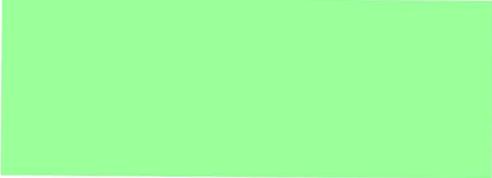


(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

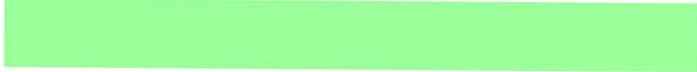


U.S. Citizenship
and Immigration
Services



DATE: **AUG 07 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".

Ron Rosenberg
Acting Chief, Administrative Appeals Office



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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

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 May 31, 1986 departure pursuant to a deportation order 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 09, 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 CIS does not produce such evidence from the prior deportation or exclusion file,

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."

then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

In his legal brief, counsel for the applicant conceded that he received a copy of the tape recording of the applicant's deportation proceeding. However, counsel states that the tape recording is indecipherable. On May 22, 1989, legacy INS released to the applicant record material related to the applicant's deportation hearing. On July 26, 1991, legacy INS released the entire record of proceedings to the applicant. From a review of the record of proceedings, it does not appear that the applicant ever received a transcript of the proceeding. The applicant's physical file (currently in the possession of the AAO) contains no such transcript. The court is not required to transcribe all deportation hearings, only to record them. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with a copy of his legalization file as it currently exists.

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. Also, the director approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. 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 Administrative Appeals Office (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 he 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, 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 (3d Cir. 2004) (same).

Counsel for the applicant states that the evidence and circumstances surrounding the applicant's January 14, 1986 deportation order shows that it was defective and entered in violation of the statute and regulations. The record reflects that the applicant was served with an Order to Show Cause on April 26, 1977. A hearing was convened on May 27, 1977, whereupon the applicant was served by Legacy INS with a letter indicating that pursuant to the injunction entered in the case *Silva v. Levi*, 76 C 4268, the Service "would take no action on [the applicant's] case until further order from the court. This means that you are permitted to remain in the United States without threat of deportation or expulsion until further notice." Importantly, the Immigration Judge Hearing Worksheet and Memorandum for May 27, 1977, contains a notation from the Immigration Judge in the "decision" section indicating that "proceedings terminated on [trial attorney's] request – TRO case." The record further contains a handwritten letter to file prepared by the Legacy INS trial attorney assigned to the case in which he states that "the 5-27-77 deportation hearing was terminated pursuant to the TRO." Therefore, with the tape recording being indecipherable, the only available documentation of the May 27, 1977 hearing indicates that deportation proceedings against the applicant were terminated and that he was served the "Silva letter" on that same day.

The administrative power to terminate deportation proceedings in appropriate cases has existed long before the relevant regulation regarding dismissal of cases was promulgated. *See Matter of Vizcarra-Delgadillo*, 13 I&N Dec. 51, 53 (BIA 1968); *Matter of B-*, 6 I&N Dec. 713 (A.G. 1955). The Board has held that after the commencement of a deportation hearing, only an immigration judge may terminate proceedings upon the request or motion of either party. *Matter of G-N-C-*, 22 I&N Dec. 281 (BIA 1998); *see also* 8 C.F.R. § 1239.2(c). In this regard, an immigration judge may terminate proceedings when the DHS cannot sustain the charges or in other specific circumstances consistent with the law and applicable regulations. *See Matter of W-C-B-*, 24 I&N Dec. 118 (BIA 2007) (discussing termination to permit reinstatement of a prior order of deportation); *Matter of Hidalgo*, 24 I&N Dec. 103 (BIA 2007) (discussing when termination is appropriate based on a pending naturalization application).

Moreover, the Board has stated that termination of removal proceedings for a valid reason cancels the issuance of the charging document. *See Matter of W-C-B-*, 24 I&N Dec. at 122 ("Instead, if there is a valid reason specified in the regulations for cancelling the Notice to Appear, the DHS may move for dismissal of the matter, i.e., request termination of the removal proceedings."). A termination order is without prejudice to the DHS to file the same charge or a new charge at a later time. 8 C.F.R. § 242.7(b) (1997) (Order to Show Cause); 8 C.F.R. § 1239.2(c) (2012) (Notice to Appear); *see Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984). However, it is understood that when the government wants to place the alien back into proceedings after a case is terminated or dismissed, it must file a new charging document with the immigration court. *Id.*

