



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: JUL 25 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE: [Redacted]

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: [Redacted]

ON BEHALF OF APPLICANT:
[Redacted]

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

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 April 1, 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 April 16, 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 Naturalization 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.

In his May 8, 2013 brief, counsel for the applicant states that the applicant has previously requested a complete copy of his deportation file, including any tape recording and/or transcript of the deportation hearing. Counsel contends that a complete copy of the applicant's deportation file has not been produced. The record includes a letter dated January 18, 2005 by the Acting Director of USCIS, in which it is indicated that 205 pages were sent to the applicant in response to his Freedom of Information Act (FOIA) request. The record also contains two additional FOIA letters, dated January 18, 1991 and May 4, 1998, indicating that 103 and 153 pages were sent to the applicant, respectively. However, 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. As a result of the missing transcript and tape recording, however, the applicant's complete file is unavailable.

To invoke a shift in the burden of proof from the applicant to USCIS, the applicant must make a *prima facie* showing that his order of deportation 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.

In this case, the director granted the applicant's Motion to Reopen and the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. 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 his deportation file nor did he 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 that the evidence and circumstances surrounding the applicant's April 1, 1985 deportation shows it was defective and entered in violation of the statute, regulations, and due process. Counsel asserts that the record does not include sufficient evidence to establish that the applicant was ordered deported by an immigration judge prior to his April 1, 1985 deportation.

The record reflects that the applicant entered the United States without inspection in February 1979. On October 13, 1984, the applicant was apprehended by U.S. Border Patrol officers near [REDACTED] California. The Record of Deportable Alien (Form I-213) reflects that the applicant requested a formal deportation proceeding at the time of his apprehension. Consequently, the applicant was detained and Legacy INS issued an Order to Show Cause (OSC) on October 14, 1984. The OSC did not set forth the time and place of the applicant's deportation hearing. From documentation in the record consisting of Orders of the Immigration Judge with Respect to Custody, it can be determined that the applicant requested bond hearings on October 25, 1984, and again on November 14, 1984. The presiding immigration judge denied the applicant's request for bond on both occasions. However, on or about November 21, 1984, bond was established in the amount of \$2,000. The record indicates that applicant's bondsman paid the bond amount and the applicant was released from detention shortly thereafter.

On the same day the applicant was released, a Form I-293 was prepared informing the applicant that he would be notified "at a later date" of the date and place of the deportation hearing. Likewise, the record does not contain any subsequent notice to the applicant informing him of the date, time, and place of the deportation hearing. Moreover, the record does not contain any evidence establishing that the presiding immigration judge ordered the applicant be deported to Mexico. That is, the record does not include any written Decision of the Immigration Judge (Form EOIR-6) ordering the applicant deported. Nevertheless, Legacy INS issued a warrant of deportation on March 18, 1985 indicating that the applicant was subject to deportation pursuant to former section 241(a)(2) of the Act. On April 1, 1985, an immigration officer witnessed the applicant's departure from the United States to Mexico.

Counsel contends that, since a deportation hearing before an immigration judge was never scheduled, no order of deportation was ever entered against the applicant; consequently, counsel asserts that the applicant cannot be regarded as having departed from the United States under an order of deportation. Counsel further asserts that the documentary evidence shows the applicant's deportation proceeding violated the statute, regulations, and the due process notice requirement.

The record reflects that bond hearings were held. There is no documentation establishing that the applicant was notified of, or personally appeared at any further hearing after his release from detention. The version of the Act in effect at the time of the applicant's deportation proceeding provided that an alien must be given a reasonable opportunity to examine the evidence against him and present evidence on his own behalf. *See* former section 242(b) of the Act. The record also contains a memorandum from an immigration judge to a legacy INS trial attorney, dated February 21, 1985, which states the applicant's merits hearing was held on November 4, 1984 and that the applicant was granted voluntary departure. The immigration judge also notes that he and the trial attorney had listened to the hearing tape together the previous day. The record also contains a letter from the applicant's prior counsel, [REDACTED], requesting an extension of ten days until April 1, 1985, to permit the applicant to depart from the United States, so as to permit the applicant to register a complaint with the [REDACTED] Bar Association.

In relevant part, under the terms of the *Proyecto* amended order, counsel has repeatedly requested a copy of the tape recording and/or transcript of the 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." 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 January 18, 2005, USCIS provided the applicant with 205 pages of record material. Legacy INS letters in response to FOIA requests, dated January 18, 1991 and May 4, 1998, indicate that 103 and 153 pages were sent to the applicant, respectively. 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 outstanding deportation order appears valid on its face (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 because there is no evidence that the immigration court maintained a recording of the deportation hearing. 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).

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 this case, documentary evidence in the record indicates that the applicant has been residing in the United States unlawfully since 1979. In support of his Form I-687 legalization application, the applicant submitted substantial evidence in the form of paystubs, Form W-2 Wage and Tax Statements, rent receipts, California Department of Motor Vehicle records including a copy of the applicant's California driver's license, bank records, medical and immunization records of his children, birth certificates for his two United States-born sons, dated during the requisite period and affidavits. 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 residence in the United States for the requisite period.

The applicant has met his burden of proof of establishing his eligibility for temporary resident status. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved on humanitarian grounds. Although the applicant has one misdemeanor conviction, it does not disqualify him for temporary resident status.² 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.

² According to the record of proceedings, on July 13, 1989, the applicant was convicted of a violation of section 273.5 of the California Penal Code, corporal injury of spouse/cohabitant/child for which a sentence of 3 years of probation and 90 days jail (with 85 days of jail sentence suspended) was imposed. A single misdemeanor conviction does not disqualify the applicant for temporary resident status.