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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

[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.

A handwritten signature in black ink, appearing to read "Ron Rosenberg", written over a circular stamp.

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.<sup>1</sup>

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 27, 1984 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).<sup>2</sup>

On April 26, 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. 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

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<sup>1</sup> The record indicates that the applicant is the beneficiary of an approved Form I-130 petition with a priority date of June 24, 1993.

<sup>2</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."

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

In her May 23, 2013 legal brief, counsel for the applicant states that although she has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS has failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. The record reflects that in a letter dated February 13, 2013, an EOIR Paralegal Specialist noted that after an "extensive manual and electronic search of [their] files in the Immigration Court," the agency was unable to locate any file under the alien numbers counsel provided. A review of the record indicates that USCIS fulfilled counsel's February 19, 2012 FOIA request on November 8, 2012 by providing 22 pages of documentation to the applicant.

However, the record does not indicate that the applicant ever received a copy of the tape recordings and/or the transcripts of his deportation hearings. The applicant's physical file (currently in the possession of the AAO) contains no such tape and/or transcripts. 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 director granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. 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 the director 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 contends that the documentary evidence and the circumstances surrounding the applicant's April 27, 1984 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations.

Counsel states that the applicant was not provided with a list of free legal services, as required under former section 242(b)(2) of the Act. However, the Order to Show Cause (OSC) issued against the applicant and personally served upon him on April 23, 1984 contains a notation indicating that the applicant was furnished a Notice of Appeal Rights (Form I-618) and a list of free legal service providers. Further, the applicant's Record of Deportable Alien (Form I-213) reflects that on April 20, 1984, the applicant "was furnished [Form] I-618 and list of legal services." Consequently, documentary evidence in the record indicates that the applicant was afforded a list of free legal service providers, as required by former section 242(b)(2) of the Act, on two separate occasions.

Counsel next states that the OSC served upon the applicant did not contain a written notice of hearing as required by former section 242(a)(2) of the Act, and that a separate written notice of hearing was not provided to the applicant at the time of his deportation proceeding. It is noted that the version of the Act in effect at the time of the applicant's deportation proceeding required that the alien be provided with written notice of the time and place at which the deportation hearing would be held. See section 242B(a)(2)(A) of the Act (1984) ("Written notice shall be given in person to the alien ( ), in the order to show cause or otherwise, of the time and place at which the proceedings will be held..."). The Act also required a subsequent written notice of the new time and place of the proceeding in the case of any change or postponement of the original hearing date. See section 242B(a)(2)(B) of the Act.

In this case, the OSC informed the applicant of his obligation to appear for a deportation hearing before an immigration judge "to be scheduled." However, the record does not contain documentation showing that a subsequent hearing notice was issued informing the applicant of the time and place of his deportation hearing, as required by former section 242(a)(2)(A) of the Act. Rather, the record evidence indicates that the applicant's deportation hearing was convened on April 24, 1984, one day after being personally served with the charging document. The applicant was ordered deported from the United States on the same day.

Nevertheless, the decision of the immigration judge reflects that the applicant was found deportable upon his admissions, that the applicant made no application for relief from deportation, that the applicant waived his right to appeal the decision of the immigration judge, and that the applicant was served with a copy of the immigration judge's decision. As such, it appears that the applicant was present at the hearing which resulted in his deportation and that the deportation order is valid on its face.

In relevant part, 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 in 1984, 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 and/or transcript 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 November 8, 2012, USCIS provided the applicant with 22 pages of record material. 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 records relating to his deportation proceedings. While the outstanding deportation 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.

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, 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.

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 or she 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).

The applicant has been residing in the United States unlawfully since 1980. In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence including: W-2 forms and employment verification letters, 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.<sup>3</sup> 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. He 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.

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<sup>3</sup> The record shows that on August 4, 1985, the applicant was convicted in the Circuit Court of Cook County, Illinois, of misdemeanor retail theft in violation of 720 ILCS 5/16A3A. For this offense, the applicant was sentenced to one year of court supervision. On July 12, 1996, the term of supervision was discharged. As this misdemeanor offense constitutes the applicant's sole criminal conviction, he remains eligible for temporary residence status as the section 245A(a)(4)(B) ground of ineligibility relating to a conviction for a felony or three misdemeanors does not apply.