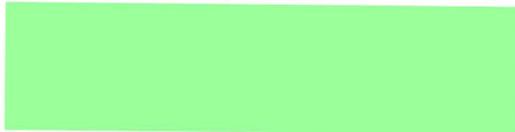




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 21 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:



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 will be affirmed. The application will be denied.

On June 30, 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 August 20, 1986 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 27, 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 approved 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 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).

In his legal brief, counsel for the applicant states that the applicant's deportation was in violation of his due process rights and the regulations as they existed in 1986. Counsel further states 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.

Here, the record reflects that the applicant's Freedom of Information Act (FOIA) request, number [REDACTED] was processed on July 11, 2013, and that 434 pages of record material were released to the applicant in their entirety, and 135 pages of record material were released to the applicant in part. The record also contains documentation indicating that on July 31, 2013, USCIS

mailed the applicant a copy of the cassette tape of his deportation hearing. On September 17, 2013, a copy of the cassette tape of the applicant's deportation hearing was provided to counsel.

The record of proceedings (currently in the possession of the AAO) contains a cassette tape recording of the applicant's June 13, 1984 and December 19, 1984 deportation hearings. The tape recording reflects that the applicant was represented by counsel, who stipulated service of the Order to Show Cause and waived a reading of the factual allegations and the charge of deportability as contained therein. *See* Section 242B of the Act (1983) (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) (1983) ("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 tape recording of the hearing reflects that 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) (1983). Importantly, the recording of the hearing reflects that based upon the admissions and concessions made on the record, the immigration judge entered a finding of deportability by clear, unequivocal, and convincing evidence, as required by the regulation at former 8 C.F.R. § 242.14 (1983). Mexico was designated as the country of deportation pursuant to former section 243 of the Act.

Moreover, upon determining that the applicant was deportable as charged, the immigration judge inquired as to various possible forms of relief from deportation, including voluntary departure. *See* 8 C.F.R. § 242.17(a) (1983) ("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 applicant, through counsel, requested the privilege of voluntary departure in lieu of deportation. Based on the evidence in the record, the immigration judge granted the applicant voluntary departure without expense to the government on or before March 19, 1985. The immigration judge further ordered that, if the applicant failed to depart when and as required, the privilege of voluntary departure would be withdrawn and an order of deportation to Mexico would become immediately effective without further notice or proceeding. The recording of the hearing reflects that a copy of the Decision of the Immigration Judge (Form I-39) was served to counsel and the legacy INS trial attorney, and that counsel waived his client's right to appeal the decision of the immigration judge to the Board on behalf of the applicant.

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

- The Order to Show Cause is dated May 21, 1984 and the notes on it indicate that the applicant, through counsel, admitted to being a native and citizen of Mexico who entered the United States without inspection. The Order to Show Cause reflects that it was served upon the applicant by certified mail and that a list of free legal service providers was

attached. The Order to Show Cause further reflects that Form I-618, Written Notice of Appeal Rights, was served upon the applicant on May 21, 1984. At the deportation hearing convened on December 19, 1984, the immigration judge found the applicant deportable pursuant to section 241(a)(1) of the Act by clear, unequivocal, and convincing evidence.

- The Notice of Entry of Appearance as Attorney or Representative (Form G-28) is dated June 13, 1984 and indicates that [REDACTED] entered an appearance as attorney for the applicant at his request.
- The Decision of the Immigration Judge (Form I-39) is dated December 19, 1984 and instructs the applicant that, in lieu of deportation, he has been granted the privilege of voluntary departure without expense to the Government on or before March 19, 1985. The Form I-28 reflects that the applicant waived his right to appeal the decision of the immigration judge to the Board.
- A Form I-166, which is dated April 23, 1985, instructs the applicant that he has been ordered deported to Mexico. The Notice explains that there was no available administrative relief that could be extended to the applicant and explained that it was incumbent upon legacy INS to enforce the deportation order.
- The Warrant of Deportation (Form I-205) is dated April 23, 1985 and states the applicant is subject to deportation under section 241(a)(2) of the Act. The Form I-205 contains the applicant's signature and right thumb print, and indicates that the applicant was deported at El Paso, Texas on August 20, 1986 and that he traveled by foot.

When balancing the evidence in the record, including the tape recording of the applicant's hearing and the documentary evidence related to the deportation proceeding with the assertions of counsel and the applicant, it appears that the applicant was deported pursuant to proceedings conducted in accordance with the governing standards. As a result, the applicant has failed to establish that the *Proyecto* order has implications for his legalization application.

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 approved 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.

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 August 20, 1986. Therefore, the applicant did not reside continuously in the United States for the requisite period. On that basis, the applicant is statutorily ineligible for temporary residence status.²

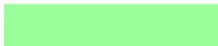
Though relief is provided in the Act for absences based on factors related to emergencies and absences approved under the advance parole provisions, it was not congressional intent to provide relief for absences during an order of deportation. In addition, general grounds of inadmissibility, set forth in section 212(a) of the Act, apply to any alien seeking a visa or admission into the United States, or adjustment of status. The applicant's inadmissibility under section 212(a)(9)(A)(ii) for having been deported and having returned to the United States without authorization has been waived. However, an alien's inadmissibility under section 212(a) of the Act is a separate issue from the continuous residence requirement issue discussed above. Although the applicant's failure to maintain continuous residence and his inadmissibility for having been deported and having returned without authorization are both based on the deportation, a waiver is possible only for the inadmissibility.

There is no authority in the Act given to the Attorney General, now the Director, USCIS, 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 on August 20, 1986 due to an order of deportation, he lacks the necessary continuous presence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the application.

² Additionally, documentation in the record indicates that the applicant has been convicted of at least two misdemeanors.

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NON-PRECEDENT DECISION

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ORDER: The director's March 27, 2013 decision is affirmed. The Form I-687 application is denied.