



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

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

IN RE: [Redacted]

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: [Redacted]

ON BEHALF OF APPLICANT:  
[Redacted]

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 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 October 30, 1984 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).<sup>1</sup>

On March 26, 2013, the director granted the applicant's motion and reopened the Form I-687 and Form I-690. 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.

In his April 24, 2013 legal brief, counsel for the applicant states that the applicant has previously requested a complete copy of his deportation file, including any tape recording and/or transcript of the applicant's deportation hearing. Counsel indicates that although he 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 and/or transcript of his deportation proceeding. On August 4, 1988, legacy INS released record material to the applicant pursuant to a FOIA request. On August 29, 2003, legacy INS referred the applicant's FOIA request to the Nebraska Service Center after determining that if any record related to the applicant exists, it would be maintained by that office. Upon review of the record, it is unclear whether the referral resulted in record material being released to the applicant. The record contains what is purportedly a tape recording of the applicant's deportation hearing. However, the content of the recording is unintelligible.

From the documentary evidence in the record it does not appear that that the applicant received a discernible recording or a transcript of the deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing transcript. 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 transcript and tape recording, however, 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 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).

Counsel for the applicant contends that the documentary evidence and the circumstances surrounding the applicant's October 30, 1984 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations. Counsel asserts that evidence in the record establishes that the applicant departed the United States pursuant to an order of voluntary departure on September 1, 1984. Consequently, counsel contends that the October 30, 1984 deportation was unlawful.

The record reflects that the applicant entered the United States without inspection in July 1979. On April 23, 1984, an immigration judge entered an order granting the applicant, his wife and their daughter the privilege of voluntary departure from the United States on or before September 4, 1984. The applicant's father states in a sworn statement dated April 23, 2013, that no interpreter was present during his deportation hearing; that he did not understand the proceedings and was unable to explain to his wife and daughter what occurred; that he was not informed of his right to appeal the decision of the immigration judge; and that his attorney told him that he would have to depart the United States with his family before September 4, 1984 to avoid deportation. The applicant indicates that he voluntarily departed the United States with his family on September 1, 1984 but reentered several days later and returned to their residence.

The regulations in effect at the time of the applicant's hearing required the immigration judge to inform the applicant of his right to appeal the decision. *See* 8 C.F.R. § 242.16(a) (1984) ("The immigration judge shall . . . ascertain that the respondent has received . . . a copy of Form I-618, Written Notice of Appeal rights . . ."). The Ninth Circuit Court of Appeals, the jurisdiction under which this case arises, has noted that a failure to inform the respondent of his or her appeal right amounts to a due process violation. *See U.S. v. Lopez-Vasquez*, 985 F.2d 1017, 1020 (9th Cir. 1993); *U.S. v. Zarate-Martinez*, 133 F.3d 1194, 1197-98 (9th Cir. 1998). In this case, however, the Decision of the Immigration Judge (Form I-38) reflects that the applicant waived his right to appeal the immigration judge's decision to the Board.

Regarding the assertions that the applicant was not provided an interpreter at the deportation hearing, it is well-established that due process requires that an applicant in a deportation proceeding be given competent translation services. *See He v. Ashcroft*, 328 F.3d 593, 598 (9th

Cir. 2003); *see also Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (“If an alien does not speak English, deportation proceedings must be translated into a language the alien understands”); *see generally* former 8 C.F.R. § 242.12. Further, the version of the Act in effect at the time of the applicant’s hearing required the immigration judge to inform the applicant of the nature of the charges against him, and give the alien a reasonable opportunity to examine the evidence against him and present evidence on his own behalf. *See* former section 242(b) of the Act. Here, as the tape recording is indiscernible, the AAO is unable to determine whether an interpreter was present at his deportation hearing.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, the court order occurred in violation of the governing regulations because the court failed to record or maintain a recording of the deportation hearing. 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.” Counsel has repeatedly requested a copy of the tape recording of the hearing. The record contains an audio cassette tape from the EOIR, purportedly relating to the applicant’s April 1984 deportation hearing. However, the cassette tape is inaudible. The current entire USCIS record, which is before the AAO, does not contain a playable tape recording or the transcript of the deportation hearing. 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.

