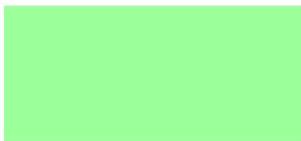




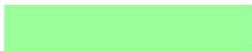
U.S. Citizenship
and Immigration
Services

(b)(6)



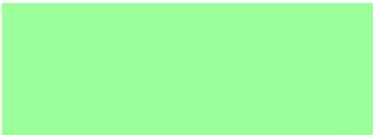
DATE: JUL 25 2013 OFFICE: NEBRASKA SERVICE CENTER

IN RE:

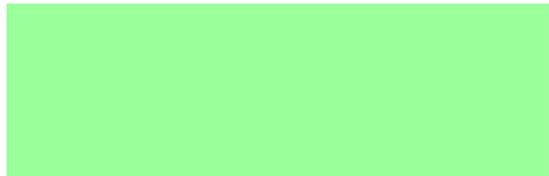


APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

FILE:



ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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

DISCUSSION: The director of the Nebraska Service Center denied the application for temporary resident status and certified the decision to the Administrative Appeals Office (AAO). The director's decision to dismiss the Form I-687 application will be withdrawn and the AAO will approve the application.

On June 30, 1987, the applicant filed a Form I-687, Application for Status as a Temporary Resident. On March 8, 1988, Legacy Immigration and Naturalization Service (Legacy INS) denied the applicant's Form I-687 after finding that her August 20, 1986 departure from the United States pursuant to an order of deportation meant she failed to maintain the necessary continuous residence required by section 245A of the Immigration and Nationality Act (the Act). See Section 245A(g)(2)(b)(i) of the Act.

On July 27, 2009, the applicant filed a Motion to Reopen pursuant to *Proyecto San Pablo v. INS*, No. 89-00456-WBD (D. Ariz.) (*Proyecto*). In the amended *Proyecto* order dated June 4, 2007, the United States District Court for the District of Arizona instructed the defendants¹ to:

prior to making a decision on the reopened legalization application, provide to legalization applicants complete copies of prior deportation files, including copies of the tapes and/or transcripts of the prior deportation hearings held before the Immigration Court, to enable them to bring a collateral challenge to the deportation order if appropriate.

The record evidence reflects that on March 30, 2004, United States Citizenship and Immigration Services (USCIS) provided the applicant documentation related to her deportation proceeding. However, the record does not indicate that the applicant ever received a tape recording and/or transcript of her deportation hearing. The applicant's physical file (currently in the possession of the AAO) contains no such tape or transcript. As a result, USCIS has complied with the District Court's order to the extent that it has provided the applicant with documentation of her legalization file as it currently exists. As a result of the missing tape and/or transcript, however, the applicant's complete file is unavailable.

The amended *Proyecto* order instituted the following burdens of proof for class members for whom the entire record cannot be found:

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

¹ Defendants in the law suit are Department of Homeland Security, *et al.*

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.

To invoke the portions of the amended *Proyecto* order that apply when the entire contents of a legalization file cannot be found, the applicant must make a *prima facie* showing that her August 20, 1986 departure from the United States pursuant to an order of deportation 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 Nebraska Service Center 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 Service Center found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. The Service Center therefore denied the application and certified the matter to the AAO for a ruling. In rendering a decision, the Service Center did not address whether the applicant was provided with a complete copy of her deportation file nor did it discuss whether the applicant submitted *prima facie* evidence that her 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 August 20, 1986 deportation proceeding shows that it was defective and entered in violation of the statute, regulations, and due process. The record reflects that the applicant was served with an Order to Show Cause on May 21, 1984 and that the hearing date was scheduled for a "date, time, and place to be set." On December 4, 1984, a hearing notice was mailed to [REDACTED] the applicant's counsel of record at the time, informing him of a deportation hearing scheduled for

December 19, 1984. The record includes a return receipt which reflects that the notice was received by counsel on December 10, 1984. Additionally, the applicant indicates in her declaration that [REDACTED] informed her that she did not have to appear in court for the December 19, 1984 hearing, as he would file for a continuance.

Upon review of the hearing notice in the file, it does not appear that the notice was ever mailed or served upon the applicant. Though we acknowledge that the regulations 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, the record evidence does not indicate that the applicant has substantially complied with the procedural requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988).² Though the applicant indicates in her affidavit that Mr. Watson’s representation was ineffective, she has not included copy of a personal affidavit or any correspondence to his prior counsel regarding his allegations of ineffectiveness. The applicant also has not submitted evidence of her filing of a complaint with the appropriate disciplinary authority nor adequately explained why she has not done so.

The record evidence includes the Immigration Judge Hearing Worksheet and Memorandum of Decision, which reflects that [REDACTED] represented the applicant at the December 19, 1984 deportation hearing. The Hearing Worksheet does not indicate whether the applicant was present at the hearing. The record evidence reflects that in a decision dated December 19, 1984, the immigration judge presiding over the applicant’s deportation proceeding granted the applicant until March 19 1985 to depart the United States voluntarily. In the decision, the immigration judge further ordered that, should the applicant not depart within that period, an order of deportation would immediately and automatically become effective without further notice to the applicant.

In her declaration, the applicant states that she did not appear at any deportation hearing before an immigration judge in December 1984. The applicant asserts that she was not informed of her right to appeal the decision of the immigration judge. Under the regulations in effect at the time of the applicant’s hearing, the immigration judge was required to inform the applicant of her right to appeal the decision. *See* 8 C.F.R. § 242.16(a) (1984) (“The immigration judge shall ... ascertain

² 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*.

that the respondent has received... a copy of Form I-618, Written Notice of Appeal rights..."). Further, the regulations required the immigration judge to render a decision in the presence of the applicant. See 8 C.F.R. § 242.19(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."). As the tape recording and/or transcript of the hearing are unavailable, the AAO cannot corroborate the applicant's assertions regarding her not being informed by the immigration judge of her right to appeal the decision to the Board.

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 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." 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 March 30, 2004, USCIS released to the applicant documentation that corroborates the determination that she was ordered deported on August 20, 1986. However, the current entire USCIS record, which is before the AAO, does not contain a tape 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 her deportation proceedings. While 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 that resulted in her 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 this case, USCIS records indicate that the applicant has been residing in the United States unlawfully since December 1979. In support of her Form I-687 legalization application, the applicant submitted numerous evidence dated during the requisite period in the form of W-2s wages and earnings statements; employer reference letters indicating that the applicant has been employed as a machine operator for [REDACTED] in Salina, Kansas since June 1980; landlord letters; medical services declarations; affidavits from friends; and copies of the applicant's Kansas driver's license. 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.

Given that the applicant has satisfied the continuous unlawful residence requirement of section 245A(a)(2); that on April 2, 2013, the Director of the Nebraska Service Center approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, that the record does not reflect any arrests or criminal convictions which would render the applicant statutorily ineligible for legalization under section 245A(a)(4)(B) of the Act; and that the record reflects the applicant is otherwise admissible, the AAO finds that the applicant is eligible for temporary resident status under section 245A of the Act. Consequently, the applicant's Form I-687 application will be granted.

ORDER: The director's decision is withdrawn. The application is approved.