



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: NOV 07 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,

Ron Rosenberg
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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

On March 4, 1988, the applicant filed a Form I-687, Application for Temporary Resident Status, pursuant to Section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225a. The director denied the application, finding that the applicant's departure in August of 1983 pursuant to a deportation order meant he 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 April 17, 2013, the director granted the applicant's motion and reopened the applicant's 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. June 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

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."

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.

Neither counsel nor the applicant assert on certification that the USCIS or the Executive Office for Immigration Review (EOIR) have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. From the documentary evidence in the record, however, it does not appear that the applicant ever received a tape recording and/or transcript of his deportation proceeding. The applicant's physical file (currently in the possession of the AAO) does not contain a tape recording or hearing transcript. As a result of the missing tape and/or 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 his Form I-690 waiver application, on humanitarian grounds. However, on April 17, 2013, the director denied the applicant's Form I-687, Application for Temporary Resident Status, finding that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his August 1983 departure pursuant to an order of deportation. The director, therefore, denied the application and certified the matter to the AAO for a ruling. The AAO notes that in rendering a decision, the director did not address whether the applicant was provided with a complete copy of his deportation file.

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).

Here, the record reflects that on November 24, 1980, the applicant was personally served with an Order to Show Cause, which charges the applicant with deportability pursuant to former section 241(a)(2) of the Act for being a native and citizen of Mexico who entered the United States

without inspection. The Order to Show Cause reflects that the applicant was advised of his appeal rights and that a list of free legal service providers was furnished to him. The Order to Show Cause contains notations indicating that the applicant admitted the allegations and the charge of deportability included therein. Therefore, deportability was established by clear, unequivocal, and convincing evidence. Furthermore, the Deportation Case Check Sheet (Form I-170) contains a notation indicating that on June 24, 1981, a Warrant of Deportation (Form I-205) was issued against the applicant. The Form I-205, however, is not included in the record. Notwithstanding, the record does include a Notice of Immigration Bond Breach (Form I-323), which is dated July 16, 1981, and instructs the obligor that he did not comply with the directive to surrender the applicant on July 2, 1981 for deportation to Mexico.

However, it is noted that pursuant to the terms of the *Proyecto* amended order, USCIS is required to provide the applicant with a copy of his complete deportation file, including the tape recording and/or transcript 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." 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. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Therefore, 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 proceeding. 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 therefore 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 there is no evidence that the applicant's deportation hearing was recorded. 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 assertion that he resided continuously in the United States during the requisite period, the applicant submitted evidence in the form of witness affidavits, employment verification letters on official employer letterhead, medical records, an Illinois driver's license issued in 1987, an Illinois identification card issued in 1979, W-2 wage and tax statements, and bank records, 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.

Furthermore, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). The regulations provide relevant definitions at 8 C.F.R. § 245a.

"Misdemeanor" means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

"Felony" means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

Here, the record before the AAO reveals that on August 13, 1983, the [redacted] Police Department arrested and charged the applicant with unlawful use of a weapon. (Case number [redacted] SID number [redacted]) On October 4, 2013, the AAO issued a Request for Evidence (RFE) regarding the Form I-687 application, informing the applicant of deficiencies in the record and asking him to submit documentation to establish the disposition of this criminal charge.

On October 18, 2013, counsel submitted documentation in response to the RFE. Specifically, counsel submitted a certified statement from the Office of the Circuit Court Clerk of [redacted] Illinois, dated October 10, 2013, finding no information in their criminal records dating from 1980 to the present regarding the applicant. Further, counsel submitted a Background Check Form

issued by the [REDACTED] Police Department dated October 10, 2013, disclosing that on August 13, 1983, the applicant was arrested and charged with unlawful use of a weapon. The Background Check Form indicates that the disposition for this arrest is unknown. Additionally, counsel enclosed the [REDACTED] Police Department General Incident Report, which indicates that the weapon found on the applicant at the moment of his arrest was a hunting knife.

From a review of the relevant statutory provisions, the Illinois offense of unlawful use of a weapon is a class A misdemeanor if the type of weapon alleged is a "knife." See 720 ILCS 5/24-1(a)(1) and (b). In Illinois, the sentence for a class A misdemeanor shall be a determinate sentence of imprisonment of less than one year. See 730 ILCS 5/5-4.5-55. Thus, even if the record established that the applicant was convicted of misdemeanor unlawful use of a weapon, this conviction would not disqualify the applicant for the benefit sought, as a single misdemeanor conviction does not render an alien ineligible for temporary resident status. See section 245A(a)(4)(B) of the Act.

Consequently, 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. Accordingly, the applicant's Form I-687 application will be approved.

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