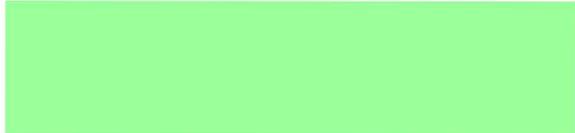


(b)(6)

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
Services



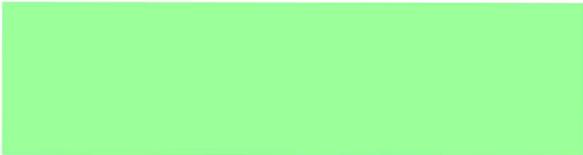
DATE: JUL 17 2013 OFFICE: NEBRASKA SERVICE CENTER

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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", is written over a circular stamp.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

CC: Gibbs Houston Pauw

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the Form I-687 application will be approved.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 November 28, 1984 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 10, 2013, the Nebraska Service Center 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 a letter or brief, counsel states that the applicant has at “various times requested a complete copy of his file, but has never received the transcripts or tapes or a complete copy of his file.”

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that her 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 Nebraska Service Center granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, the Service Center found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The Service Center therefore denied the application and certified the matter to the AAO for a ruling. In rendering a decision, the Service Center did not address whether the applicant was provided with a complete copy of his deportation file nor did it 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 states that the evidence and circumstances surrounding the applicant's November 28, 1984 deportation show it was defective and entered in violation of the statute, regulations, and due process.

The record reflects that the applicant entered the United States without inspection in September 1977.² On March 31, 1984, the applicant was apprehended by U.S. immigration officers in California. The Record of Deportable Alien (Form I-213) reflects that the applicant requested a formal deportation hearing at the time of his apprehension. The applicant was detained and Legacy INS issued an Order to Show Cause (OSC) on April 1, 1984. The OSC did not set forth the time and place of the applicant's deportation hearing. From documentation in the record consisting of a Determination of the Immigration Judge with Respect to Custody, it can be determined that the applicant's request for a change in a custody status was denied in a hearing convened on April 4, 1984.

On or about April 27, 1984, the applicant appeared before an immigration judge and was granted voluntary departure from the United States on or before July 27, 1984. According to the immigration judge's remarks as reflected in the Immigration Judge Hearing Worksheet and Memorandum of Decision, the applicant was advised to return to court on July 27, 1984 if bond had not been posted by that date. On May 1, 1984, some four days after being granted voluntary departure, the applicant was released from detention after posting bond and was served with a Form I-293 hearing notice providing that:

Your hearing has been rescheduled. You are requested to appear before an Immigration Judge at the place, date and time shown below.

Your hearing which was scheduled at [REDACTED] has been taken off the calendar. Your obligor will be notified by mail of the date, time and place of your rescheduled hearing.

Documentation in the record dating back to January 1990 reflects that the applicant sought the assistance of counsel to resolve the issue concerning the May 1, 1984 hearing notice. The applicant was advised by former counsel to wait until he received a subsequent hearing date to request a voluntary departure extension and work authorization. The applicant asserts that contrary to being advised of the consequences of a failure to abide by the terms of a voluntary departure order, he was counseled that he did not have to depart the United States by the required date. The record does not contain any subsequent notice to the applicant or his obligor with details of the date, time, and place of the rescheduled deportation hearing. As such, it would appear that the applicant never received notice informing him of the date, time and place of the rescheduled hearing.

Instead, a Form I-166 deportation letter was issued to the applicant on November 16, 1984 advising him to appear at the deportation branch of Legacy INS in Los Angeles, California, on November 28, 1984. The applicant appeared at the deportation branch on the required date represented by counsel. Documentation in the record reflects that the applicant requested an

² He began residing in the United States in 1958.

interview with a deportation officer to explain that he never received a notice for a hearing date, and was thus unable to request a voluntary departure extension. However, the record reflects that the applicant was detained, transported to the [REDACTED] California, port of departure, and deported to Mexico on November 28, 1984.

Based on the above procedural history, counsel contends that the applicant's deportation proceeding was not in compliance with the governing regulations and resulted in a due process violation. Counsel further contends that had the applicant understood the consequences of voluntary departure, he would have instead appealed the decision of the immigration judge and subsequently applied for suspension of deportation.

It is noted that the regulations in effect at the time of the applicant's deportation proceeding provided that the authority to extend the time within which to depart voluntarily specified initially by an immigration judge was within the sole jurisdiction of the district director. *See* former 8 C.F.R. § 244.2 (1984). From the documentary evidence in the record, it appears that the process for and ability to apply for an extension of the voluntary departure period was not adequately explained to the applicant. The immigration judge's remarks as contained in the Immigration Judge Hearing Worksheet, the advice of former counsel with regards to waiting until receipt of a subsequent hearing notice to request an extension of the voluntary departure period, and the issuance of a Form I-166 on May 1, 1984 without specific details regarding the date, time and place of the rescheduled deportation hearing, all suggest that the applicant was not properly advised of the procedure for requesting an extension of the time within which to depart the United States voluntarily, as set forth in former 8 C.F.R. §§ 242.17 and 244.2. The circumstances surrounding the grant of voluntary departure, together with the applicant's sworn statements, further suggest that the applicant was not properly advised about the consequences of overstaying the voluntary departure order and that he was required to depart the United States on or before the voluntary departure order expired. Additionally, the documentation in the record indicates that even though the applicant was notified on May 1, 1984 that he would receive notice of a subsequent hearing to be scheduled, no such notice was ever sent or served upon him. It is well-established that due process requires proper notice to the applicant. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

Furthermore, the AAO notes that counsel has requested a copy of the tape recording of the hearing. The EOIR and USCIS have been unable to provide the applicant with such a copy. According to the regulation at 8 C.F.R. § 1240.9, immigration court hearings must be recorded. The current record does not contain a tape recording or transcript. Legacy INS released 44 pages of record material to the applicant on November 20, 1989. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. 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 appears valid under current ninth circuit case law (and

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. We find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings that resulted in his deportation were not in compliance with the governing regulations. As a result, CIS 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.

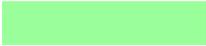
An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). An alien shall 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 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 support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence including Form W-2s, wage statements, employment letters, money order receipts, tax returns, affidavits from neighbors, donation receipts, bank records, copies of California Identification Cards, evidence of worker's compensation benefits and official documentation by the California Worker's Compensation Appeals Board, 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. The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved on humanitarian grounds. The applicant 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 applicant has established his eligibility for temporary resident status under section 245A of the Act. The application is approved.