

(b)(6)

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
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:

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 (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".

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 14, 1985 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).<sup>1</sup>

On April 22, 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

---

<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 May 21, 2013 brief, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, Legacy INS and USCIS<sup>2</sup> has failed to provide the applicant with a copy of the tape recording and/or transcript of her deportation proceeding. Counsel further asserts that at her deportation hearing, the applicant was never informed of the charges against her and that she was not advised of her rights.

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 director granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on April 22, 2013. 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 her deportation file nor did it discuss whether the applicant submitted *prima facie* evidence that her 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 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).

---

<sup>2</sup> USCIS is used interchangeably with CIS in this decision.

Counsel for the applicant states that the evidence and circumstances surrounding the applicant's deportation proceeding shows it was defective and entered in violation of the statute, regulations, and due process.

Counsel asserts that the applicant was never informed of the charges against her. However, the record shows that on November 30, 1981, the applicant was served with an Order to Show Cause (OSC) informing her of the allegations and charges that formed the basis of the deportation proceeding. The OSC was signed by the applicant upon service from an immigration official, and it reflects that she requested an immediate hearing to expedite the determination of her case. Thus, contrary to counsel's assertions, the record evidence indicates that the applicant was informed of the allegations and charges which gave rise to her deportation proceeding.

Counsel next states that the applicant was never informed of her right to have an attorney represent her. The version of the Act in effect at the time of the applicant's deportation hearing provided that an alien receive notice of his or her statutory right to be represented by counsel at no expense to the government. *See* former INA § 242B(b); *see also* former INA § 292. Also, the regulation in effect at the time of the applicant's hearing provided that an alien may be represented by counsel. *See* 8 C.F.R. § 242.10 (1984) ("The respondent may be represented at the hearing by an attorney or other representative qualified under part 292 of this chapter.") The record reflects that the OSC served upon the applicant, in its Notice to Respondent section, provides that aliens in deportation proceedings may be represented, at no cost to the government, by an attorney or other individual authorized to and qualified to represent persons before the Immigration and Naturalization Service. Additionally, the Record of Deportable Alien (Form I-213) included in the record is stamped to indicate that Legacy INS provided the applicant with a list of free legal service providers. As such, counsel's assertion with respect to the duty to inform the applicant of her right to counsel is discounted by the documentary evidence in the record.

It is also asserted upon certification that the applicant was not informed of her right to apply for asylum before the immigration judge, in violation of former 8 C.F.R. § 242.17. However, documentary evidence in the record contradicts this claim. In his written decision dated January 25, 1985, the immigration judge mentioned that deportation proceedings against the applicant were continued to January 8, 1985, to allow her an opportunity to apply for asylum. The immigration judge noted that neither the applicant nor her attorney appeared at the rescheduled hearing and, therefore, he entered an order of voluntary departure *in absentia*. The record also includes the applicant's unsigned Form I-589, Request for Asylum in the United States, received by the Los Angeles Immigration Court on January 15, 1982. Accordingly, the record shows that the applicant was informed of her right to request relief from deportation and was afforded an opportunity to apply for asylum.

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 verbatim. The

current record does not contain a tape recording or transcript. On June 28, 2007, USCIS released record material to the applicant. On June 20, 2007, EOIR indicated that no records were found. 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 her 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. 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).

In this case, USCIS records indicate that the applicant has been residing in the United States unlawfully since November 1981. In support of her Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of extensive school records, tax records, a California marriage certificate and identification card, bank records, affidavits, medical records, and her United States born child's birth certificate, 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 her continuous unlawful residence in the United States for the requisite period.

The AAO finds that the applicant has met her burden of proof of establishing her eligibility for temporary resident status under section 245A of the Act. She established her continuous unlawful residence throughout the requisite period. Her Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved on humanitarian grounds. She has established her eligibility for temporary resident status under section 245A of the Act.

(b)(6)

*NON-PRECEDENT DECISION*

Page 6

**ORDER:** The director's decision denying the applicant's Form I-687 application is withdrawn. The application is approved.