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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave. N.W., MS 2090
Washington, DC 20529-2090

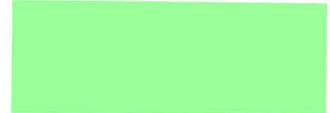


U.S. Citizenship
and Immigration
Services



Date: **NOV 12 2013** Office: NEBRASKA SERVICE CENTER

FILE:

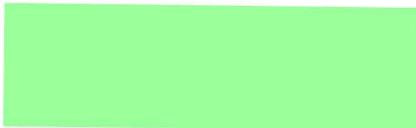


IN RE: Applicant:



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

ON BEHALF OF APPLICANT:



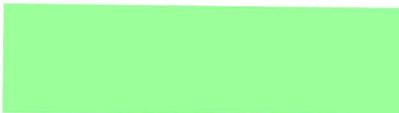
INSTRUCTIONS:

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,

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

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 is affirmed. The application remains denied.

On September 29, 1987, 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. On March 15, 2013, the director denied the application, finding that the applicant's June 15, 1985 departure pursuant to an order of deportation 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

The applicant filed a Motion to Reopen pursuant to the court's amended June 6, 2007 order in the class action *Proyecto San Pablo v. Department of Homeland Security*, No. CV 89-456-TUC-RCC (D. Arizona). On March 15, 2013, the director granted the applicant's Motion to Reopen, but denied the I-687 application and certified the matter to the AAO.²

The AAO reviews each appeal on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Following *de novo* review, the AAO identified alternative grounds for denial of the application. Specifically, the AAO noted that the applicant is inadmissible on two grounds.³

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:

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."

² On October 21, 2005, the applicant's Form I-690, application for waiver of grounds of inadmissibility, was denied. On certification, the AAO affirmed the director's decision to deny the waiver application on September 28, 2006.

³ The applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), as an alien who was deported and returned without permission. Congress set forth, at section 245A(d)(2) of the Act, 8 U.S.C. § 1255a(d)(2), a provision to waive certain *grounds of inadmissibility* under section 212(a) of the Act, 8 U.S.C. § 1182(a). The applicant applied for a waiver, but the application was denied. The applicant is also inadmissible as he is likely to become a public charge. See Section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A).

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

Counsel indicates on appeal that although she has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS, USCIS and 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. In support, counsel submitted copies of FOIA requests sent to the Nebraska Service Center and the EOIR. The record reflects that legacy INS released 64 pages of record material to the applicant pursuant his FOIA request, [REDACTED], on December 13, 1990, and released 66 pages of record material to the applicant pursuant to his FOIA request, [REDACTED] on May 1, 1990. Moreover, on March 23, 1994, legacy INS released an unstated amount of record material to the applicant pursuant to his FOIA request, number [REDACTED]. Further, on February 22, 2005, USCIS released 113 pages of record material to the applicant pursuant to his FOIA request, [REDACTED]. Additionally, on April 29, 2009, USCIS fulfilled the applicant's FOIA request, number [REDACTED] and released 236 pages of record material to the applicant. However, the record includes a letter dated September 29, 2008 by [REDACTED] Associate General Counsel of the EOIR, in which she states that after an extensive manual search of its files in the [REDACTED] Immigration Court, the agency was unable to locate any files under any of the A numbers the applicant provided.

From the documentary evidence in the record, it does not appear that 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, 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. 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. However, on March 15, 2013 the director denied the applicant's Form I-687 application, finding that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his June 14, 1985 departure pursuant to a deportation order. The director, therefore, denied the application and certified the matter to the AAO for a ruling.

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 May 28, 1985, the applicant was personally served with an Order to Show Cause, which charges him 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 deportability was established by clear, unequivocal, and convincing evidence. It further reflects that the applicant was ordered deported to Mexico and that the applicant waived his right to appeal the decision of the immigration judge to the Board.

However, pursuant to the terms of the *Proyecto 2007* amended order, counsel has requested a copy of the tape recording and/or transcripts of the applicant's deportation hearings. 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 record reflects that legacy INS released 64 pages of record material to the applicant pursuant his FOIA request, [REDACTED] on December 13, 1990, and released 66 pages of record material to the applicant pursuant to his FOIA request, [REDACTED] on May 1, 1990. Moreover, on March 23, 1994, legacy INS released an unstated amount of record material to the applicant pursuant to his FOIA request, number [REDACTED]. Further, on February 22, 2005, USCIS released 113 pages of record material to the applicant pursuant to his FOIA request, [REDACTED]. Additionally, on April 29, 2009, USCIS fulfilled the applicant's FOIA request, number [REDACTED] and released 236 pages of record material to the applicant.

However, 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).

An applicant for temporary resident status must also establish that he is admissible to the United States as an immigrant. Section 245A(a)(4)(A) of the Act, 8 U.S.C. § 1255a(a)(4)(A). 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).

Among the categories of inadmissible aliens are those likely to become a public charge. Section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A). If an applicant is determined to be inadmissible under section 212(a)(4)(A) of the Act, he or she may still be admissible under the special rule for determination of public charge. See 8 C.F.R. § 245a.2(d)(4) and (k)(4).

