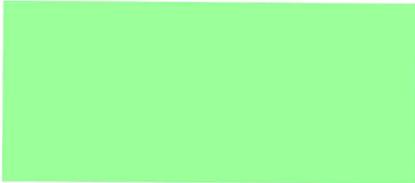




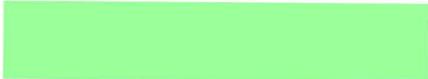
U.S. Citizenship
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Services

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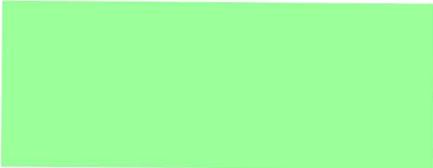
DATE: **AUG 07 2013** OFFICE: **NEBRASKA SERVICE CENTER**

IN RE:

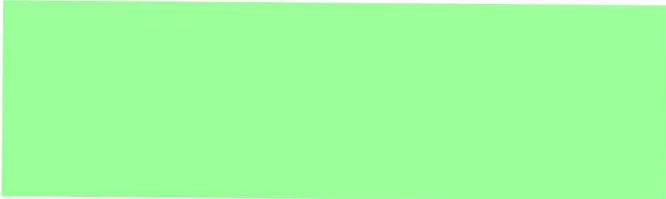


APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

FILE:



ON BEHALF OF APPLICANT:



INSTRUCTIONS:

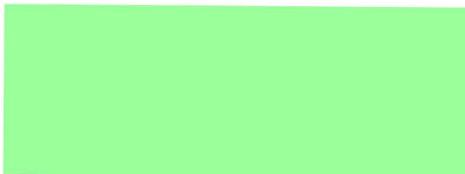
Enclosed please find the decision of the Administrative Appeals Office in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

cc:



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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 August 12, 1987 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-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 her May 6, 2013 legal brief, counsel for the applicant states that although she has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS have failed to provide the applicant with a copy of the tape recording of his deportation proceeding. On September 9, 2003, legacy INS released 135 pages of record material to the applicant. In a letter dated September 15, 2003, EOIR determined that upon review of all records related to the applicant's proceedings, "no tapes [sic] exists for this matter." We note, however, that on February 17, 2012 the EOIR responded to the applicant's July 14, 2011 third FOIA request by releasing a partially redacted transcript of the applicant's August 12, 1987 master calendar hearing.

However, the record does not indicate that the applicant ever received a copy of the tape recordings of his deportation hearing. The applicant's physical file (currently in the possession of the AAO) contains no such tape. 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. As a result of the missing tape, the applicant's complete file is unavailable.

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 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, 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 (3d Cir. 2004) (same).

Counsel for the applicant contends that the documentary evidence and the circumstances surrounding the applicant's August 17, 1987 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations.

Counsel states that the applicant was not informed of his right to counsel nor did he consent to the representation of the attorney who appeared on behalf of the applicant and all other respondents at the August 12, 1987 master calendar hearing. At the time of the applicant's deportation proceeding, section 292 of the Act provided as follows:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362.

The Attorney General promulgated 8 C.F.R. § 242.16(a) to implement former section 292 of the Act. At the time of the applicant's deportation proceedings, 8 C.F.R. § 242.16(a) provided in pertinent part:

The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; [and] advise the respondent of the availability of free legal services programs . . . in the district where the deportation hearing is being held[.]

8 C.F.R. § 242.16(a) (1987).

Here, the record reflects that the Order to Show Cause (OSC) served upon the applicant on July 21, 1987 provides that aliens in deportation proceedings may be represented, at no cost to the government, by an attorney or other individual authorized to and qualified to represent persons before the Immigration and Naturalization Service. Additionally, the OSC contains a notation indicating that legacy INS officers provided the applicant with a list of free legal service providers. However, we note that the statute and regulations provide that the alien respondent be notified of the right to counsel at various stages of the deportation proceeding, including in the OSC, *see* INA

§ 242B(a)(1)(E) (1987), and at the start of the deportation hearing itself, *see* 8 C.F.R. § 242.16(a) (1987).²

Upon reviewing the transcript of the applicant's August 12, 1987 deportation hearing, the AAO is persuaded by counsel's assertion that immigration judge conducted a group master calendar hearing and did not individually address the applicant regarding his right to legal representation of his choosing at no cost to the government. Rather, the transcript reflects that the attorney who appeared at the deportation hearing stated on the record that he represented all of the respondents present at the group deportation hearing. The transcript further reflects that this exchange between the immigration judge and the attorney was not interpreted to the alien respondents in a language which they understood.