Here, it appears that the deportation proceeding against the applicant was terminated on May 27, 1977 by the immigration judge upon request made by the legacy INS trial attorney. Such request must have been based on the applicant qualifying as a class member in the *Silva v. Levi* class

action lawsuit and the injunction subsequently issued by the District Court Judge in that case. Consistent with the above-mentioned precedent case law, it would appear that no valid deportation order could have been entered against the applicant without the proper service of an Order to Show Cause prepared and issued subsequently to the May 27, 1977 termination order. A review of the entire record of proceedings in this case reveals that no subsequent charging document has been found. Yet, the documentation in the record reflects that on January 7, 1986, a notice of hearing was sent by the immigration court to the applicant's last provided address scheduling a deportation hearing on January 14, 1986. Documentation in the record establishes that this residence had burned in 1984, and that the applicant and his family no longer resided there. On January 14, 1986, proceedings were conducted *in absentia* and the applicant was ordered deported to Mexico. On May 31, 1986, the applicant was deported to Mexico.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, he has requested a copy of the tape recording and/or transcript of the deportation hearings. The relevant regulation in existence at the time of the applicant's deportation hearing, 8 C.F.R. § 242.15, indicated that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer." The record contains an audio cassette tape from the EOIR, purportedly relating to the applicant's deportation proceeding. However, the cassette tape is inaudible. The current entire USCIS record, which is before the AAO, does not contain any other tape recording or the transcript of the deportation hearings. It appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all available records relating to his deportation proceedings. While the applicant does not appear to be statutorily eligible for legalization without the special rules of construction set out by the court in the *Proyecto* amended order and the outstanding deportation order has apparently never been challenged to EOIR or to the Court of Appeals, we are obliged to follow, to the letter, the 2007 amended *Proyecto* order.

Having determined that the evidence in the record indicates that deportation proceedings against the applicant were terminated at the request of the trial attorney on May 27, 1977, it would appear that legacy INS should have issued a new Order to Show Cause prior to the immigration court scheduling a hearing to be held on May 31, 1986. As the record contains no evidence of the issuance and service of a subsequent charging document and the cassette tape recording of the hearings is inaudible, the AAO is persuaded that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing law and regulations. When balancing the evidence in the record, including the applicant's sworn statements, the documentary evidence in the record indicating that deportation proceedings were terminated, and the absence of a transcript to contradict the applicant's claims, we find the evidence sufficient to outweigh the contradicting documents. As a result, USCIS cannot use the

prior deportation order as evidence to support a denial of legalization benefits.² Consequently, the applicant has overcome the particular basis of the denial cited by the director.

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 245(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 the United States under an order of deportation. Section 245A(g)(2)(B)(i), 8 U.S.C. § 1255a(g)(2)(B)(i).

The applicant 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. The inference drawn from the documentation provided shall depend on the extent of the documentation, its credibility and amenability to verification. 8 C.F.R. § 245a.2(d)(5).

In support of his Form I-687 legalization application, the applicant submitted evidence in the form of W-2s wage statements, bank records, Form 1099s, employment verification letters, his children's birth certificates, and an Illinois-issued driver's license, all dated during the requisite period. The contemporaneous documents submitted by the applicant are credible. Upon review, the AAO finds that the documents furnished in this case may be accorded sufficient evidentiary weight to meet the applicant's burden of proof of residence in the United States for the requisite period.

The AAO finds that the applicant has met his burden of proof of establishing his eligibility for temporary resident status under section 245A of the Act. The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved on humanitarian grounds. He has established his eligibility for temporary resident status under section 245A of the Act.³

² In this case, the applicant is a member of the *Proyecto San Pablo* class action lawsuit. The record reflects that the applicant's deportation order was reinstated in 2003 after the applicant applied for legalization benefits. Pursuant to a District Court order issued in March 2001, DHS may not reinstate a prior deportation order against class members and, therefore, the reinstatement order against the applicant will not be considered.

³ The applicant was arrested on February 9, 2003 and charged with domestic battery in violation of section 720-5/12-3.2-A-1 of the Illinois Compiled Statutes (ILCS). As shown in the certified court disposition submitted by counsel in response to a request for evidence, the charge was dismissed "*Nolle Prosequi*" in the Circuit Court of Cook County, Illinois on February 24, 2003. The applicant was also arrested on May 23, 1995, and charged with domestic battery in violation of section 720-5/12-3.2A of the ILCS. The certified court disposition of the Cook County Circuit Court reflects that the charge was "stricken off docket with leave to reinstate." In Illinois, a case is

ORDER: The director's decision denying the applicant's Form I-687 application is withdrawn. The application is approved.

“stricken with leave to reinstate” by entering an order of dismissal when the State’s Attorney runs out of time to prosecute a case. *See People v. Totzke*, 974 N.E.2d 408, 413 (Ill.App. 2012). A “stricken with leave to reinstate” is a procedure similar to a *nolle prosequi*, which does not result in a conviction for immigration purposes under the requirements of section 101(a)(48) of the Act. *See id.* As the applicant has not been convicted of a felony or three misdemeanors, his arrests do not affect his eligibility for temporary resident status. *See* section 245A (a)(4)(B) of the Act.