



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **OCT 25 2013** OFFICE: NEBRASKA SERVICE CENTER
IN RE: Applicant:

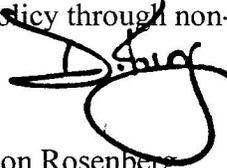
APPLICATION: Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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 December 21, 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 June 4, 1984 departure pursuant to an order of deportation under the name [REDACTED] 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-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 the Form I-687 application. However, the director found 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 March 12, 2008 legal brief in support of the applicant's motion to reopen, counsel for the applicant stated that the applicant's deportation was in violation of the applicant's due process rights. Counsel claims the applicant received ineffective assistance of counsel, that prior counsel did not explain to the applicant the nature of the deportation proceedings, and that the applicant was not afforded an opportunity to apply for various forms of relief from deportation.

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 June 18, 1990, and that 72 pages of record material were released to the applicant and his attorney [REDACTED]. The record further reflects that a second request was processed by legacy INS on March 15, 1995, and that 120 pages were released to the applicant, however, two cassette tapes were withheld. On February 9, 1999, legacy INS released 105 pages of record material to the applicant and his attorney [REDACTED].

The applicant's physical file (currently in the possession of the AAO) contains the cassette tapes of the applicant's deportation proceeding. On August 21, 2013, the Nebraska Service Center (NSC) FOIA unit sent a letter to counsel acknowledging receipt of his request for the cassette tapes of the applicant's deportation hearing. The NSC FOIA unit prepared a supplemental FOIA case, number [REDACTED] to release the copies of the cassette tape recordings to counsel. However, prior to releasing records to a third party, the NSC FOIA unit must have a written authorization by the applicant permitting disclosure of records to a third party. See 6 C.F.R. § 5.3(d) ("If you are making a request for records about another individual, either a written authorization signed by that individual permitting disclosure of those records to you or proof that that individual is deceased (for example, a copy of a death certificate or an obituary) must be submitted.") On August 21, 2013, the FOIA unit mailed a letter to counsel requesting the applicant's consent to release the petitioned records to counsel. As counsel did not respond to the FOIA unit's request, the case was administratively closed on October 5, 2013 for failure to comply with the regulations governing the release of records. As a result, USCIS has complied with the District Court's order in that it attempted to provide the applicant with copies of tape recordings of his deportation hearing.

The cassette tape recording reflects that the applicant appeared *pro se*, that he was provided with an interpreter and that the immigration judge explained the nature of the proceedings and the applicant's rights during the deportation proceeding, all in accordance with the governing statute and regulations in effect at the time of the deportation hearing. See § 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 hearing transcript reflects that proceedings were translated into Spanish, which is the language the applicant understands. It further reflects that the applicant stated on the record that he did not wish to retain counsel. The immigration judge entered the order to show cause as an exhibit in the record, and the applicant admitted the allegations and conceded deportability as charged. See 8 C.F.R. § 242.16(a) (1983). Importantly, the cassette tape recording reflects 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). 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 asylum and 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 immigration judge explained the requirements for both asylum and voluntary departure and offered the applicant an opportunity to submit an application for either form of relief from deportation. Upon questioning by the immigration judge, the applicant stated on the record that he did not want to apply for asylum or voluntary departure.

Based on the evidence in the record, the immigration judge ordered the applicant be deported from the United States to Mexico on the charge contained in the Order to Show Cause. The recording of the hearing reflects that a copy of the Decision of the Immigration Judge (Form I-38) was served to the applicant, and that he waived his right to appeal the decision of the immigration judge to the Board.

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

- The Order to Show Cause is dated May 30, 1984 and alleges that the applicant is a native and citizen of Mexico who entered the United States without inspection. The Order to Show Cause reflects that it was personally served upon the applicant 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 30, 1984. At the deportation hearing convened on June 4, 1984, the immigration judge found the applicant deportable pursuant to section 241(a)(1) of the Act by clear, unequivocal, and convincing evidence.
- The Decision of the Immigration Judge (Form I-38) is dated June 4, 1984 and instructs the applicant that he has been ordered deported from the United States to Mexico on the charge contained in the Order to Show Cause. The Form I-38 reflects that a copy of the decision was served upon the applicant.
- A Form I-294, which is dated June 4, 1984, instructs the applicant that he has been ordered deported to Mexico. The Form I-294 further reflects that the notice was personally served on the applicant, and that the warnings and advisals contained therein were provided to the applicant in the Spanish language.
- The Warrant of Deportation (Form I-205) is dated June 4, 1984 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 the Calexico, California port of departure on June 4, 1984 and that he traveled by foot. The applicant's departure was witnessed by immigration officer [REDACTED]

