and/or transcript of the applicant's deportation hearings. 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 to Reopen but denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, finding that the applicant was ineligible for a waiver on humanitarian grounds. The director further 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 (3rd Cir. 2004) (same).

Pursuant to the terms of the *Proyecto* amended order, counsel has requested a copy of the tape recording and/or transcripts of the applicant's deportation hearings. The relevant regulation in existence at the time of the applicant's deportation hearing, 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." On January 16, 1990, legacy INS released 75 pages of record material to the applicant. On December 5, 1994, legacy INS released 113 pages of record material to the applicant. Additionally, on February 15, 1999, legacy INS released 138 pages of record material to the applicant. Furthermore, on June 12, 2002, legacy INS released 92 pages of record material to the applicant. On December 18, 2003, the Nebraska Service Center provided the applicant with a certified copy of documentation of the applicant's February 24, 1983 deportation. However, the current entire USCIS record, which is before the AAO, does not contain the tape recordings and/or transcripts of the applicant's deportation hearings. 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.

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 as there is no evidence that the immigration court maintained a recording of the applicant's deportation hearings. 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 support of his Form I-687 legalization application, the applicant submitted evidence in the form of a school enrollment verification letter issued by the , a California driver's license, an identification card issued by the Laborer's Local No. of the Laborer's International Union of North America, a letter certifying that the applicant first joined Local No. on September 23, 1983, a California Department of Motor Vehicles Customer Receipt, employment verification letters in official employer letterhead, pay stubs, and state and federal income tax returns, all 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 establishing his continuous residence in the United States for the requisite period.

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). "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). "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).

The record reflects that on June 14, 1982, the applicant was convicted in California of driving under the influence of alcohol, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. For this offense, the applicant was sentenced to probation. The record further reflects that on July 2, 1985, the applicant was again convicted of driving under the influence of alcohol, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. For this offense, the applicant was placed on probation for a period of three years. Pursuant to section

245A)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B), two misdemeanor convictions do not disqualify the applicant for temporary resident status.

An alien who applies for temporary resident status must further establish that he or she is admissible to the United States as an immigrant and 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) of the Act, 8 U.S.C. § 1255a(a)(4)(A).

The record reflects that on February 13, 1983, the applicant was apprehended by officers of the United States Border Patrol near El Paso, Texas. A narrative of the apprehension reflects that the applicant "made a strong oral false claim to the agents to being a U.S. citizen."

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
>
> (ii) Falsely claiming citizenship. –
>
> (I) In General –
>
> Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

The provisions of Section 212(a)(6)(C)(ii) relating to false claims to U.S. citizenship were added to the Act as part of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The AAO notes that aliens making false claims to U.S. citizenship on or after September 30, 1996 are ineligible to apply for a Form 1-601 waiver. *See* Sections 212(a)(6)(C)(ii) and (iii) of the Act. However, if the false claim was made prior to the enactment of IIRIRA, September 30, 1996, it is treated as misrepresentation under section 212(a)(6)(C)(i) of the Act and the alien is eligible to apply for a waiver under section 212(i). *See Memorandum by Lori Scialabba, Associate Director, RAIO, Donald Neufeld, Associate Director, Domestic Operations Directorate, Pearl Chang, Acting Chief, Policy and Strategy, dated March 3, 2009.*

> In considering a case where a false claim to U.S. citizenship has been made, Service [USCIS] officers should review the information on the alien to determine whether the false claim to U.S. citizenship was made before, on, or after September 30,

> 1996. If the false claim was made before the enactment of IIRIRA, Service [USCIS] officers should then determine whether (l) the false claim was made to procure an immigration benefit under the Act; and (2) whether such claim was made before a U.S. Government official. If these two additional requirements are met, the alien should be inadmissible under section 212(a)(6)(C)(i) of the Act and advised of the waiver requirements under section 212(i) of the Act.

Memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, Immigration and Naturalization Service, dated April 8, 1998 at 3.

Here, documentation in the record reflects the applicant made a false claim to U.S. citizenship prior to September 30, 1996, which is the enactment date of IIRIRA. As such, his false claim to U.S. citizenship is treated as a misrepresentation under section 212(a)(6)(C)(i) of the Act.

The record further reflects that at the time of the applicant's February 13, 1983 apprehension, the Border Patrol officers discovered that the applicant made arrangements in Mexico to smuggle 10 citizens of Mexico to Dallas, Texas for $350 each. A narrative of the apprehension indicates that each alien paid the applicant $100 in advance, with the remaining balance to be paid on arrival in Dallas, Texas. Additionally, documentation in the record indicates that on March 19, 1983, the applicant was apprehended again by officers of the United States Border Patrol. A narrative of the incident reflects that the applicant was as the driver of a vehicle with five "other EWI's en route to Albuquerque, NM, via Hwy 52."

Section 212(a)(6)(E) of the Act provides that:

> Smugglers (i) In General – Any alien, who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of the law, is inadmissible.

Additionally, the applicant was deported from the United States on February 24, 1983 and on March 31, 1983. As he returned to the United States without inspection within five years of his departure pursuant to an order of deportation, he is inadmissible to the United States under section 212(a)(9)(A)(i) of the Act.

An applicant for temporary resident status under section 245A of the Act has the burden to establish by a preponderance of the evidence that he or she is admissible to the United States. *See* 8 C.F.R. § 245a.2(d)(5). The applicant might only overcome these particular grounds of inadmissibility if he applies for and secures a waiver for the grounds of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The record reflects that the applicant submitted to the director a Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of the above-mentioned grounds of inadmissibility. Here, the applicant's Form I-690 was approved by the AAO in a separate decision. Consequently, the

applicant has established his eligibility for temporary resident status under section 245A of the Act. The applicant's Form I-687 application will therefore be approved.

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