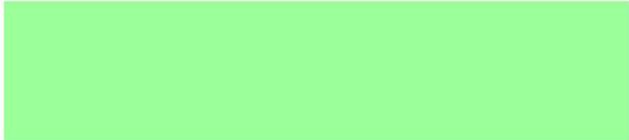


(b)(6)

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

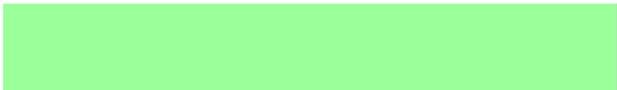


U.S. Citizenship
and Immigration
Services



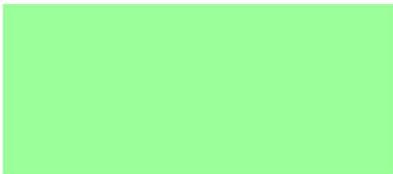
DATE: JUL 17 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

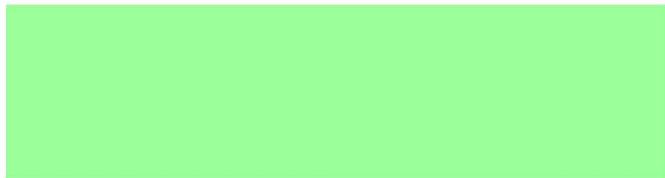


APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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,


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 The director's decision to dismiss the Form I-687 application will be withdrawn and the AAO will approve the application.

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. On August 19, 1987, Legacy Immigration and Naturalization Service (Legacy INS) granted the applicant's Form I-687. However, Legacy INS subsequently terminated the applicant's temporary resident status, finding the applicant's departure pursuant to a deportation order meant the applicant failed to maintain continuous residence, required by section 245A of the Immigration and Nationality Act (the Act). See Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).¹

The applicant filed a Motion to Reopen pursuant to *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001). On April 2, 2013, the Nebraska Service Center Director granted the applicant's motion and reopened the Form I-687 application.

In support of a previous motion to reopen, counsel for the applicant submitted a copy of a letter, dated October 16, 2008, from the Associate General Counsel for the Executive Office for Immigration Review (EOIR) in response to the applicant's Freedom of Information Act (FOIA) request. In the letter, the EOIR stated that after an "extensive manual search," the office was unable to locate any file, tape, or transcript under any of the A numbers provided by counsel. Though EOIR counsel suggests that United States Citizenship and Immigration Services (CIS) may be able to provide copies of the applicant's files, the record does not indicate that the applicant ever received a complete copy of prior deportation files including the tape recordings or a transcript of her deportation hearing.

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.

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 on March 27, 1985 either: 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.

Here, the Nebraska Service Center granted the applicant's Motion to Reopen and approved her Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, the Service Center found the applicant failed to submit *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 involved a gross miscarriage of justice. The Service Center, therefore, denied the application and certified the matter to the AAO for a ruling.

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).

The Service Center found that the applicant did not make the necessary *prima facie* showing because evidence in the record establishes that her March 27, 1985 departure from the United States pursuant to an order of deportation was conducted in accordance with governing law and regulations. In support, the Service Center indicates in its April 22, 2013 decision that the record includes: a Form I-274 acknowledging receipt of hearing and appeal rights; an Order to Show Cause; a Form G-28 dated July 28, 1983; a Form G-26 sent to the applicant's address informing the applicant of her interview with a deportation officer; an order of the Immigration Judge sent to the attorney who represented the applicant; and a Form I-294 which explained to the applicant in English and Spanish that she had been ordered deported. Consequently, the Service Center denied the applicant's temporary resident application and certified the case to the AAO for review.

Regarding the Form I-274, the AAO notes that the advisals of rights contained in the Form I-274 involve an alien's right to remain silent and obtain legal representation, and not any notice of a deportation hearing time and date. By itself, this document is insufficient to the determination of whether the applicant's deportation order complied with the statutes or regulations at the time she was deported, or whether it occurred in violation of due process, or whether it was otherwise unlawful or involved a gross miscarriage of justice.

The Service Center's decision next references several documents, including notice of hearings before the immigration court, which were served on the applicant's bondsman. Counsel for the applicant asserts on certification that, since service to a bondsman does not constitute notice to the alien, the Service Center's reliance on such documentation is misplaced. Upon review of the above-mentioned documents, it does not appear that they were ever mailed or served on the applicant. Accordingly, the documents mailed and served on the applicant's bond holder are insufficient to demonstrate that the proceeding that resulted in the applicant's deportation complied with the statutes and regulations in effect in 1984.

