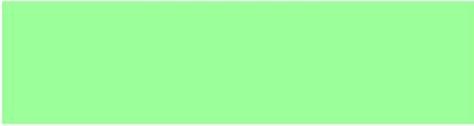


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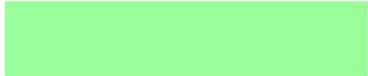
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090



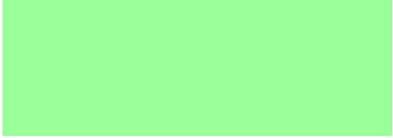
U.S. Citizenship
and Immigration
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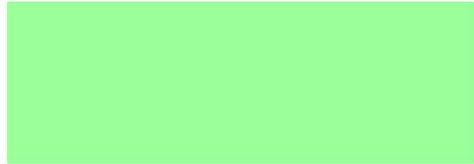
DATE: **AUG 14 2013** OFFICE: NEBRASKA SERVICE CENTER

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

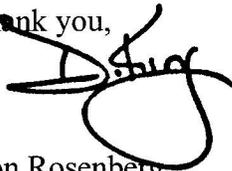
FILE: 

ON BEHALF OF APPLICANT:

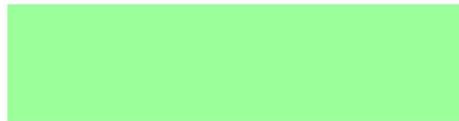


INSTRUCTIONS:

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,


Ron Rosenberg
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 January 7, 1987 deportation pursuant to an exclusion 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 March 22, 2013, the director granted the applicant's motion and reopened the Form I-690², 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."

² The record reflects that the director did not certify his Form I-690 decision to the AAO for review.

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 September 13, 2007 legal brief in support of the applicant's motion to reopen, counsel requested the tape recording and/or transcript of the applicant's exclusion hearing. On May 10, 1994, legacy INS released 95 pages of record material to the applicant. Two audio cassette tapes were withheld in their entirety at that time. The record reflects that on August 26, 2003, USCIS fulfilled the applicant's June 11, 2003 Freedom of Information Act (FOIA) request. It is unclear whether the 2003 FOIA request resulted in the tape recordings and/or hearing transcripts of the deportation hearing being released to the applicant. However, the record contains two audio cassette tapes, which relate to a December 29, 1986 marriage interview conducted by a legacy INS fraud unit examiner regarding the *bona fides* of the applicant's prior marriage.

From the documentary evidence in the record it does not appear that that the applicant ever received a tape recording or a transcript of the deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain the tape recording and/or transcript of the deportation hearing. 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 but denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, finding that it was not in the public interest to grant such a waiver. The director further 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 asserts that, under the terms of the *Proyecto* amended order, he has requested a copy of the tape recording of the applicant's 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." The record contains two audio cassette tapes from legacy INS. However, the cassette tapes relate to a Form I-130 interview about the *bona fides* of the applicant's prior marriage conducted by a legacy INS examiner on December 29, 1986. The current entire USCIS record, which is before the AAO, does not contain the tape recording or transcript of the applicant's deportation hearing. It appears that USCIS has 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. 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).

In support of his Form I-687 legalization application, the applicant submitted evidence in the form of an employment reference letter by the ranch manager of the [REDACTED] an employment reference letter by [REDACTED] Inc., a California marriage registry certificate, a U.S. Department of State Offer of Employment to Alien (Form DSL-1743), a W-2 wage and tax statement, copy of an income tax return, and bank correspondence, 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.

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 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) of the Act, 8 U.S.C. § 1255a(a)(4)(A).

The record reflects that on December 29, 1986, the applicant was charged as excludable under former section 212(a)(19) of the Act, as an alien who has sought to procure an immigrant visa by fraud in order to enter the United States, and under former section 212(a)(20) of the Act for being an intended immigrant to the United States who at the time of application for admission was not in possession of a valid immigrant visa.

The ground of excludability at section 212(a)(19) of the Act has been replaced by the ground of inadmissibility listed at section 212(a)(6)(C)(i) of the Act, as amended.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

Misrepresentation. - (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

The record reflects that the applicant arrived to the United States on December 16, 1986 seeking admission as an immigrant based on his marriage to [REDACTED] a United States citizen. The applicant presented an immigrant visa issued at the United States Embassy in Mexico City. Upon inspection by an immigration officer, the applicant could not determine the whereabouts of his spouse. The applicant was referred to secondary inspection for a marriage fraud interview, which was conducted on December 29, 1986. On that date, [REDACTED] submitted a statement to legacy INS indicating that she married the applicant to help him obtain immigration benefits. She

mentioned that she believed the applicant had earned the right to live in the United States and that she wanted to help the applicant because “he’s a good friend.” [REDACTED] also stated that she wished to retract the Form I-130 petition she had filed on the applicant’s behalf. The record also contains a Form EOIR-23, Order of the Immigration Judge, dated January 6, 1987, ordering the applicant excluded and deported from the United States pursuant to sections 212(a)(19) and (20) of the Act. The record evidence therefore establishes the applicant procured entry into the United States by willfully misrepresenting a material fact. As such, he is excludable (now inadmissible) under former section 212(a)(19) of the Act (now section 212(a)(6)(C)(i) of the Act).

An applicant for temporary resident status under section 245A of the Act has the burden to establish by a preponderance of the evidence that he is admissible to the United States. *See* 8 C.F.R. § 245a.2(d)(5). The applicant might only overcome this particular ground of inadmissibility if he applies for and secures a waiver for the ground of inadmissibility at issue in the matter. *See* 8 C.F.R. § 245a.18(c). The record reflects that the applicant submitted to the director a Form I-690, Application for Waiver of Grounds of Excludability, which is the form he must file to request a waiver of this ground of inadmissibility. However, the Form I-690 was denied on March 22, 2013, as it was determined that it was not in the public interest to grant such a waiver to an applicant who entered into a marriage for the purpose of circumventing U.S. immigration law, an assessment with which we agree. Thus, the applicant has not established that he is admissible to the United States. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

ORDER: The director’s decision denying the applicant’s Form I-687 application is affirmed. The Form I-687 application is denied.