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

(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

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 May 4, 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 July 13, 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 May 17, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary residence 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 reopened the applicant's Form I-687 temporary residence application. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to the applicant's July 13, 1984 departure pursuant to an order of deportation. 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).

Neither counsel nor the applicant responded to the certified denial, except to provide an updated address for the applicant. However, the applicant's physical file (currently in the possession of the AAO) contains the cassette tapes and hearing transcripts of his deportation proceedings. The record reflects that the applicant appealed the June 4, 1981 decision of the immigration judge to the Board of Immigration Appeals. On July 22, 1982, the Los Angeles Immigration Court mailed a copy of the hearing transcript and the decision of the immigration judge to counsel of record. In a letter dated July 27, 1982, counsel acknowledged having received a transcript of the applicant's deportation hearing. It can therefore be concluded that the applicant, through counsel, has received the transcripts of his deportation hearing. *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.

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* INA § 242B (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 hearing transcript 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) (1983). Importantly, the hearing transcript and the transcript of the oral decision of the immigration judge reflect that based upon the applicant's admissions and the documentary evidence presented into the record, the immigration judge made a finding of deportability by clear, unequivocal, and convincing evidence, as required by the regulation at former 8 C.F.R. § 242.14 (1983). Peru 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 and suspension of deportation. *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 suspension of deportation and voluntary departure as forms of relief from deportation. The immigration judge took testimony and admitted evidence into the record in connection with the applications for relief from deportation. Based upon the evidence in the record, the immigration judge found the applicant statutorily ineligible for suspension of deportation and denied the application on that basis. However, the immigration judge granted the applicant voluntary departure without expense to the government on or before July 3, 1981. 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 Peru would become immediately effective without further notice or proceeding.

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

- The Order to Show Cause (OSC) is dated January 2, 1981 and the notes on the OSC indicate that the applicant admitted to being a native and citizen of Peru who entered the United States without inspection. The OSC reflects that the applicant requested a prompt hearing to expedite determination of his case. At the deportation hearing convened on March 25, 1981, 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 March 25, 1981 and indicates that entered an appearance as attorney for the applicant at his request.

- The Oral Decision of the Immigration Judge is dated June 4, 1981 and instructs the applicant that he has been granted the privilege of voluntary departure on or before July 3, 1981. The hearing transcript 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 June 27, 1984 and instructs the applicant that he has been ordered deported to Peru. The Notice explains the ramifications of this and includes a Spanish translation.

- The Warrant of Deportation (Form I-205) is dated June 27, 1984 and states the applicant is subject to deportation under section 241(a)(2) of the Act. It indicates the applicant was deported at the Los Angeles Airport (LAX) port of departure on July 13, 1984 and that the manner of departure was via airline The departure was witnessed by an immigration officer and the Form I-205 bears the applicant's signature and right thumb print.

When balancing the evidence in the record, including the transcript of the applicant's deportation hearings 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 prior 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 the applicant's Form I-687 temporary residence application. 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 departed the United States pursuant to an order of deportation on July 13, 1984. Therefore, the applicant did not reside continuously in the United States throughout the requisite period. On that basis, the applicant is statutorily ineligible for temporary residence status.

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 outside the United States pursuant to an order of deportation.

As previously determined by the director, due to the applicant's departure pursuant to an order of deportation, he lacks the necessary continuous residence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director's denial of the petition.[2]

ORDER: The director's May 17, 2013 decision is affirmed. The Form I-687 application is denied.

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[2] The record reflects that on January 5, 1981, the applicant was convicted in the United States District Court for the Southern District of California (Case No. of knowingly and willfully aiding and abetting aliens to enter the United States unlawfully, in violation of 8 U.S.C. § 1325 and 18 U.S.C. § 2. The applicant is inadmissible under section 212(a)(6)(E) of the Act, 8 U.S.C. 1182(a)(6)(E). He is ineligible for this additional reason.