



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED]  
XVN 88 503 1108

Office: Nebraska Service Center

Date: OCT 30 2008

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, Chief  
Administrative Appeals Office

**DISCUSSION:** According to a computer printout in the record, reflecting updates by the Los Angeles office of the legacy Immigration and Naturalization Service (INS), the Form I-687 application for temporary residence (legalization) was originally denied on April 13, 1989. However, there is no such dated denial notice in the record. In addition, on October 26, 1992 and April 25, 1994 the Director, Western Service Center, issued notices to the applicant advising him that his application remained pending. As that director had jurisdiction over the application, and as there is no denial order in the record dated April 12, 1989, it is concluded that the application was not denied on April 13, 1989.

The record contains an improperly submitted appeal form from the applicant dated September 29, 1992, that was not fee-registered. The application had not been denied, and the record does not contain a properly filed appeal.

As stated above, on October 26, 1992 and April 25, 1994 the Director, Western Service Center, issued notices to the applicant advising him that his application remained pending. Nevertheless, the Director, Texas Service Center, reopened the matter on June 12, 2003, and in doing so incorrectly indicated that the application had been denied on March 13, 1989. That director requested that the applicant submit documentation, most of which was already in the record. When the applicant did not respond, the director terminated action on the application and advised the applicant that his application was considered abandoned. Because that entire reopening and rendering of a decision was in error, it is withdrawn.

On April 2, 2006, the Director, Nebraska Service Center (center director) 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. May 21, 2001). 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 for temporary resident status reopened and adjudicated on a *de novo* basis. The Director, Nebraska Service Center, denied the application for temporary resident status and certified his decision to the Administrative Appeals Office (AAO). As the initial Form I-687 application was terminated for failure to respond and not denied based on an absence after deportation, this matter does not actually constitute a *Proyecto* case. Accordingly, the director's determination that this may be considered a *Proyecto* case is withdrawn. However, as the center director has now fully considered the Form I-687 application and all supporting documents in issuing his certified decision, a final decision will be rendered by the AAO. The portion of the center director's decision finding that the alien did not establish eligibility for temporary resident status will be affirmed.

The applicant was deported on June 19, 1984. The center director noted 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. The applicant has not responded to the certified decision.

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).

As a result of the deportation, the applicant did not reside continuously in the United States for the requisite period. He is therefore statutorily ineligible for temporary residence on that basis.

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, 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 that were prolonged because of 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, are both predicated on the deportation, a waiver is possible only for the inadmissibility under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II).

The question has arisen as to why 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 fail to meet the continuous residence requirement. For example, an alien who was deported in 1978 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. Accordingly, an alien who has been deported or removed may be eligible for a waiver, but must still establish that he has met the continuous residence requirement as a separate eligibility criterion.

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. First and foremost, 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)(II) of the Act as an alien who was deported and returned without permission. That ground of inadmissibility may be waived. The applicant did not file a waiver application.

The applicant was deported, and therefore did not maintain continuous residence as required by section 245A(a)(2) of the Act. He remains ineligible for temporary residence, and inadmissible under section 212(a)(9)(A)(ii)(II) of the Act.

Beyond the director's decision, the alien has a criminal history record which may be an additional ground of ineligibility. His failure to submit requested information related to his criminal history record is an additional ground for denial of the application.

Pursuant to section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B), the applicant must establish that he has not been convicted of any felony or of three or misdemeanors committed in the United States.

1. On Form I-687, the applicant indicated that in 1984 he had been arrested, convicted or confined in a prison for driving without a license. The final disposition is unknown. Although the location of the offense is unknown, the alien claimed to have continuously resided in California from 1981 through 1988. Accordingly, if the alien was ultimately convicted of this offense in California, then it would constitute a misdemeanor under section 12500 of the California Vehicle Code.
2. The applicant was convicted on February 23, 1984 of 8 U.S.C. § 1324(a)(2), for having knowingly and unlawfully transported an alien within the United States knowing he was in the United States in violation of law. On March 30, 1984 he was sentenced to 140 days under 18 U.S.C. § 5010(a) and § 3651 under the Youth Corrections Act. (CR No. [REDACTED] U.S. District Court, Southern District of Texas, Brownsville Division).
3. The applicant was arrested under the name of [REDACTED] by the Los Angeles Police Department on May 15, 1988 for Force/Assault with Deadly Weapon: Great Bodily Injury, a violation of section 245 of the California Penal Code (felony). The final disposition of this offense is unknown.
4. The applicant was arrested by the Dallas Sherriff's Office on March 6, 1991 for Unlawful Use of Motor Vehicle, a violation of section 31.07 of the Texas Penal Code (third degree felony) The final disposition of this offense is unknown.
5. Finally, he was arrested by the U.S. Border Patrol for a violation of immigration law on August 4, 1989. The applicant was released.

The applicant has at least three arrests for which the final disposition is unknown, two of which were punishable as felony offenses, and one of which may be a crime involving moral turpitude. If convicted of a single felony, this would constitute another ground of ineligibility. See section 245A(a)(4)(B) of the Act; 8 C.F.R. § 245a.2(c)(1). In addition, the offense of Assault with a Deadly Weapon is a crime involving moral turpitude. *Matter of O-*, 3 I&N Dec. 193 (BIA 1948). A conviction of a crime involving moral turpitude could render the alien inadmissible under section 212(a)(2)(A)(i) of the Act. Finally, if convicted of 2 or more offenses for which the aggregate sentences to confinement were 5 years or more, the alien would be inadmissible under section 212(a)(2)(B) of the Act. An alien who is inadmissible is ineligible for temporary resident status. See section 245A(a)(4)(A) of the Act; 8 C.F.R. § 245a.2(c)(3).

On June 12, 2003, the applicant was requested to submit all arrest records and the final court dispositions. The applicant did not provide these documents. On June 24, 2004, the applicant was again requested to submit all arrest records and the final court dispositions. He again failed to provide this evidence. An alien applying for adjustment of status 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 under

this section. The alien has failed to submit requested evidence regarding this criminal history record. Failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the application or petition. 8 C.F.R. § 103.2(b)(13). For this additional reason, the application may not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

**ORDER:** The portion of the director's decision finding that the alien is ineligible for temporary resident status is affirmed. This decision constitutes a final notice of ineligibility.