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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: OCT 0 7 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 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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.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 3, 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 May 22, 1986 departure 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 3, 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. 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 responded to the certified denial. However, counsel for the applicant has stated that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, USCIS and the Executive Office for Immigration Review (EOIR) have failed to provide the applicant with the tape recording and/or transcript of his deportation hearing. On May 31, 2006, USCIS fulfilled the applicant's FOIA request, number and released record material to the applicant. However, in a letter addressed to USCIS and dated September 9, 2009, counsel for the applicant requested a copy of the tape recording and/or transcript of the applicant's deportation hearing. Therefore, from the documentary evidence in the record, it does not appear that that the applicant ever received a tape recording and/or transcript of the 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 and approved his Form I-690 waiver application on humanitarian grounds. However, 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 May 22, 1986 departure pursuant to a deportation order. 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 director did note that the proceedings which resulted in the applicant's deportation were conducted in compliance with the governing statute and regulations, and that the applicant failed to make a prima facie case that his deportation order was not in compliance with the governing statute or regulations, or occurred in violation of due process, or involved a gross miscarriage of justice.

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).

The record reflects that on August 13, 1985, immigration officers apprehended the applicant. Also on August 13, 1985, the applicant signed the Spanish language version of Form I-274, Notice and Request for Disposition, thereby acknowledging receipt of the notice containing the hearing and appeal rights accorded to aliens who have been detained for being present in the United States in violation of law. On August 28, 1985, the applicant was served with an Order to Show Cause issued on August 15, 1985. The Order to Show Cause charged the applicant with deportability pursuant to section 241(a)(2) of the Act for having entered the United States without inspection. A deportation hearing was scheduled for October 29, 1985, and the notes in the Order to Show Cause indicate that the applicant admitted the allegations contained therein and conceded deportability as charged. The record includes Form EOIR-6, Decision of the Immigration Judge, which reflects that the immigration judge granted the applicant the privilege of voluntarily departing the United States on or before March 29, 1986. The Form EOIR-6 further reflects that the applicant waived his right to appeal the decision of the immigration judge to the Board. Importantly, the Form EOIR-6 warned the applicant that failure to depart by the required date would result in the applicant being ordered deported on the charge contained in the Order to Show Cause without further notice or proceeding.

On April 21, 1986, the applicant was served with a Form I-294, which explained to him in English and in Spanish that he had been ordered deported. The Form I-205, Warrant of Deportation, indicates that on May 22, 1986, the applicant was deported at the Brownsville, Texas port of departure. The Form I-205 reflects that an immigration officer witnessed the applicant's deportation to Mexico, and the form bears the applicant's signature and right thumb print.

However, pursuant to the terms of the *Proyecto* amended order, counsel has requested complete copies of his client's 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 record reflects that on May 31, 2006, USCIS released record material to the applicant relevant to his FOIA request. 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).

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 birth certificates of the applicant's United States-born children, a copy of the applicant's Illinois driver's license, employment reference letters on official employer letterhead, verification of residence declarations, W-2 wage and tax statements, copies of income tax returns, unemployment insurance benefits statements, a lease agreement, a lease extension agreement, a letter indicating that the applicant opened a bank account with the Illinois, on June 22, 1985, bank records, and a utility receipt, 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 throughout 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 by the director on humanitarian grounds. He has established his eligibility for temporary resident status under section 245A of the Act. Consequently, 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.