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

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FILE:



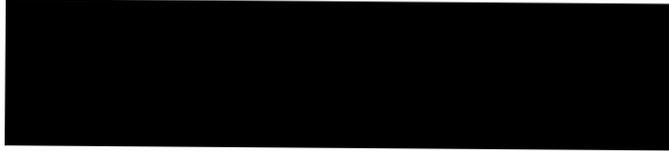
Office: NEBRASKA SERVICE CENTER

Date: SEP 28 2006

LIN-05-244-51215

IN RE:

Applicant:



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:



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.

Robert F. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application for waiver of inadmissibility within the legalization program, pursuant to *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB (D. Ariz.), was denied by the Director, Nebraska Service Center, and 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 reasoned that there would be no purpose in granting a waiver that could not assist the applicant in gaining temporary residence.

In response to the certified decision, counsel reiterates her request that she be granted additional time to respond, as the Executive Office for Immigration Review (EOIR) has not yet provided her with copies of the tapes or transcripts of the applicant's deportation hearing. Earlier in these proceedings, counsel contended that the applicant's inadmissibility for having been deported and having reentered without authorization should be waived, and that this waiver would also cure the break in continuous residence.

Prior to the issuance of the director's decision, counsel filed a Freedom of Information Act (FOIA) request with EOIR, in an attempt to obtain a copy of the transcript or tape relating to the applicant's deportation hearing. EOIR informed counsel that it had no records relating to the applicant. Counsel appealed that determination, and on April 18, 2005 the Office of Information and Privacy, Department of Justice, affirmed the decision of EOIR. On February 22, 2005, pursuant to another FOIA request, Citizenship and Immigration Services released the material that it had relating to the applicant. There is no indication that either CIS or EOIR has any other records to release to counsel that relate to the applicant, or that any FOIA request is now pending.

Counsel points out that the District Court order in *Proyecto, supra*, states that the class members shall be informed of their rights to obtain immigration files, including a "tape or transcript of the prior proceeding." Guidance was set forth in the *Federal Register*, Volume 68, No. 19 (Jan. 29, 2003) concerning the implementation of the order in *Proyecto, supra*. In section 13 of the *Federal Register*, it is stated:

The Service (CIS) may decide your motion to reopen at any time after you file it, unless you indicate in your motion that you are still awaiting the results of your FOIA requests. If you are still awaiting the results of your FOIA requests, the Service will not rule on your motion until you have had an opportunity to obtain and review the FOIA documents. You must submit a brief and any documents you want the Service to consider no later than six months after you have received a response to both of your FOIA requests.

In this case, counsel received FOIA responses from both CIS and EOIR. She appealed the response from EOIR, and received a decision on her appeal. The Director, Nebraska Service Center then properly held the matter in abeyance for an additional six months in case counsel wished to file a brief. The director then ruled on the waiver application. Almost two years have passed since the director first notified the applicant and counsel of the opportunity to file the waiver application, and to file FOIA requests. There is no other provision in the *Federal Register* that allows for another, *indefinite* waiting period for possible

additional FOIA action before a final decision may be rendered on the application. Nor is there a provision for multiple FOIA requests to one agency once the initial request has been complied with. Counsel's request for additional time in which to respond to the certified decision is denied.

An applicant for temporary residence (legalization) 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).

The deportation record in this matter is well documented. Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, reveals that on June 13, 1985 the immigration judge (special inquiry officer) found the applicant to be deportable, noted that the applicant waived his appeal, and ordered him to be deported to Mexico. Stamps and notations on this form indicate the applicant was indeed deported on June 14, 1985. Because 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. He is also 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. 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.

Counsel has demonstrated that the applicant has resided in the United States since 1978, and that he suffers from heart disease, liver disease and diabetes. The director nevertheless denied the waiver application because the applicant cannot otherwise qualify for legalization, as he fails to meet the "continuous residence" provision of the legalization program.

Relief is provided in the Act for absences based on factors other than deportation, specifically absences that were prolonged 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.

Counsel maintains that the audiotape or transcript of the deportation hearing may establish that the immigration judge erred, and that CIS, in this current proceeding, has the authority to review and overrule the actions of the judge. However, it is not within the authority of CIS to pass judgment on judicial proceedings. The assertion 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 subject to appeal, at the time, to the Board of Immigration Appeals. The applicant did not appeal.

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.

Counsel states that "Congress would have no purpose in creating a waiver for a prior deportation if a prior deportation rendered all legalization applicants unable to establish continuous residence." However, 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 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. A waiver of inadmissibility in such instance would serve a useful purpose.

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). Those decisions relate to applications for permission to reapply for admission after deportation, and yet the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner concluded 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.

It is noted that the applicant was arrested for Oral Copulation with Minor (Felony), section 288 of the California Penal code, on May 17, 1985. On June 5, 1985, the charges were dismissed.

ORDER: The decision is affirmed, and the application remains denied.