



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.

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

[Redacted]

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 October 22, 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 21, 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 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 legal brief, counsel states that the applicant has attempted on four occasions to obtain his record through Freedom of Information Act (FOIA) requests in order to review the tape and/or transcripts related to his deportation hearing, but that the responses all indicate that his records could not be located. In support, the applicant submitted a copy of a letter dated December 20, 2010 by [REDACTED] an employee of the EOIR, prepared in response to the applicant's FOIA request. In the letter, the [REDACTED] stated that "after a search of our database no records were located regarding this matter."

From the documentary evidence in the record, it does not appear that the EOIR or USICS provided the applicant with either tape recordings or transcripts of his deportation hearing. Further, the applicant's physical file (currently in the possession of the AAO) contains no such tape or transcript. In a letter dated May 21, 2013, counsel acknowledges receiving documentation from USCIS in response to a FOIA request. 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. However, since the tape recording and/or transcript of the applicant's deportation hearing cannot be located, his 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 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 at a later time establish the issue in question. *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).

In a declaration dated April 15, 2013, the applicant asserts that his deportation proceeding did not comply with due process as he was not advised of his right to apply for voluntary departure nor or his right to appeal the immigration judge's decision to the Board. The declaration is signed by the applicant, who states that it was translated to him in Spanish and he declares that that its contents are true and correct.

Other documents in the record pertaining to the applicant's deportation include the following:

- The Record of Deportable Alien (Record) is dated October 18, 1986 and states the applicant requested a deportation hearing. The Record reflects that the applicant was served with a Form I-274 on the same day but that he refused to sign the document. The Form I-274 contains advisals in the Spanish language providing notice of relief in the form of voluntary departure and of the applicant's right to counsel.
- The Order to Show Cause (OSC) is dated October 18, 1986 and the trial attorney's notes reflect that the applicant conceded that he was subject to deportation under section 241(a)(2) of the Act in that he entered the United States without inspection.
- The trial attorney's notes from the October 22, 1986 deportation hearing further reflect that the applicant was ordered deported, that he reserved his right to appeal, and that the applicant did not have the economic means with which to voluntarily depart promptly from the United States.
- The Order of Deportation is dated October 22, 1986 and orders that the applicant be deported to Mexico. It states he made no application for relief from deportation and notes that he waived the right to appeal.
- The Warrant of Deportation is dated October 22, 1986 and states the applicant is subject to deportation under section 241(a)(2) of the Act. It indicates the applicant was deported at San Ysidro, California on October 22, 1986 and that he traveled by foot.

Counsel contends that the applicant was never informed of his right to apply for voluntary departure. However, several documents in the record contradict this claim. The Record of Deportable Alien indicates that the applicant requested an immigration hearing. The Order of Deportation further states that he made no application for relief from deportation. The Record of

Deportable Alien is signed by the arresting immigration officer, and the Order of Deportation is signed by the presiding immigration judge. Further, the trial attorney's notes indicate that the applicant did not have the economic means with which to voluntarily depart the United States, suggesting that relief in the form of voluntary departure was addressed.

In addition, the AAO notes that the applicant was not entitled to voluntary departure as a matter of law. Instead, the Attorney General was allowed, in his discretion, to permit certain aliens in deportation proceedings to depart voluntarily from the United States at their own expense if they established they had maintained good moral character for at least five years immediately preceding application for voluntary departure. INA § 244(e), 8 U.S.C. § 1254(e) (1980). Again, the trial attorney's notes suggest that the applicant was not eligible for voluntary departure because he was unable to secure the economic means with which to depart.

Furthermore, 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). Lastly, documentary evidence in the record reflects that the applicant was informed of the possibility of an appeal of the immigration judge's decision to the Board.

Nevertheless, under the terms of the *Proyecto* amended order, counsel has repeatedly requested a copy of the tape recording and/or transcript of the applicant's deportation 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. In a letter dated December 20, 2010, the EOIR indicated that no tape recording or transcript of the applicant's deportation hearing was found. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. However, counsel acknowledges receiving record material from USCIS. 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. 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).

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).

In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of wage and earnings statements, employment verification letters, a U.S. issued driver's license, all dated during the requisite period and affidavits from neighbors and friends. 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 on humanitarian grounds. He has established his eligibility for temporary resident status under section 245A of the Act.

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NON-PRECEDENT DECISION

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