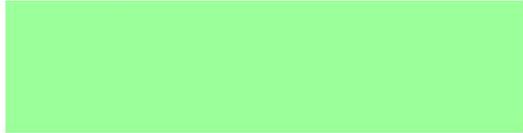




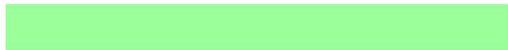
**U.S. Citizenship  
and Immigration  
Services**

(b)(6)



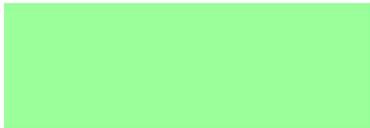
DATE: **AUG 07 2013** OFFICE: NEBRASKA SERVICE CENTER

IN RE:

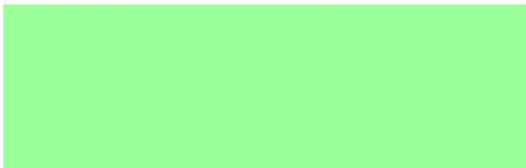


APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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", written over a circular stamp or mark.

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 March 26, 1986 deportation meant the applicant failed to maintain the required continuous residence. See Section 245A(g)(2)(b)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255a(g)(2)(b)(i).<sup>1</sup>

On March 29, 2013, the director granted the applicant's motion and reopened the Form I-687 and Form I-690 applications. The director approved the Form I-690 waiver 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

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<sup>1</sup> 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.

Neither counsel nor the applicant responded to the certified denial. However, the AAO notes that in a July 22, 2008 legal brief in support of the applicant's motion to reopen, counsel for the applicant acknowledged receipt of the transcript of the applicant's 1986 deportation hearing. The record reflects that counsel submitted a copy of the hearing transcript to USCIS as evidence in support of the applicant's 2008 motion to reopen pursuant to the *Proyecto* amended order. Therefore, it can be determined that the applicant received the transcript of his deportation proceeding. The applicant's physical file (currently in the possession of the AAO) also contains the hearing transcript. As a result, USCIS has complied with the District Court's order in that the applicant has been provided with complete copies of prior deportation files, including copies of transcripts of the hearings before the immigration court.

As the applicant has been provided with a copy of the hearing transcript, the AAO does not have the authority to determine whether the applicant has made a *prima facie* showing that the prior deportation 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. Under the terms of the 2007 *Proyecto* amended order, the AAO's consideration of whether an applicant has made a *prima facie* showing that proceedings were not conducted in accordance with the law applies only in cases where the entire deportation record cannot be located. Consequently, we will not consider prior arguments regarding ineffective representation by previous counsel as it is not within the authority of the AAO to pass judgment on prior proceedings falling outside of its jurisdiction. The applicant may request the Board of Immigration Appeals to take *sua sponte*, affirmative action under 8 C.F.R. § 1003.2(a). The relevant portion of 8 C.F.R. § 1003.2(a) provides that "[t]he Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." In addition, with the USCIS and EOIR having provided the applicant with a copy of the hearing transcript, the applicant may request judicial review and challenge the underlying deportation order pursuant to section 245A(f)(4) of the Immigration Reform and Control Act of 1986.

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.

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).

Documentation in the record shows that the applicant was deported from the United States to Mexico on March 26, 1986. As the applicant failed to depart from the United States voluntarily within the period granted by the Board of Immigration Appeals, the voluntary departure privilege was withdrawn and the applicant was ordered deported from the United States to Mexico. In support, the record contains the Form I-294 addressed to the applicant and dated January 14, 1986, which notified the applicant that he had been ordered deported to Mexico. The record also includes the Warrant of Deportation, Form I-205, which is dated April 9, 1986 and states the applicant is subject to deportation under section 241(a)(2) of the Immigration and Nationality Act. It indicates that the applicant, pursuant to section 8 C.F.R. § 243.5, self-deported at the port of San Francisco, California on May 26, 1986 via Mexicana Airlines. Therefore, the record evidence establishes that the applicant did not reside continuously in the United States for the requisite period. On that basis, the applicant is statutorily ineligible for temporary residence status.

Though relief is provided in the Act for absences based on factors related to emergencies and absences approved under the advance parole provisions, it was not congressional intent to provide relief for absences during an order of deportation. In addition, general grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant's inadmissibility under section 212(a)(9)(A)(ii) for having been deported and having returned to the United States without authorization has been waived. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence requirement 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 based on the deportation, a waiver is possible only for the inadmissibility.

There is no authority in the Act given to the Attorney General, now the Director, USCIS, to waive the statutory requirement of continuous residence in the United States. The Congress may have intended applicable waivers to be granted liberally in support of the legalization program. However, the clear intent of Congress was to deny legalization benefits to applicants who did not maintain their continuous residence in the United States because they were deported outside the United States.

As previously determined by the director, due to the applicant's deportation on March 26, 1986, 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 March 29, 2013 decision is affirmed. The Form I-687 application is denied.