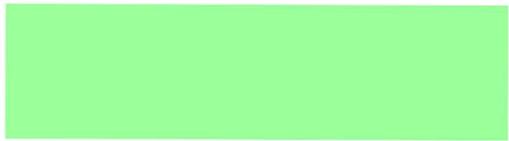




U.S. Citizenship
and Immigration
Services

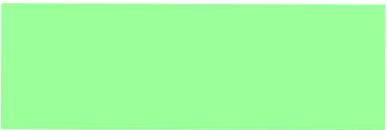
(b)(6)



DATE: **AUG 06 2013** OFFICE: NEBRASKA SERVICE CENTER

IN RE: 

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

FILE: 

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over the "Thank you," text.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

cc: Gibbs, Houston, Pauw
1000 Second Avenue, Suite 1600
Seattle, WA 98104

DISCUSSION: The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687). In a separate action, the director certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

The applicant filed an Application for Temporary Resident Status pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1225a. The director denied the application, finding the applicant's April 15, 1983 departure from the United States pursuant to an order of deportation meant the applicant failed to maintain the required continuous residence. *See* Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).¹

On April 1, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and the Form I-687 application.

This matter has a complex procedural history. In *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001), the U.S. District Court for the District of Arizona held that the legacy Immigration and Nationalization Service (legacy INS) violated the due process rights of a class of applicants for legalization under the Immigration Reform and Control Act of 1986 (IRCA) when it denied those applicants access to their complete deportation or exclusion files and prevented them from seeking waivers to "cure" prior deportations or exclusions. On March 27, 2001, the court ordered the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS) to reopen legalization applications filed by class members and (1) accept waiver applications submitted by class members and adjudicate them in the same manner as waiver applications filed by other legalization applicants were adjudicated; and (2) prior to making a decision on a reopened legalization application, provide the applicant with complete copies of prior deportation files, including copies of tapes and/or transcripts of the hearings before the immigration court, to enable the applicant to bring a collateral challenge to the deportation order, if appropriate. Subsequently, in *Proyecto San Pablo v. Dept of Homeland Security*, No. CV 89-456-TUC-RCC (D. Ariz. May 4, 2007), the court reiterated its March 27, 2001 holding and ruled that, if the entire record cannot be located by the defendants, the following burden of proof will apply:

A legalization applicant who may be denied on the basis of 8 U.S.C. 1225a(g)(2)(B)(i), or because of a prior deportation or exclusion order, must make a *prima facie* showing that the prior deportation or exclusion order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. If the applicant makes such a showing, then CIS has the burden of coming forward with a copy of the tape and/or transcript of the prior deportation or exclusion hearing . . . If

¹ The section provides that "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 the United States as a result of a departure under an order of deportation."

CIS does not produce such evidence from the prior deportation or exclusion file, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

Therefore, to invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his deportation order was either: the result of proceedings not in compliance with the governing law or regulations; or occurred in violation of due process; or was otherwise unlawful or involved a gross miscarriage of justice.

In this case, the director granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The director therefore denied the application and certified the matter to the AAO for a ruling. In rendering a decision, the director did not address whether the applicant was provided with a complete copy of his deportation file nor did the director discuss whether the applicant submitted *prima facie* evidence that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or resulted in a gross miscarriage of justice, as required by the amended *Proyecto* order.

The standard for establishing a *prima facie* case means the evidence reveals a reasonable likelihood that requirements have been satisfied. *See Fernandez v. Gonzales*, 439 F.3d 592, n.6 (9th Cir. 2006) (citing *Ordonez v. INS*, 345 F.3d 777, 785 (9th Cir.2003) (citations omitted)). A reasonable likelihood means showing a realistic chance that the petitioner can establish the issue in question at a later time. *Guo v. Ashcroft*, 386 F.3d 556, 564 (3rd Cir. 2004) (discussing the *prima facie* standard in the context of motions to reopen).

In applying these standards, the Board of Immigration Appeals (Board) and most Circuits employ a balancing test and weigh all evidence for and against in determining whether a *prima facie* case has been made. *See Zheng v. Mukasey*, 546 F.3d 70, 72 (1st Cir. 2008) (discussing the issue in the context of a motion to reopen); *Wang v. BIA*, 437 F.3d 270, 276 (2d Cir. 2006) (same); *Matter of J-W-S-*, 24 I&N Dec. 185, 191-92; *Matter of C-C*, 23 I&N Dec. 899, 902-03 (BIA 2006) (same); *Guo v. Ashcroft*, 386 F.3d 556, 564-66 (3rd Cir. 2004) (same).

In his May 21, 2013 statement on certification, counsel for the applicant states that the record evidence is insufficient to corroborate the applicant's deportation in 1983, that the applicant has previously stated that he did not recall the proceedings that resulted in his deportation, and that the applicant remains eligible for temporary resident status.

Counsel further states that pursuant to the *Proyecto* 2007 amended order, USCIS is required to provide class members with a copy of the tape recording and/or transcript of the prior deportation hearing, to enable the applicants to bring a collateral challenge to the deportation order, if appropriate. Here, the record reflects that the applicant's Freedom of Information Act (FOIA)

request, number [REDACTED] was processed on March 21, 2006, and that 98 pages of record material were released to the applicant. The record also contains a letter dated December 13, 2006 sent to the applicant and prior counsel, stating that the applicant was being provided a certified copy of documentation that corroborates the determination of legacy INS and USCIS that the applicant was deported from the United States on April 15, 1983. The letter enclosed the Form I-205 Warrant of Deportation relating to the applicant's deportation on that date. Finally, the AAO notified substituted counsel that if he had not received a copy of the tape of the deportation hearing, to inform the agency. No response was received.

