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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

On April 20, 1988, the applicant filed a Form I-687, Application for Temporary Resident Status, pursuant to Section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225a. The director denied the application, finding that the applicant's December 23, 1986 departure pursuant to a deportation order meant he 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 March 22, 2013, the 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. June 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

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<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 legal 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 have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. From the documentary evidence in the record, it does not appear that the applicant ever received a tape recording and/or transcript of the proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing transcript. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with a copy of his legalization file as it currently exists.

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. Upon reopening, the Service Center did not issue a decision on the applicant's previously filed I-690, Application for Waiver of Grounds of Inadmissibility.<sup>2</sup> The Service Center denied the applicant's Form I-687, Application for Temporary Resident Status, on March 22, 2013, because it found that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to the applicant's departure pursuant to a deportation order dated December 22, 1986. The Service Center, therefore, denied the application and certified the matter to the AAO for a ruling. The AAO notes that 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).

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<sup>2</sup> In a separate decision, the AAO reopened the Form I-690 waiver application proceedings, *sua sponte*, and approved the waiver application.

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 deportation proceeding shows it was defective and entered in violation of the statute, regulations, and due process. Counsel asserts that the immigration judge presiding over the applicant's deportation proceedings committed a due process violation by failing to inquire with the applicant about possible relief from deportation. Specifically, counsel contends that at the time of the applicant's deportation proceeding, his client was eligible for suspension of deportation and voluntary departure.

Documentation in the record reflects that the applicant entered the United States in March 1979 and has resided unlawfully in the United States since then. On December 6, 1986, the applicant was apprehended by immigration officers following a five day visit to Mexico. The applicant was issued an Order to Show Cause (OSC), charging him with deportability under former section 241(a)(2) of the Act for his December 6, 1986 unlawful entry into the United States. On December 22, 1986, the applicant appeared *pro se* before an immigration judge, at which time he was ordered deported from the United States. The record evidence does not suggest that the immigration judge informed the applicant of his apparent eligibility for relief in the form of suspension of deportation, as required by the regulations, or voluntary departure. Though the immigration judge prepared a memorandum and summary of the applicant's December 12, 1986 initial master calendar hearing, the record does not contain a summary of the December 22, 1986 hearing. The documentation in the record does not otherwise reflect that the immigration judge informed or offered the applicant an opportunity to apply for suspension of deportation or voluntary departure.

We note that at the time of the applicant's deportation hearing, immigration judges had an obligation to inform aliens of apparent eligibility to relief from deportation, including suspension of deportation. *See* former 8 C.F.R. § 242.17 ("The [immigration judge] shall inform the respondent of his apparent eligibility to apply for any of the benefits enumerated in this paragraph [including suspension of deportation] and shall afford him an opportunity to make an application therefor during the hearing.").

Additionally, it is noted that a deportable alien may be granted suspension of deportation if he has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application, proves that he has been a person of good moral character during that period, and can demonstrate that his deportation would result in extreme hardship to himself or to his U.S. citizen or lawful permanent resident spouse, parent, or child.

Former Section 244(a)(1) of the Act. The seven-year period of continuous presence is not broken by a brief, casual and innocent departure from the United States that is not “meaningfully interruptive.” Former Section 244(b)(2) of the Act.

Here, the applicant entered the United States in August 1979. His Temporary Residence Application reflects that he departed the United States twice since his initial entry in 1979. The first absence was for 20 days from December 1985 to January 1986. The second absence was for five days in December 1986. The AAO notes that because the applicant's absences were less than 30 days in total, they did not meaningfully interrupt any continuous residence that he may have established. *See Rosenburg v. Fleuti*, 374 U.S. 449 (1963) (where the court looked to (1) the duration of the alien's absence; (2) the purpose of the absence; and (3) the need for special documentation to make the trip abroad to determine whether the absence was brief, innocent and casual or meaningfully disruptive of the alien's residence in the United States); *see also* 8 C.F.R. § 245a.1(g) (defining “brief, causal, and innocent” for purposes of legalization as “a departure authorized by the Service . . . of not more than thirty (30) days for legitimate emergency or humanitarian purposes . . .”). As such, the circumstances surrounding the applicant’s unlawful entry in 1979 and the subsequent OSC issued on December 7, 1986, support counsel’s assertion that the immigration judge was required to inform the applicant of his “apparent eligibility” for suspension of deportation, as required by former 8 C.F.R. § 242.17.

Furthermore, counsel asserts that, under the terms of the *Proyecto* amended order, the deportation order occurred in violation of the governing regulations 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, 8 C.F.R. § 242.15, indicated that “[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the special inquiry officer.” Counsel has repeatedly requested a copy of the tape recording of the hearing. It is likely that the hearing was recorded, and possible 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 February 12, 1999, legacy INS released 151 pages of record material to the applicant. The EOIR released 145 pages of material to the applicant on March 21, 2003. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording. It appears that USCIS and EOIR have fully complied with the court’s order to provide the applicant with all existing 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.

In light of the foregoing, we find the evidence sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in his deportation were not in compliance with the governing regulations. As a result, USCIS 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).

In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of W-2 statements, tax records, employer letters and records, pay statements receipts, DMV records, utility receipts, bank statements, a California identification card, and affidavits of friends, 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 by the AAO in a separate decision on humanitarian grounds. He has established his eligibility 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 denying the applicant's Form I-687 application is withdrawn. The application is approved.

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