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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 1 5 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
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 December 17, 1982 departure from the United States pursuant to an order of 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).[1]

On March 29, 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.

Therefore, 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).

In his April 25, 2013 legal brief, counsel for the applicant states that the applicant's deportation was in violation of his due process rights and the regulations as they existed in 1982. Counsel contends that the applicant was not advised of his rights upon apprehension by immigration officers and that it is not clear that an interpreter was present during the deportation hearing. In his declaration in support of his Form I-687 application, the applicant indicates that he was not provided with an opportunity to secure counsel, and that he was not given an opportunity to apply for relief from deportation.

Counsel further states that pursuant to the *Proyecto* 2007 amended order, USCIS is required to provide class members with a copy of the tape recording and/or transcript of the prior deportation

hearing, to enable the applicants to bring a collateral challenge to the deportation order, if appropriate. Here, the record reflects that the applicant's Freedom of Information Act (FOIA) request, number was processed on August 23, 1997, and that one cassette tape and 148 pages of record material were released to the applicant. The record also contains documentation indicating that on June 13, 2013, a copy of the cassette tape of the applicant's deportation hearing was provided to counsel.

The record of proceedings (currently in the possession of the AAO) contains a cassette tape recording of the applicant's December 17, 1982 deportation hearing. Contrary to counsel's contentions and the applicant's assertions, the tape recording reflects that the applicant was represented by counsel, that he was provided with an interpreter and that the immigration judge explained the nature of the proceedings, all in accordance with the governing statute and regulations in effect at the time of the deportation hearing. *See* INA § 242B (providing that an alien must be informed of the nature of the charges against him or her, and given a reasonable opportunity to examine the evidence against him or her, and present evidence on his or her own behalf); 8 C.F.R. § 242.16(a) (1982) ("The Immigration Judge shall . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government. . . .") The tape recording of the hearing reflects that proceedings were translated into Spanish, which is the language the applicant understands. The immigration judge entered the order to show cause as an exhibit in the record, and counsel for the applicant admitted the allegations and conceded deportability as charged. *See* 8 C.F.R. § 242.16(a) (1982). Importantly, the recording of the hearing reflects that based upon the applicant's admissions and the documentary evidence presented into the record, the immigration judge made a finding of deportability by clear, unequivocal, and convincing evidence, as required by the regulation at former 8 C.F.R. § 242.14 (1982).

Moreover, upon determining that the applicant was deportable as charged, the immigration judge inquired as to various possible forms of relief from deportation, including voluntary departure. *See* 8 C.F.R. § 242.17(a) (1982) ("The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing.") Counsel originally indicated that the applicant was not interested in voluntary departure as he did not have the monetary means with which to depart voluntarily. Upon further clarification from the immigration judge regarding the cost of departure, counsel questioned the applicant so as to qualify him for voluntary departure. However, the applicant indicated he did not have the funds to return voluntarily to Mexico. At that point, counsel requested a deportation order on behalf of the applicant.

Based on the evidence in the record, the immigration judge entered an order of deportation against the applicant. The recording of the hearing reflects that the order of the immigration judge was

explained to the applicant in the Spanish language, and that counsel waived his client's right to appeal the decision of the immigration judge to the Board on behalf of the applicant.

Other documents in the record pertaining to the applicant's deportation include the following:

- The Order to Show Cause (OSC) is dated December 15, 1982 and the notes on the OSC indicate that the applicant admitted to being a native and citizen of Mexico who entered the United States without inspection. The OSC reflects that the applicant requested a prompt hearing to expedite determination of his case. At the deportation hearing, the immigration judge found the applicant deportable pursuant to section 241(a)(1) of the Act by clear, unequivocal, and convincing evidence.

- The Notice of Entry of Appearance as Attorney or Representative (Form G-28) is dated December 14, 1982 and indicates that entered an appearance as attorney for the applicant at his request. The Form G-28 reflects that Ms. entered an appearance as the applicant wished to withdraw his consent for voluntary departure and instead requested the issuance of an OSC.

- The Decision of the Immigration Judge (Form I-38) is dated December 17, 1982 and instructs the applicant that he has been ordered deported to Mexico on the charge contained in the OSC. The Form I-28 reflects that the applicant waived his right to appeal the decision of the immigration judge to the Board.

- The Notice of Order of Deportation (Form I-294) is dated December 17, 1982 and instructs the applicant that he has been ordered deported to Mexico. The Notice explains the ramifications of this and includes a Spanish translation.

- The Warrant of Deportation is dated December 17, 1982 and states the applicant is subject to deportation under section 241(a)(2) of the INA. It indicates the applicant was deported at on December 17, 1982 and that he traveled by foot.

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. As the applicant has been provided with the entire deportation record, we will not consider counsel's arguments regarding violations of the applicant's due process rights 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 cassette

tapes, 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).

The documentation in the record conclusively shows that the applicant left the United States pursuant to an order of deportation on December 17, 1982. There is no authority in the Act given to the USCIS Director to waive the statutory requirement of continuous residence in the United States.

As previously determined by the director, due to the applicant's departure from the United States pursuant to an order of deportation on December 17, 1982, the applicant lacks the necessary continuous residence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the application.

ORDER: The director's March 29, 2013 decision is affirmed. The Form I-687 application is denied.