

(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", written over a circular stamp.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The director of the Nebraska Service Center denied the application for temporary resident status and certified the decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The AAO will approve the application.

On July 23, 1987, the applicant filed a Form I-687, Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act (Act), 8 U.S.C. § 1225a. On October 14, 1987, Legacy Immigration and Naturalization Service (Legacy INS) granted the applicant's application. However, on March 7, 1991, Legacy INS terminated the applicant's temporary resident status after finding that her October 30, 1984 departure pursuant to a deportation order meant she failed to maintain the necessary continuous residence required by section 245A of the Immigration and Nationality Act (the Act). See Section 245A(g)(2)(b)(i) of the Act.

On August 5, 2008, the applicant filed a Motion to Reopen pursuant to *Proyecto San Pablo v. INS*, No. 89-00456-WBD (D. Ariz.) (*Proyecto*). In the amended *Proyecto* order dated June 4, 2007, the United States District Court for the District of Arizona instructed the defendants<sup>1</sup> to:

prior to making a decision on the reopened legalization application, provide to legalization applicants complete copies of prior deportation files, including copies of the tapes and/or transcripts of the prior deportation hearings held before the Immigration Court, to enable them to bring a collateral challenge to the deportation order if appropriate.

In his April 30, 2013 brief, counsel for the applicant asserts that the applicant has established a *prima facie* showing that her deportation order was not in compliance with the governing statute or regulations and that CIS has failed to provide the applicant with a copy of a recording of her deportation hearing.

The amended *Proyecto* order instituted the following burdens of proof for class members for whom the entire record cannot be found:

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,

---

<sup>1</sup> Defendants in the law suit are Department of Homeland Security, *et al.*

then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

To invoke the portions of the amended *Proyecto* order that apply when the entire contents of a legalization file cannot be found, the applicant must make a *prima facie* showing that her deportation order was 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. Further, on April 2, 2013, the Service Center granted 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 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).

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 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, when she was two years old. On April 23, 1984, when the applicant was six years of age, an

immigration judge entered an order granting both her and her parents the privilege of voluntary departure from the United States. In a declaration dated April 23, 2013, the applicant's father indicates that the cases against his family were consolidated and that he represented his six-year-old daughter during the course of her deportation proceeding. The applicant's father states in his declaration 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; and that he was not informed of his right to appeal the decision of the immigration judge.

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 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 view of the applicant's father's sworn statement, the applicant's age at the time of the deportation hearing, and the absence of other documentary evidence reflecting that either the applicant or his counsel at the time waived the appearance of an interpreter, it would appear that the applicant's deportation proceeding was conducted in violation of the governing regulations and occurred in violation of due process.

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, USCIS cannot use the prior deportation order because there is no evidence that the court maintained a recording of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing in 1984, the regulation at 8 C.F.R. § 242.15, indicated that "[t]he hearing shall be recorded verbatim . . . ." Counsel has repeatedly requested a copy of the tape recording of the hearing. It is likely that the hearing was recorded, and possibly that it was included among other hearings on one tape (as we understand was frequently the case); however, EOIR and USCIS searches have not produced a copy of the recording. On December 23, 2003, USCIS released 161 pages of record material to the applicant. On January 8, 1990 and December 23, 1994, Legacy INS provided the applicant with copies of the applicant's record. 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 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, which resulted in her deportation, were not in compliance with the governing regulations and precedent case law decisions.<sup>2</sup> As a result, CIS cannot use the applicant's prior deportation as evidence to support a denial of legalization benefits. Consequently, 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 adjustment to temporary resident status must also establish that he 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 her Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of extensive school records and medical reports, dated during the requisite period, and affidavits of family and friends. 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.

Given that the applicant has satisfied the continuous unlawful residence requirement of section 245A(a)(2); that on April 2, 2013, the Director of the Nebraska Service Center approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds; that the record does not reflect any arrests or criminal convictions that would render the

---

<sup>2</sup> Since the applicant has met the burden to demonstrate a *prima facie* showing pursuant to the *Proyecto* order based on the asserted deficiencies in the deportation proceeding, the AAO will not determine whether the record supports a finding that the applicant departed the United States on September 1, 1984 pursuant to a grant of voluntary departure.

applicant statutorily ineligible for legalization under section 245A(a)(4)(B) of the Act; and that the record reflects that the applicant is otherwise admissible, the AAO finds that the applicant is eligible for temporary resident status under section 245A of the Act. Consequently, the applicant's Form I-687 application will be approved.

**ORDER:** The director's decision is withdrawn. The application is approved..