The regulation at 8 C.F.R. § 245a.2(d)(4) provides:

Proof of financial responsibility. An applicant for adjustment of status . . . is subject to the provisions of section 212(a)(15) of the Act relating to [inadmissibility] of aliens likely to become public charges. Generally, the evidence of employment submitted by an applicant pursuant to 8 C.F.R. § 245a.2(d)(3)(i) will serve to demonstrate the applicant's financial responsibility during the documented period(s) of employment. If the applicant's period(s) of residence in the United States include significant gaps in employment or if there is reason to believe that the alien may have received public assistance while employed, the applicant may be required to provide proof that he or she has not received public cash assistance.

Pursuant to 8 C.F.R. § 245a.2(d)(4), the burden of proof to demonstrate the inapplicability of the ground of inadmissibility arising under section 212(a)(4) of the Act lies with the applicant who may provide:

- (i) Evidence of a history of employment (i.e., employment letter, W - 2 Forms, income tax returns, etc.);
- (ii) Evidence that he/she is self-supporting (i.e., bank statements, stocks, other assets, etc.); or
- (iii) Form I - 134, Affidavit of Support, completed by a spouse in behalf of the applicant and/or children of the applicant or a parent in behalf of children which guarantees complete or partial financial support. Acceptance of the affidavit of support shall be extended to other family members where family circumstances warrant.

To evaluate the applicability of this ground of inadmissibility, the USCIS applies the special rule for determination of public charge. 8 C.F.R. § 245a.2(k)(4). Under the special rule, an alien who has a consistent employment history and shows the ability to support himself even though his income may be below the poverty level is not inadmissible as a public charge. 8 C.F.R. § 245a.3(k)(4). The alien's employment history should be continuous in the sense that the alien shall be regularly attached to the workforce, has an income over a substantial period of the applicable time, and has demonstrated the capacity to exist on his or her income without recourse to public cash assistance. 8 C.F.R. § 245a.3(g)(4)(iii).

A review of the record of proceeding reveals the applicant is seventy-five years old. According to the record, in 2009 the applicant resided at the [REDACTED] California because he suffered from diabetes, lung and heart disease. According to the record, the applicant is no longer residing at the [REDACTED]

A statement of earnings from the Social Security Administration dated October 6, 2003 indicates the applicant worked and earned wages in the United States as follows:

- 1979 – \$9,305
- 1980 – 11,744
- 1981 – 10,696
- 1982 – 7,427
- 1983 – 2,560
- 1984 – 98
- 1985 – 0
- 1986 – 3,873
- 1987 – 5,617
- 1988 – 5,216
- 1989 – 356
- 1990 – 43

The record does not contain any evidence of earnings for the applicant in 1985, or from 1991 to the present.

The applicant stated that he was never married at part #11 of the I-687 application, and indicated that his mother was living and his father was unknown, at parts #20 and #21 of the application. The record does not contain any evidence to reflect that the applicant has children. The record does not contain evidence regarding the applicant's educational background, except that he indicated that he is illiterate. The record does not contain any evidence that he possesses any particular skill. The record does not contain any documentation such as tax returns or bank statements to establish any current employment or demonstrate the applicant's means of economic support. The applicant has not submitted a Form I-134, affidavit of support, from a family member guaranteeing complete or partial financial support.

Medical records dated 2008 and 2009 indicate that at that time the applicant received home health care. In a statement dated August 11, 2005, the applicant stated he lived alone at [REDACTED] in [REDACTED] California. He stated he could not live in Mexico because "I have no means to support myself there . . . Here [in the United States] I have friends who help me. My nephews and nieces live in [REDACTED] California and we visit each other frequently."

The AAO issued a request for further evidence (RFE) to counsel and the applicant on September 9, 2013, advising the applicant that he failed to establish that he is not likely to become a public charge. The AAO requested that the applicant provide the following evidence:

- (1) Evidence of current employment including the number of hours worked in a week and the rate of pay per hour; and/or
- (2) Evidence that the applicant is able to support himself without public assistance; and/or

- (3) A notarized Form I-134, Affidavit of Support along with any supporting documentation required; and/or
- (4) Any other evidence establishing that the applicant is not likely to become a public charge.

In addition, the applicant was requested to provide evidence of the manner in which he has supported himself in the United States and for what period of time he has resided at the addresses previously mentioned.

In the RFE, the AAO specifically alerted the applicant that failure to respond to the RFE may result in dismissal of the case. Neither the applicant nor counsel responded to the RFE. Consequently, the applicant has failed to establish that he is not likely to become a public charge or that this ground of inadmissibility is inapplicable to him.

Section 212(a)(4) of the Act states in pertinent part that any alien who: "is likely at any time to become a public charge is inadmissible."

An applicant for residence who is determined likely to become a public charge and is unable to overcome this determination after application of the special rule will be denied adjustment. The applicant has failed to meet his burden in establishing proof of financial responsibility, as required by 8 C.F.R. § 245a.2(d)(4). He failed to demonstrate the inapplicability of the ground of inadmissibility under the special rule for determination of public charge. The applicant is therefore ineligible for temporary resident status.⁴

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

⁴ The record reflects that on May 17, 1985, the applicant was arrested and charged with lewd or lascivious conduct against a child in violation of section 288 of the California Penal Code. However, the applicant's FBI rap sheet reflects that this charge was dismissed in the furtherance of justice due to insufficient evidence to prosecute and, therefore, will not be considered.