U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: Nebraska Service Center Date: [illegible]

IN RE: Applicant: [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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that decided and certified your case.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for temporary resident status (legalization) was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The decision will be affirmed.

The application was originally denied by the Director, Western Regional Processing Facility. An appeal of that decision was dismissed. The Director, Nebraska Service Center granted a motion to reopen that was recently filed by the applicant pursuant to a class action lawsuit entitled *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB (D. Ariz.). The decision in that case allows an alien whose application was denied or whose status was terminated because he had been outside of the United States after January 1, 1982 under an order of deportation to have his application reopened.

The applicant was deported on October 30, 1984. Both directors noted that the applicant was outside of the United States under an order of deportation after January 1, 1982, and therefore did not reside continuously in the United States since such date.

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. § 1255(g)(2)(b)(i).

Neither counsel nor the applicant has responded to the certified denial. With the request to reopen, counsel stated that the applicant should not have been deported because he had already departed the United States voluntarily within the authorized period of departure.

The applicant did not establish to the satisfaction of the district director in 1984 that he had departed voluntarily, and he was therefore deported. It was the responsibility of the applicant to have both complied with the grant of voluntary departure and to have demonstrated his compliance by reporting to government officials at the border or at the U.S. Embassy or Consulate.

Counsel also asserted that it is a violation of the equal protection clause of the Fifth Amendment to rule that aliens who were deported cannot meet the continuous residence requirement, because other aliens who were ordered deported and did not depart are treated differently. There has been no judicial finding that the section of law that states that deported aliens failed to maintain continuous residence is unconstitutional.

Relief is provided in the Act for absences based on factors other than deportation, specifically absences due to emergencies and absences approved under the advance parole provisions. Clearly, with respect to maintenance of continuous residence, it was not congressional intent to provide relief for absences under an order of deportation.

Because of the deportation, the applicant did not reside continuously in the United States for the requisite period. On that basis, he is statutorily ineligible for temporary residence.

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 may be waived. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence issue discussed above. Although the applicant's failure to maintain continuous residence, and her inadmissibility for having been deported and having returned without authorization, are both based on the deportation, a waiver is possible only for the inadmissibility.

The question has arisen as to why, if the above interpretation is correct, the law would allow for a waiver of inadmissibility in the case of a deported alien while providing no waiver for a lack of continuous residence, also based on a deportation. It is noted that not all aliens who were deported in the past fail to meet the continuous residence requirement. For example, an alien who was deported in 1980 and reentered the United States before January 1, 1982 would be inadmissible because of the deportation and yet would not be ineligible for legalization on the continuous residence issue.

In summary, the applicant was out of the United States after January 1, 1982 under an order of deportation, and cannot be granted temporary residence for two reasons. He failed to maintain continuous residence, and there is no waiver available. Therefore, he is ineligible for temporary residence. Secondly, he is inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. The applicant filed a waiver application in an effort to overcome such inadmissibility. That waiver application was denied by the director, and the decision was affirmed by the AAO in a separate decision.

The applicant was deported on October 30, 1984 and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence.

Finally, the applicant was convicted of four misdemeanors committed in the United States, as set forth in the original decision by the facility director. He is thus ineligible for temporary residence under section 245A(b)(1)(C)(ii) of the Act, which relates to any alien convicted of a felony or three or more misdemeanors committed in the United States.

The applicant provided expungements for two of the convictions. Although expungements were effective in past proceedings, under the statutory definition of "conviction" provided at section 101(a)(48)(A) of the Act, no current 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. Any subsequent action which overturns a conviction, other than on the merits of the case, is ineffective to expunge a conviction for immigration purposes. An alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

ORDER: The director's decision is affirmed. This decision constitutes a final notice of ineligibility for temporary residence.