The record of proceedings (currently in the possession of the AAO) contains a cassette tape recording of the applicant's April 14, 1983 deportation hearing.² The tape recording reflects that the applicant was provided with an interpreter and that the immigration judge explained the nature of the proceedings and the applicant's right to present evidence, all in accordance with the governing statute and regulations in effect at the time of the deportation hearing. *See* INA § 242B (1983) (providing that an alien must be informed of the nature of the charges against him or her, and given a reasonable opportunity to examine the evidence against him or her, and present evidence on his or her own behalf); 8 C.F.R. § 242.16(a) (1983) ("The Immigration Judge shall . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government. . . .") The tape recording of the hearing reflects that proceedings were translated into Spanish, which is the language the applicant understands. The immigration judge also read the factual allegations and the charges in the order to show cause to the applicant in nontechnical language, and entered the order to show cause as an exhibit in the record. *See* 8 C.F.R. § 242.16(a) (1983). Importantly, the recording of the hearing reflects that based upon the applicant's admissions and the documentary evidence presented into the record, the immigration judge made a finding of deportability by clear, unequivocal, and convincing evidence, as required by the regulation at former 8 C.F.R. § 242.14 (1983). Mexico was designated as the country of deportation pursuant to former section 243 of the Act.

Moreover, upon determining that the applicant was deportable as charged, the immigration judge inquired as to various possible forms of relief from deportation, including voluntary departure. *See* 8 C.F.R. § 242.17(a) (1983) ("The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing."). Government

² On May 31, 2013, the AAO sent a facsimile transmission to substitute counsel informing him that the applicant's physical file contained a cassette tape recording of the April 14, 1983 deportation hearing. The AAO provided counsel 10 days to request a copy of the recording; otherwise, the AAO would proceed under the assumption that counsel already received a copy. Since counsel did not request a copy of the tape recording, the AAO presumes that counsel has already received a copy of the tape recording and has reviewed its contents.

counsel opposed voluntary departure as evidence in the record showed the applicant used a counterfeit document to claim lawful permanent resident status. In addition, documentation in the record suggested the applicant was involved in the transportation of undocumented aliens into the United States. Based on the evidence in the record, the immigration judge denied voluntary departure in the exercise of discretion and ordered the applicant deported to Mexico. We note that the record reflects the applicant was not entitled to voluntary departure as a matter of law. Instead, the Attorney General was allowed, in his discretion, to permit certain aliens in deportation proceedings to depart voluntarily from the United States at their own expense if they established they had maintained good moral character for at least five years immediately preceding application for voluntary departure. *See* INA § 244(e) (1983). The recording of the hearing reflects that the immigration judge explained to the applicant his appeal rights, and that the applicant waived his right to appeal the decision of the immigration judge to the Board.

Other documents in the record pertaining to the applicant's deportation include the following:

- The Record of Deportable Alien (Record) is dated March 28, 1983 and states the applicant presented a counterfeit card to an immigration officer. The applicant indicated to the immigration officer he obtained the card from an unknown white male in San Diego, California.
- The Application for Order to Show Cause and Bond/Custody Processing Sheet (Form I-265) is dated March 29, 1983 and a stamp on the sheet indicates the applicant was issued a Form I-618 and a list of free legal services.
- The Order to Show Cause (OSC) is dated March 29, 1983 and the notes on the OSC indicate that the applicant admitted to being a native and citizen of Mexico who entered the United States for the purpose of seeking employment. At the deportation hearing convened on April 14, 1983, the immigration judge found the applicant deportable pursuant to section 241(a)(1) of the Act by clear, unequivocal, and convincing evidence.
- The Order of Deportation was rendered orally by the immigration judge on April 14, 1983, and orders that the applicant be deported to Mexico. The oral decision reflects that the immigration judge denied voluntary departure to the applicant in the exercise of discretion and that the applicant waived the right to appeal. The decision was rendered in accordance with the regulatory standards set forth in 8 C.F.R. § 242.19(b) (1983).
- The Notice of Order of Deportation (Form I-294) is dated April 15, 1983 and instructs the applicant that he has been ordered deported to Mexico. The Notice explains the ramifications of this and includes a Spanish translation.

- The Warrant of Deportation is dated April 15, 1983 and states the applicant is subject to deportation under section 241(a)(2) of the INA. It indicates the applicant was deported at Nogales, Arizona on April 15, 1983 and that he traveled by foot.

Upon consideration of the totality of the evidence in the record, the applicant has failed to make a *prima facie* showing that his deportation or deportation hearing was not conducted in accordance with the governing law or regulations, or occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice. When balancing the evidence in the record, including the tape recording of the applicant's hearing and the documentary evidence related to the deportation proceeding with the assertions of counsel and the applicant, we find the documentation sufficient to conclude that the applicant was deported pursuant to proceedings conducted in accordance with the governing standards. As a result, the applicant has failed to establish that the *Proyecto* order has implications for his legalization application.

As previously determined by the director, due to the applicant's deportation on April 15, 1983, he lacks the necessary continuous presence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the petition.

ORDER: The director's April 1, 2013 decision is affirmed. The Form I-687 application is denied.