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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,

Ron Rosenberg
Acting Chief, 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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 July 19, 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).[1]

On March 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 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 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 Nebraska Service Center granted the applicant's Motion to Reopen. Also, the Service Center 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 upon certification to the AAO that the evidence and circumstances surrounding the applicant's July 19, 1985 deportation shows it was defective and entered in violation of the statute, regulations, and due process. Specifically, counsel contends that the applicant was not afforded an opportunity to secure legal representation during his deportation proceeding.

The version of the Act in effect at the time of the applicant's deportation hearing required 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); 8 C.F.R. § 242.16(a). The regulation in effect at the time

of the applicant's hearing also 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.")

Here, the record reflects that the applicant was informed in writing of his statutory right to counsel, at no cost to the government, at the time of his apprehension. Further, the applicant was served with an Order to Show Cause (OSC) on May 6, 1985. The OSC, 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 evidence includes a Notice of Entry of Appearance as Attorney or Representative (Form G-28) dated May 28, 1985, which reflects that an attorney admitted to practice in the state of Texas, represented the applicant during his deportation proceeding. As documentation in the record suggests that the applicant was informed of his statutory right to counsel and an attorney entered an appearance to represent the applicant during his deportation proceedings, counsel's claim is contradicted by the record evidence.

Counsel further contends that the applicant was not provided an opportunity to post bond for his release. Counsel states that the applicant was prima facie eligible for release from detention on bond, and should have been granted an opportunity to post bond for his release. Counsel asserts that as a person of low economic means, the applicant was unable to obtain legal representation and simultaneously post bond.

In this case, the record reflects that in a bond hearing convened on June 4, 1985, an immigration judge ordered that the applicant be released from custody under bond of $3,000. As reflected in the Form EOIR-1, Order of the Immigration Judge with Respect to Custody, the applicant waived his right to appeal the immigration judge's determination. Counsel for the applicant asserts that the applicant was not afforded an opportunity to post the bond amount. However, we note that the applicant's deportation hearing was convened on July 2, 1985, some 28 days after the bond amount was set. Furthermore, we note that the Board has held that immigration judges may conduct subsequent custody hearings so long as the request is made in writing and based on a showing that the alien's circumstances have changed materially since the initial bond redetermination hearing. *Matter of Chew*, 18 I&N Dec. 262, 263 (BIA 1982) (noting that the bond regulations give a detained alien the right to apply for modification of the conditions of his release at any time after an initial custody determination has been made and before an order of deportation becomes administratively final); *see Matter of Uluocha*, 20 I&N Dec. 133, 134 (BIA 1989) (noting that *Matter of Chew* suggests that an alien is not limited to one bond reduction request).

Here, the record does not contain any documentation suggesting that the applicant made such a request to the immigration judge presiding over his deportation proceeding. On the contrary, the record reflects that the applicant requested to be released from custody, that the immigration judge ordered his release from custody under bond of $3,000, and that the applicant waived his right to

appeal the immigration judge's determination with respect to custody. Though we acknowledge that the regulations allowed the applicant to seek a continuance for good cause under former 8 C.F.R. § 242.13, and the precedent Board decisions allowed him to request a subsequent bond redetermination hearing pursuant to *Matter of Chew* and former 8 C.F.R. § 242.2(d), we note that the record does not include any documentation indicating that the applicant either sought a continuance, informed the immigration judge of his inability to post the bond amount, requested a bond reduction hearing, or that such requests were denied by the immigration judge.

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. On May 10, 1996, Legacy INS released record material to the applicant. The applicant made a subsequent request for a copy of his record of proceedings, but the FOIA Unit closed out the request due to the applicant's failure to comply with its request. 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. 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 support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of earnings statements, remittance order forms, rent receipts, a California identification cards, and postmarked mail, 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 application is approved.