



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **OCT 04 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", written over a circular stamp or mark.

Ron Rosenberg
Chief, Administrative Appeals Office

cc: Gibbs, Houston, Pauw
1000 Second Avenue, Suite 1600
Seattle, WA 98104

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 will be affirmed. The application will be denied.

On September 2, 1987, 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 November 27, 1984 departure from the United States pursuant to an order of deportation 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 29, 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,

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.

Therefore, 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 granted 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 Form I-687 temporary resident status 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).

Neither counsel nor the applicant responded to the certified denial. However, documentation in the record reflects that on December 27, 2004, USCIS fulfilled the applicant's Freedom of Information Act (FOIA) request and released record material to the applicant relevant to his request for his deportation file. It is noted that pursuant to the *Proyecto 2007* amended order, USCIS is required to provide class members with a copy of the tape recording and/or transcript of the prior deportation hearing, to enable the applicants to bring a collateral challenge to the deportation order, if appropriate.

The record of proceedings (currently in the possession of the AAO) contains a transcript of the applicant's January 27, 1983 deportation hearing. The hearing transcript reflects that the applicant

was represented by counsel, that he was provided with an interpreter and that the immigration judge explained the nature of the proceedings, all in accordance with the governing statute and regulations in effect at the time of the deportation hearing. *See* Section 242B of the Act (providing that an alien must be informed of the nature of the charges against him or her, and given a reasonable opportunity to examine the evidence against him or her, and present evidence on his or her own behalf); 8 C.F.R. § 242.16(a) (1982) (“The Immigration Judge shall . . . advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf and to cross-examine witnesses presented by the Government. . . .”) The hearing transcript further reflects that proceedings were translated into Spanish, which is the language the applicant understands. The immigration judge entered the order to show cause as an exhibit in the record, and counsel for the applicant admitted the allegations and conceded deportability as charged. *See* 8 C.F.R. § 242.16(a) (1982). Importantly, the transcript of the hearing reflects that based upon the applicant’s admissions and the documentary evidence presented into the record, the immigration judge made a determination of deportability by clear, unequivocal, and convincing evidence, as required by the regulation at former 8 C.F.R. § 242.14 (1982).

Moreover, upon determining that the applicant was deportable as charged, the immigration judge inquired as to various possible forms of relief from deportation. *See* 8 C.F.R. § 242.17(a) (1982) (“The immigration judge shall inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing.”) The only form of relief from deportation requested by counsel on behalf of the applicant was voluntary departure. The transcript reflects that the legacy INS trial attorney, the immigration judge, and counsel questioned the applicant about his statutory eligibility for voluntary departure. Based on the evidence in the record, the immigration judge denied voluntary departure in the exercise of discretion and entered an order of deportation against the applicant. The transcript reflects that counsel reserved his client’s right to appeal the decision of the immigration judge to the Board on behalf of the applicant. In a decision dated April 26, 1983, the Board found that a grant of voluntary departure was not warranted and affirmed the decision of the immigration judge. On November 27, 1984, the applicant was deported to Mexico.

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

- The Order to Show Cause (OSC) is dated January 7, 1983 and the notes on the OSC indicate that the applicant admitted to being a native and citizen of Mexico who entered the United States without inspection. The OSC reflects that it was personally served upon the applicant on January 7, 1983. The OSC contains a notation indicating that a Form I-618, Written Notice of Appeal Rights, and a list of free legal service providers was furnished to the applicant.

- The Notice of Entry of Appearance as Attorney or Representative (Form G-28) is dated January 27, 1983 and indicates that [REDACTED] entered an appearance as attorney for the applicant at his request.
- The Decision of the Immigration Judge (Form I-38) is dated January 27, 1983 and instructs the applicant that he has been ordered deported to Mexico on the charge contained in the OSC. The Form I-38 reflects that the applicant reserved his right to appeal the decision of the immigration judge to the Board.
- The Notice of Order of Deportation (Form I-294) is dated October 5, 1984 and instructs the applicant that he has been ordered deported to Mexico. The notice contains a Spanish language translation of the warnings and advisals related to deportation from the United States.
- The Warrant of Deportation is dated October 5, 1984 and states the applicant is subject to deportation under section 241(a)(2) of the INA. It indicates the applicant was deported at the El Paso Bridge of the Americas (BOTA) port of departure on November 27, 1984 and that he traveled by foot.
- A transcript of the deportation hearing.²

Under the terms of the 2007 *Proyecto* amended order, the AAO's consideration of whether an applicant has made a *prima facie* showing that proceedings were not conducted in accordance with the law applies only in cases where the entire deportation record cannot be located. As the applicant has been provided with the entire deportation record, we will not consider counsel's arguments regarding violations of the applicant's due process rights as it is not within the authority of the AAO to pass judgment on prior proceedings falling outside of its jurisdiction. The applicant may request the Board of Immigration Appeals to take *sua sponte*, affirmative action under 8 C.F.R. § 1003.2(a). The relevant portion of 8 C.F.R. § 1003.2(a) provides that "[t]he Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision." In addition, with the USCIS and EOIR having provided the applicant with a copy of the cassette tapes, the applicant may request judicial review and challenge the underlying deportation order pursuant to section 245A(f)(4) of the Immigration Reform and Control Act of 1986.

In this case, the director granted the applicant's Motion to Reopen and granted 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.

²The record contains a copy of a cover letter, indicating that a copy of the transcript was sent to the applicant's attorney of record.

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 245A(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 of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(B)(i).

The documentation in the record conclusively shows that the applicant left the United States pursuant to an order of deportation on November 27, 1984. There is no authority in the Act given to the USCIS Director to waive the statutory requirement of continuous residence in the United States.

As previously determined by the director, due to the applicant's departure from the United States pursuant to an order of deportation on November 27, 1984, the applicant lacks the necessary continuous residence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the application.

ORDER: The director's March 29, 2013 decision is affirmed. The Form I-687 application is denied.