



U.S. Citizenship  
and Immigration  
Services

(b)(6)

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 Reinberg  
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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 March 27, 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. § 1225a(g)(2)(b)(i).<sup>1</sup>

On March 22, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and 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,

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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."

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

In his April 17, 2013 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. On January 24, 1995, legacy INS released 143 pages of record material to the applicant. In a letter dated October 16, 2008, EOIR Associate General Counsel informed counsel that after an extensive electronic and manual search, the agency was unable to find any files under [REDACTED] which is the A-number associated with the applicant's deportation proceeding that resulted in his March 27, 1985 deportation. In the letter, EOIR informs counsel that the agency released to the applicant a copy of his immigration court record under [REDACTED], which covers the period from 1986 until 2003.

However, the record does not indicate that the applicant ever received a copy of the tape recordings and/or transcript of the deportation hearing held under agency number [REDACTED]. The applicant's physical file (currently in the possession of the AAO) contains no such tape or transcript. As a result, EOIR and USCIS 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 tape and transcript, 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 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. 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 (3rd Cir. 2004) (same).

Counsel for the applicant contends that the documentary evidence and the circumstances surrounding the applicant's March 25, 1987 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations.

The record shows that the applicant was apprehended by immigration officers in August 1983 at an immigration checkpoint near Temecula, California. On August 25, 1983, the applicant was placed in deportation proceedings by personal service of an Order to Show Cause (OSC) charging him as deportable for having entered the United States without inspection. The OSC reflects that the applicant requested an immediate hearing before the immigration judge to expedite a determination on his case and that bond was set in the amount of \$2,000. On August 30, 1983, an immigration judge granted the applicant's request for a change in his custody status and ordered the applicant be released from custody under bond of \$1,000. On August 31, 1983, obligor [REDACTED] posted the required immigration bond amount, and the applicant was subsequently released from detention. On that same day, a written notice scheduling a hearing for March 5, 1984 at the San Diego Immigration Court was served on the applicant's bondsman. Upon review of the hearing notice in the file, it does not appear that the notice was ever mailed or served upon the applicant.

The record further reflects that the applicant was represented by [REDACTED] during the applicant's 1983 deportation proceedings. However, the applicant states in a sworn statement dated March 31, 2010, that he never personally appeared before an immigration judge at any hearing to address the charges of deportability or the voluntary departure order. See 8 C.F.R. § 1240.51(b) ("[a]n oral decision shall be stated by the immigration judge in the presence of the respondent and the trail [sic] attorney, if any, at the conclusion of the hearing."). The applicant also indicates that on the day he was deported, he learned for the first time that his attorney had appeared in immigration court on his behalf on October 29, 1984 and that the immigration judge had ordered him to voluntarily depart the United States on or before January 5, 1985. The applicant further indicates that [REDACTED] never informed him of any hearing dates in immigration court or of the voluntary departure order. The voluntary departure period elapsed before the applicant was informed of it and was unable to voluntarily depart. The record does not include documentation showing that the immigration court notified the applicant of the voluntary departure order and that he was required to depart the United States on or before January 5, 1985. It is noted that the regulations in effect at the time of the applicant's deportation hearing required the

immigration judge to state an oral decision in the presence of the alien respondent at the conclusion of the hearing. 8 C.F.R. § 242.19(b) (1984).

Though we acknowledge that the regulations in effect at the time the applicant was deported indicate that notice to the attorney or representative shall constitute notice to the alien, *see* 8 C.F.R. § 292.5 (1984), we note that the Ninth Circuit and the Board have stated that service upon an attorney or representative is ineffective when the attorney fails to notify the alien of a hearing or an order granting voluntary departure. *See Varela v. INS*, 204 F.3d 1237, 1240 n.6 (9th Cir. 2000); *Matter of Grijalva*, 21 I&N Dec. 472, 474 (BIA 1996) (finding that a respondent who did not receive proper notice from his attorney and who has complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), has established ineffective assistance of counsel based on “exceptional circumstances”).

Here, both counsel and the applicant allege ineffective assistance of counsel by [REDACTED] in the applicant’s deportation proceeding. Moreover, the record includes documentation concerning the applicant’s filing of a complaint against [REDACTED] before the California State Bar and a sworn statement by the applicant indicating that he never received any notice from the immigration court or [REDACTED] concerning any deportation hearing or the grant of voluntary departure. The record evidence thus indicates that the applicant has substantially complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).<sup>2</sup> Accordingly, the AAO is persuaded by counsel’s assertion that the notice of hearing to the applicant’s bondsman and the fact that several notices of hearing in the record, which were not addressed to the applicant are insufficient to show compliance with the regulations in the applicant’s deportation proceeding.

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, 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 January 24, 1995, legacy INS released 143 pages of record material to the applicant. The EOIR also released to the applicant documentation that corroborates the determination that he was deported on March 27, 1985. However, the current entire USCIS record, which is before the AAO, does not contain a tape

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<sup>2</sup> Under *Matter of Lozada*, an ineffective assistance of counsel claim must satisfy the following procedural requirements: (1) an affidavit of the alien attesting to the relevant facts, including a detailed description of the agreement with former counsel, (2) former counsel must be informed of the allegations and provided with an opportunity to respond, and (3) indicate whether a complaint has been filed the appropriate disciplinary authority, and if not, why not. *Lozada, supra*.

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 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. 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 evidence in the form of correspondence, an affidavit from the applicant's landlord, employment verification letters, wage and tax statements, pay stubs, copies of bank statements, utility bills, and rent receipts, dated during the requisite period, and witness statements. 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 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. 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.

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*NON-PRECEDENT DECISION*

Page 7

**ORDER:** The director's decision denying the applicant's Form I-687 application is withdrawn.  
The application is approved.