The Service Center also relied on an October 4, 1984 court notice of hearing issued to the applicant's legal representative for a court hearing scheduled for October 15, 1984. However, the hearing notice sent to [REDACTED] provides that: "This will be the only notice of this hearing issued. The Office of the Immigration Court will not notify your client." Upon review of the hearing notice in the file, it does not appear that the notice was ever mailed or served upon the applicant. Though we acknowledge that the regulations at the time the applicant was deported indicate that notice to the attorney or representative shall constitute notice to the alien, *see* 8 C.F.R. § 292.5 (1984), we note that the Ninth Circuit and the Board have noted that service upon an attorney or representative is ineffective when the attorney fails to notify the alien of a hearing or an order granting voluntary departure. *See Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000); *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996) (finding that a respondent who did not receive proper notice from his attorney and who has complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), has established ineffective assistance of counsel based on "exceptional circumstances"). In view of the allegations of ineffective assistance of counsel by [REDACTED] in the applicant's deportation proceeding, the documentation concerning the applicant's filing of a complaint against [REDACTED] before the California State Bar; the applicant's sworn statement indicating that she never received any notice from the immigration court or [REDACTED] concerning any deportation hearing or the grant of voluntary departure; and the fact that the several notices of hearing in the record were not addressed to the applicant; the AAO finds that court notice of hearing is insufficient to show compliance with the statutes and regulations in the applicant's deportation proceeding.

We further note that the Order to Show Cause does not include notations from the trial attorney to suggest that the applicant admitted to the allegations and charges against her. Under the regulations in effect at the time of the applicant's hearing, the immigration judge was required to have the applicant plead to the order to show cause. *See* 8 C.F.R. § 1240.48(b) ("The immigration

judge shall require the respondent to plead to the order to show cause by stating whether he or she admits or denies the factual allegations and his or her deportability under the charges contained therein.”) However, the record of proceedings, as presently constituted, contains no evidence of the applicant’s pleadings. As the applicant swears under oath that she did not personally appear at any deportation hearing before an immigration judge and that her attorney did not notify her of any deportation hearing, and in the absence of countervailing evidence, it appears as though the applicant did not plead to the charges brought against her.

The applicant submitted a sworn statement dated March 31, 2010 in which she indicates that she was represented by attorney [REDACTED] during deportation proceedings, but that she never appeared personally before an immigration judge at any time to address the charges of deportability or the voluntary departure order. *See* 8 C.F.R. § 1240.51(b) (“[a]n oral decision shall be stated by the immigration judge in the presence of the respondent and the trail [sic] attorney, if any, at the conclusion of the hearing.”) The applicant also indicates that on the day she was deported, she learned for the first time that her attorney had appeared in immigration court on her behalf on October 29, 1984 and that the immigration judge had ordered her to voluntarily depart the United States on or before January 5, 1985. She further indicates that [REDACTED] never informed her of any hearing dates in immigration court or of the order of voluntary departure. The record includes documentation of the ineffective assistance of counsel complaint filed by the applicant against [REDACTED] to the State Bar of California.

Legacy INS released 59 pages of record material to the applicant on December 12, 1990. The current entire CIS record, which is before the AAO, does not contain a tape recording or transcript. It appears that CIS 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 (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 her 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.

Upon consideration of the totality of the evidence in the record, the applicant has made a *prima facie* showing that her deportation hearing was not conducted in accordance with the governing regulations and occurred in violation of due process. *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (noting that due process requires proper notice). When balancing the evidence in the record, including the applicant’s sworn statement; the documentary evidence in the record revealing deficiencies in the notice and service process to the applicant of the deportation hearing and voluntary departure order; and the absence of tapes and/or transcripts

to contradict the applicant's claims, we find the evidence sufficient to outweigh the contradicting documents. As a result, CIS cannot use the prior deportation order 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).

In support of her Form I-687 legalization application, the applicant submitted W-2 forms, wage statements, employment letters, affidavits from relatives and friends, and a copy of her California Identification Card, dated during the requisite period. 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.

Given that the applicant has satisfied the continuous unlawful residence requirement of section 245A(a)(2); that on April 22, 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; and that the record does not reflect any arrests or criminal convictions, which would render the applicant statutorily ineligible for legalization under section 245A(a)(4)(B) of the Act; the AAO finds that the applicant has established her eligibility for temporary resident status under section 245A of the Act. Consequently, the applicant's appeal is sustained and her Form I-687 application will be granted

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