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 there is no evidence that the immigration court maintained a recording of the deportation hearing and because it would appear that the applicant was not provided an interpreter at his deportation hearing.<sup>2</sup> 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.

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<sup>2</sup> As the applicant has met his burden to demonstrate a *prima facie* showing under the *Proyecto* amended order that his deportation proceeding was not in compliance with the statute and regulations, the AAO need not determine whether the record supports counsel’s contention that the applicant departed the United States on September 1, 1984 pursuant to a grant of voluntary departure.

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 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 evidence in the form of W-2 wage and tax statements, a U.S. bank account verification letter, pay stubs, employment reference letters, a California identification card, rent receipts, witness affidavits, 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.

However, we note that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

“Misdemeanor” means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or

less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

Here, the record reflects that on [REDACTED] 1983, the applicant was convicted of driving under the influence, a misdemeanor in violation of section 23152(a) of the California Vehicle Code (CVC). For this offense, the applicant was placed in custody for 48 hours, was placed on probation for three years, and was ordered to pay a \$596 fine. The record further reflects that on [REDACTED] 1983, the applicant was convicted of misdemeanor driving without a license in violation of section 12500(a) of the CVC and misdemeanor "failure to appear at hearing," in violation of section 40508(a) of the CVC. At the time of the applicant's convictions, every offense declared to be a misdemeanor was punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both. See section 19 of the California Penal Code (1983).

The record includes two judicial orders issued by the Municipal Court of California, County of San Diego, [REDACTED] which indicate that on [REDACTED] 1988, the applicant's misdemeanor convictions were dismissed pursuant to section 1203.4 of the California Penal Code. However, under the current statutory definition of conviction provided at section 101(a)(48)(A) of the Act, no effect is to be given in immigration proceedings to a state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Any subsequent, rehabilitative action that overturns a state conviction, other than on the merits or for a violation of constitutional or statutory rights in the underlying criminal proceedings, is ineffective to expunge a conviction for immigration purposes. *Id.* at 523, 528; see also *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003) (holding that in light of the language and legislative purpose of the definition of "conviction" at section 101(a)(48)(A) of the Act, there is a significant distinction between convictions vacated on the basis of a procedural or substantive defect in the underlying proceeding and those vacated because of post-conviction events).

By these standards, the AAO notes that the state court's expungements of the applicant's convictions under section 1203.4 of the California Penal Code do not eliminate the immigration consequences of the applicant's criminal convictions. This particular section of the California Penal Code is a rehabilitative type of statute, which serves to dismiss, cancel, or vacate a prior conviction as a result of the successful completion of a term of probation, restitution, or other condition of sentencing. The Ninth Circuit Court of Appeals, the jurisdiction in which this case arises, has deferred to the Board's determination regarding the effect of post-conviction expungements pursuant to a state rehabilitative statute. In general, the Ninth Circuit has consistently ruled that a criminal conviction remains valid for immigration purposes regardless of the effect of a post-conviction type of rehabilitative statute, unless the conviction was expunged or vacated because of a procedural or constitutional defect in the underlying trial court proceedings. See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *rev'd on other grounds, Pickering v. Gonzales*, 465 F.3d 263 (6<sup>th</sup> Cir. 2006). Thus, the court's two [REDACTED] 1988 judicial orders that expunged the applicant's misdemeanor convictions under section 1203.4 of the California Penal Code are ineffective to remove the immigration effect of the underlying convictions. Therefore, for immigration purposes, the applicant stands convicted of driving under the influence, driving

without a license, and failure to appear at hearing, all misdemeanors under the California Vehicle Code. As the applicant has been convicted of three misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act. *See also* 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.

**ORDER:** The director's March 26, 2013 decision is affirmed. The Form I-687 application is denied.