**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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUL 25 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

cc:

**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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 May 23, 1986 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 27, 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.

Upon certification to the AAO, counsel for the applicant states in a letter 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 1986 deportation proceedings. From the documentary evidence in the record, it does not appear that that the applicant ever received either. The applicant's physical file (currently in the possession of the AAO) does not contain a hearing transcript or tape recording. 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 March 27, 2013. 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 states that the applicant has established that the applicant's May 20, 1986 deportation hearing was defective. Counsel asserts that the applicant was not informed of his right to speak with an attorney. In a sworn statement dated August 27, 2008, the applicant states that the immigration judge who presided over his May 20, 1986 deportation hearing did not advise him of his statutory right to an attorney. 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); *see also* former INA § 292. Also, the regulation in effect at the time of the applicant's hearing provided that an alien may be represented by counsel. *See* 8 C.F.R. § 242.10 ("The respondent may be represented at the hearing by an attorney or other representative qualified under part 292 of this chapter.")

Here, the documentary evidence in the record reflects that the applicant was informed, on two separate occasions, of his right to secure counsel at no expense to the government. The record includes the Order to Show Cause (Form I-221S) dated May 20, 1986, which provides on page two that "[i]f you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service." Though the advisals contained in the Form I-221S are in the English language, the applicant concedes that he understood English at the time of his detention and deportation proceeding. The Form I-213, Record of Deportable Alien, further reflects that the applicant was fluent in the English language at the time of his apprehension. *See Matter of Ponce-Hernandez*, 22 I&N Dec. 784 (BIA 1999) (noting that a Form I-213 is reliable where the information on the form is detailed and there is nothing facially deficient about the document). Additionally, the Form I-221S reflects that the notice was read to the applicant in the Spanish language. The record also includes a Form I-274 signed by the applicant on May 20 1986, and providing notice in the Spanish language to the applicant of his right to a hearing and to representation. Accordingly, the assertion by counsel and the applicant regarding a failure to advise him of his right to counsel is discounted by the documentary evidence in the record.

The applicant asserts that the Immigration Judge failed to advise him of his right to file an appeal with the Board of Immigration Appeals (Board). The applicant states that the deportation hearing lasted "just a few minutes," and that he was ordered deported without advising him that he could appeal the judge's decision. However, the May 20, 1986 deportation order clearly reflects that the applicant waived his right to an appeal. As such, the applicant's contention is contradicted by the documentary evidence in the record and is insufficient to establish a prima facie showing pursuant to the 2007 *Proyecto* order.

The applicant states that the Immigration Judge failed to give him an opportunity to request voluntary departure. Counsel further states that the applicant's deportation proceedings were conducted in violation of the applicable law and regulations as the presiding immigration judge did not advise the applicant of his right to apply for voluntary departure. However, the Board has noted that the regulations in effect before the passage of the 1996 amendments to the Act requiring

Immigration Judges to inform aliens of apparent eligibility for relief did not include voluntary departure. *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999) (citing former 8 C.F.R. § 242.17(a), which required Immigration Judges "to inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in *this paragraph* and . . . afford the respondent an opportunity to make application therefor during the hearing" (emphasis added)). The Board further noted that the opportunity to apply for voluntary departure was described in former 8 C.F.R. § 242.17(b), which contained no notification requirement. *Id.* In contrast, the current regulations require immigration judges to inform the respondent of apparent eligibility for all "benefits enumerated in this *chapter*," which includes voluntary departure. 8 C.F.R. § 240.11(a)(2) (emphasis added). As the regulations in effect at the time of the applicant's deportation hearing required no duty to inform an alien of voluntary departure as a form of relief, counsel may not establish a violation by alleging that the applicant had a right to be informed of such relief.

Counsel also asserts that the applicant was not provided with adequate interpretation during his deportation hearing. However, in a declaration dated February 13, 2007, the applicant states that he began residing in the United States in the summer of 1979, when he was 12 years old. The applicant further states that he began attending the in El Centro, California. At the time of the applicant's apprehension by immigration officers on May 20, 1986, he was attending the 11th grade at a in El Centro, California. According to the applicant's Record of Deportable Alien, the applicant was fluent in the English language at the time of his apprehension. In declarations submitted in support of his Form I-687 application, the applicant has stated that he understood the English language at the time of his deportation proceeding. It is noted that the record does not contain the tape recording of the applicant's deportation hearing to corroborate counsel's assertion. Nevertheless, the record contains sufficient documentary evidence in support of the applicant's understanding of the deportation proceeding convened against him.

In relevant part, under the terms of the *Proyecto* amended order, counsel and the applicant have 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 in 1986, 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 24, 1996, legacy INS provided the applicant with 93 pages of record material. On May 11, 1994, legacy INS provided the applicant with 104 pages of record material. Counsel has repeatedly requested a copy of the tape recording of the hearing. 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 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 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).

In the instant case, the applicant provided legacy INS with tax documentation, pay stubs, school records, and social security earnings statements, 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 establishing his continuous unlawful residence in the United States during the requisite period.

On March 27, 2013, the Director of the Nebraska Service Center approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility; therefore, the applicant is admissible to the United States. 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.