U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: JAN 10 2006

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Inadmissibility 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 originally decided your case.

Ellen C. Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

JAN1006-0128245

DISCUSSION: The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center. It is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The director denied the waiver application because the applicant was otherwise ineligible for temporary residence in the legalization program. The director determined that it would serve no purpose to grant a waiver that could not enable the applicant to gain temporary residence.

In response, counsel indicates the applicant has lived in the United States since 1971, owns numerous properties worth approximately four million dollars, is active in the church, and supports his wife. Counsel contends that, if the waiver application is granted, both the applicant's inadmissibility for having been deported and his failure to maintain continuous residence because of the deportation will be waived.

In proceedings on September 7, 1978, the immigration judge ordered the applicant to be deported to Mexico unless he departed the United States by November 7, 1978. His period of voluntary departure was extended to March 10, 1979. He did not depart by that date, but did leave the United States on September 9, 1986. He therefore "self-deported" pursuant to the former 8 C.F.R. § 243.5, now 8 C.F.R. § 241.7. That regulation states that any alien who departed the United States while an order of deportation was outstanding is 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 is not considered to have been deported.

The applicant is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), which relates to aliens who were deported and reentered the United States without authorization. He is also inadmissible under section 212(a)(6)(C)(1) of the Act, 8 U.S.C. § 1182(a)(6)(C)(1), for having attempted to acquire a benefit by misrepresentation, as he attempted to obtain permanent resident status in 1973 on the basis of a sham marriage entered into solely for immigration purposes. Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), such inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

The applicant states that he has resided in the United States since 1971. Nevertheless, the director denied the waiver application because the applicant cannot otherwise qualify for temporary residence in the legalization program, as he fails to meet the "continuous residence" provision of the legalization program.

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).

Because he was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

Congress provided no relief in the legalization program for failure to maintain continuous residence due to a departure under an order of deportation. Relief is provided in the Act for absences based on factors other than deportation, namely 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.

The general grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. An applicant's inadmissibility under section 212(a)(9)(A)(ii)(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 an entirely separate issue from the continuous residence 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 predicated on the deportation, a waiver is available 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 and yet provide no waiver for a lack of continuous residence, also based on a deportation. Clearly, not all aliens who were deported in the past failed to meet the continuous residence requirement. For example, an alien who was deported in 1979 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.

Counsel points out that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) concluded that a waiver would cover both the inadmissibility and the continuous residence issue. However, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th Cir. 1999) the court of appeals ruled that the district court lacked jurisdiction to compel the Immigration and Naturalization Service (INS), now Citizenship and Immigration Services, or CIS, to change its interpretation of the statute.

The July 31, 2001 letter submitted by counsel from the United States Senate Committee on the Judiciary is noted. The senators urged INS to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. Although it is true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Concerning waivers of grounds of inadmissibility, counsel cites H.R. Rep. No. 98-115, 98th Cong. 1st Sess., 69-70 in which it was stated that, normally, denials of legalization on the basis of the waivable exclusions should only occur when the applicant is also ineligible for legalization on other grounds. The director's denial of the waiver application, because the applicant cannot otherwise qualify for legalization due to the "continuous residence" provision of the legalization program, is not inconsistent with that statement.

In support of his decision to deny the waiver application because the applicant is otherwise ineligible for legalization, the director cited *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) and *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). While those decisions relate to applications for permission to reapply for admission after deportation, the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because the alien was ineligible for the overall benefit of lawful residence.

It is concluded that the director's decision to deny the waiver application because no purpose would be served in granting it was proper, logical and legally sound. Therefore, it shall remain undisturbed.

In 1988, also in the legalization program, the applicant filed an earlier waiver application in an effort to overcome his inadmissibility under the same grounds. Neither the director nor counsel has mentioned this application. In the action block on this waiver application the adjudicating officer, on September 15, 1989, identified himself as the officer recommending the action and wrote the word "grant" in the block. When the legalization (temporary residence) application was initially denied six weeks later on November 1, 1989 the Director, Northern Regional Processing Facility's decision stated: "Any waiver application so filed must be rejected." It appears the "grant" notation on the waiver application was a recommendation, which was not actually adopted. Even if we were to consider the waiver application to have been granted, the fact remains that a waiver of inadmissibility does not relate to a failure to maintain continuous residence, as discussed above.

ORDER: The recent decision of the Director, Nebraska Service Center to deny the second waiver application is affirmed, and that application remains denied.