U.S. Department of Homeland Security
U. S. Citizenship and Immigration Servic
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 2 3 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 will be affirmed. The application will be denied.

On April 15, 1988, 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 October 24, 1984 and March 31, 1987 departures pursuant to deportation orders 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 June 4, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status 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

[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.

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 denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, due to the applicant's criminal history. The director further found that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act. Accordingly, the director denied the Form I-687 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, the AAO notes that in a June 23, 2008 letter addressed to the Nebraska Service Center, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, USCIS and legacy INS have failed to provide the applicant with a copy of complete files relating to the applicant's deportation proceeding, including the tape recording and/or transcript of the deportation hearings. The record reflects that on July 23, 2003, the applicant filed a FOIA request with USCIS pursuant to the court order in *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz. Feb. 2, 2001). The record further reflects that on December 13, 2007, the applicant filed

a subsequent FOIA request with USCIS pursuant to the 2007 *Proyecto* amended order. The record is unclear as to whether these requests were fulfilled by the FOIA unit at the Nebraska Service Center. Additionally, the applicant's October 10, 1997 FOIA request was administratively closed by legacy INS on December 20, 1997 for failure to comply with a request for payment.

However, the applicant's physical file (currently in the possession of the AAO) contains the cassette tapes and hearing transcripts of his 1983 and 1986 deportation proceedings. As the applicant appealed both deportation orders to the Board of Immigration Appeals, it can be concluded that the applicant received the transcripts of his deportation hearings. *See* Immigration Court Practice Manual, Chapter 4.10(b) ("If an Immigration Judge's decision is appealed to the Board of Immigration Appeals, the hearing is transcribed in appropriate cases and a transcript is sent to both parties."); *see generally* former 8 C.F.R. § 3.3(c)(1) ("In those cases that are transcribed, the briefing schedule shall be set by the Board after the transcript is available.") As a result, USCIS and EOIR have complied with the District Court's order in that the applicant has been provided with copies of prior deportation files, including copies of transcripts of the hearings before the immigration court.

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 transcripts of his 1983 and 1986 deportation hearings, we will not consider the asserted 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 EOIR having provided the applicant with a copy of the hearing transcripts, 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, but denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. Additionally, 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 departed the United States pursuant to deportation orders on October 24, 1984, and on March 31, 1987. Neither the applicant nor counsel has contested the facts of the deportation. The applicant was outside the United States pursuant to two orders of deportation during the requisite period. 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.

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 not been waived. Furthermore, 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. The Congress may have intended applicable waivers to be granted liberally in support of the legalization program. However, the clear intent of Congress was to deny legalization benefits to applicants who did not maintain their continuous residence in the United States because they were deported outside the United States.

As previously determined by the director, due to the applicant's deportation on August 20, 1986, 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 petition.

Alternatively, the record shows that the applicant has been convicted of four misdemeanors, thus rendering him ineligible for temporary resident status pursuant to section 245A(a)(4)(B) and the regulation at 8 C.F.R. § 245a.2(c)(1) as an alien convicted of three or more misdemeanors. An alien who applies for temporary resident status must establish that he or she is admissible to the United States as an immigrant, and has not been convicted of any felony, or three or more misdemeanors. Section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B). In addition, an applicant for temporary resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in the Act. Section 245A(a)(4)(A), 8 U.S.C. § 1255a(a)(4)(A).

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, a review of the record reveals that the applicant has several arrests and criminal convictions. The record shows that on January 14, 1984, the applicant was convicted in the United States District Court for the Southern District of California of illegal entry, a misdemeanor in violation of 8 U.S.C. 1325, and of possession of a false immigration document with intent to defraud, a misdemeanor in violation of 18 USC 1028(a)(4). The record reflects that the applicant was sentenced to 30 days imprisonment for the illegal entry offense. He was sentenced to 15 days in jail and was ordered to pay a $25 assessment fee for possessing a false immigration document with intent to defraud.[2] Additionally, the applicant's FBI Rap Sheet reflects that on December 23, 2000, the applicant was convicted of driving under the influence of drugs or alcohol, a misdemeanor in violation of California Vehicle Code § 23152(a) and of driving with a blood alcohol content of .08 or more, a misdemeanor in violation of California Vehicle Code § 23152(b). For these offenses, the applicant was sentenced to probation for a period of 36 months and was fined.

Therefore, for immigration purposes, the applicant stands convicted of four misdemeanors: driving under the influence, driving with a blood alcohol content of .08 or more, illegal entry, and possession of a false immigration document with intent to defraud. As the applicant has been convicted of three or more misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act. *See also* 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.

ORDER: The director's June 4, 2013 decision is affirmed. The Form I-687 application is denied.

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[2] Docket No.