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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: Nebraska Service Center

Date: **APR 04 2005**

IN RE:

Applicant:



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:



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.

Handwritten signature of Robert P. Wiemann

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 because he had been outside of the United States after January 1, 1982 under an order of deportation to have his application reopened.

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).

The applicant was deported on November 7, 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.

Neither the applicant nor counsel has responded to the certified denial. Earlier, with the motion to reopen, counsel asserted that the deportation of the applicant was unlawful. According to the applicant, he was brought before the immigration judge with numerous other aliens in a mass deportation hearing. He claimed that he was not advised of his rights to request voluntary departure and to appeal the judge's decision.

The record does not contain a transcript of the deportation hearing. It does contain the November 4, 1984 Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien. On it is stamped the November 7, 1984 Order of S.I.O. (Special Inquiry Officer, or Immigration Judge) indicating that the applicant waived his right to appeal, and ordering that he be deported to Mexico.

Counsel maintains that Citizenship and Immigration Services, in this proceeding, has the authority to review prior actions of the immigration judge. He argues that a review of the deportation proceedings will result in a finding that the applicant was unlawfully deported. However, it is not within the authority of this office to pass judgment on judicial proceedings. The claim that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was appealable at the time to the Board of Immigration Appeals.

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.

Counsel asserts that a lack of continuous residence in such circumstances may be waived. Congress set forth, at section 245A(d)(2) of the Act, 8 U.S.C. 1255a(d)(2), a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act, 8 U.S.C. 1182(a). Section 245A(g)(2) of the Act, 8 U.S.C. 1255a(g)(2), concerning *continuous residence*, is a separate section unrelated to the waiver provisions. 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. While the applicant's failure to maintain continuous residence, and his inadmissibility for having been deported and having returned without authorization, were both predicated on the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II).

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 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.

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 held that the district court lacked jurisdiction to compel INS 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 the Immigration and Naturalization Service (INS, now Citizenship and Immigration Services, or CIS) to consider an approved waiver application to overcome both the ground of inadmissibility and the failure to maintain continuous residence. While we agree 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.

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.

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