The applicant states in a declaration dated April 30, 2013 that he never spoke with the attorney who represented him during the 1987 deportation hearing, that he did not know who he was, and that he does not remember signing any form authorizing the attorney to represent him or appear on his behalf. The applicant further states that the immigration judge did not inquire as to whether the applicant consented to representation by the attorney who made representations about his case at the deportation hearing.

The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has noted that the right to counsel notice requirement was not met in a group deportation hearing where it was unclear from the transcript whether each alien respondent stated a wish to proceed without counsel or whether they were questioned as to whether they wished for the legal counsel who was present at the hearing to represent them. *See, e.g., U.S. v. Ahumada-Aguilar*, 295 F.3d 943, 948-49 (9th Cir. 2002). Accordingly, under the terms of the *Proyecto* amended order, the AAO is persuaded that the applicant has made a *prima facie* showing that the deportation hearing convened on August 12, 1987 was not conducted in compliance with the regulations.

Additionally, counsel asserts that, under the terms of the *Proyecto* amended order, the deportation order occurred in violation of the governing regulations because there is no evidence that the court maintained a recording of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing in 1987, 8 C.F.R. § 242.15, indicated that "[t]he hearing

² Section 242B(a)(1)(E) of the Act provides that in deportation proceedings, written notice shall be given in person to the alien specifying that he or she may be represented by counsel and that the alien will be provided with a list of persons who may be available to represent aliens in deportation proceedings *pro bono*. The regulation at 8 C.F.R. § 242.16(a) adds that, at the commencement of the deportation hearing, the immigration judge shall advise the alien of his or her right to counsel of his or her choosing at no expense to the government, shall require the alien to state then and there whether he or she desires representation, and shall advise the alien of the availability of free legal services programs. The immigration judge shall also ascertain that the alien has received a list of such programs.

shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer.” Counsel has repeatedly requested a copy of the tape recording of the hearing. It is likely that the hearing was recorded, and possible that it was included among other hearings on one tape (as we understand was frequently the case); however, EOIR and USCIS searches have not produced a copy of the recording. Legacy INS released 58 pages to the applicant on August 21, 1996, and 135 pages of record material to the applicant on September 9, 2003. On February 17, 2012, the EOIR provided the applicant a partially redacted transcript of the August 12, 1987 deportation hearing. However, in a letter dated September 15, 2003, EOIR determined that upon review of all records related to the applicant’s proceedings, “no tapes [sic] exists for this matter.”

The current entire USCIS record, which is before the AAO, does not contain a tape recording. However, it does contain a transcript of the applicant’s group master calendar deportation hearing. As the record reflects that a copy of the transcript was provided to the applicant, USCIS and EOIR have fully complied with the court’s order to provide the applicant with all existing 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.

In light of the foregoing, we find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations. As a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order the AAO is constrained to find that 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).

An alien who applies for adjustment to temporary resident status must also establish that he or she is admissible to the United States as an immigrant, and has not been convicted of any felony, or three or more misdemeanors. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B). In addition, an applicant for temporary resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in the Act. Section 245A(a)(4)(A), 8 U.S.C. § 1255a(a)(4)(A).

In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of tax records, employment verification letters, affidavits from the applicant's sister and housemate, and California issued driver's licenses, 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 establishing his continuous unlawful 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.³ The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved. He has established his eligibility for temporary resident status under section 245A of the Act.

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

³ The record shows that on July 21, 1987, the applicant was convicted in the United States District Court for the Southern District of California of misdemeanor illegal entry into the United States in violation of 8 U.S.C. § 1325. For this offense, the applicant was sentenced to 15 days in jail and was ordered to pay a penalty of \$25.00. Pursuant to section 245A(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B), a single misdemeanor conviction does not disqualify the applicant for temporary resident status.