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 USCIS attempted to provide the applicant with the cassette tapes of his deportation hearing, 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 Executive Office for Immigration Review to take *sua sponte*, affirmative action under 8 C.F.R. § 1003.23(a). The relevant portion of 8 C.F.R. § 1003.2(a) provides that "[a]n Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals." In addition, 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 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 was deported from the United States on June 4, 1984. The applicant was outside the United States under an order of deportation after January 1, 1982. 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.

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 on June 4, 1984 under an order of deportation, 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.

Even assuming, *arguendo*, that the applicant satisfied the continuous residence requirement of section 245A(a)(2)(A) of the Act, the AAO would alternatively find the applicant statutorily ineligible for temporary resident status for failing to show by a preponderance of the evidence that he is otherwise eligible. *See* 8 C.F.R. § 245a.2(c). The record shows that on May 10, 2013, the AAO issued a Notice of Intent to Deny (NOID) the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested that the applicant provide full criminal dispositions regarding the following matters:

The record before the AAO reveals that you were arrested in California on October 7, 1993 under the name Emilio N. Lossley for violations of the California Penal Code (PC) including: section 288(a) *lewd and lascivious acts with child under 14 years of age*; section 289(a) *sexual penetration foreign object with force*; and, 288(b) *lewd and lascivious acts with child under 14 years of age*. Convictions under these sections of the California Penal Code may constitute [crimes involving moral turpitude] under *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

The applicant, through counsel, submitted documentary evidence in response to the NOID.

An alien applying for adjustment of status to that of a temporary resident 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. 8 C.F.R. § 245a.2(d)(5).

The applicant must therefore demonstrate that his criminal history does not disqualify him for temporary resident status. Here, the applicant has failed to meet this burden because he has failed to provide a final criminal disposition for his arrest on October 7, 1993.

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).

Additionally, an alien who has been convicted of a crime involving moral turpitude is inadmissible, and therefore ineligible for temporary resident status. Section 212(a)(2)(A) of the Act provides, in pertinent part, that:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

- (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

In response to the NOID, counsel submitted a statement from the applicant, regarding his arrest in California on October 7, 1993, as follows:

In 1993, my wife was mad at me because we were fighting. I left to the street, but when I returned, she accused me of raping my niece. My wife called the police . . . I was incarcerated but only 15 days. Since they did not find evidence of anything, they released me and I did not have to go to court . . . There is no one outside of my family that was witness to these incidents.

Counsel did not submit any additional documentary evidence regarding the applicant's arrest in October 1993. Counsel also submitted a local criminal history summary from the [REDACTED] California Police Department which reveals that on July 11, 1991 the applicant was charged with violations of the California Vehicle Code (VC) as follows: two charges of violating section 31VC, giving false statements information to a peace/police officer, listed as misdemeanor offenses; and one count of having violated section 14601.2(a)VC, driving when privilege is suspended or revoked for driving under the influence, with excessive blood alcohol, or when addicted, listed as a misdemeanor offense. (Fresno Police Department, case number [REDACTED]) The applicant did not provide final court dispositions to these charges.²

The AAO finds that the submitted documentation is not sufficient to establish eligibility for temporary residence when other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications for immigration benefits the applicant must show that the requested evidence is unavailable. In the absence of primary evidence, the applicant must then submit relevant "secondary evidence." If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are

² Counsel further submitted a [REDACTED] Superior Court Certificate of Search which reveals that the applicant was charged with the following violations of the California Vehicle Code (VC), each of which appears to be an infraction: on May 8, 1998, the applicant was charged with violating section 24600(b)VC, tail lamps (Case number [REDACTED]); on May 13, 2003, the applicant was charged with violating section 22350VC, unsafe speed (case number [REDACTED]) on March 28, 2006, the applicant was charged with violating section 24601VC, license plate light (case number [REDACTED]); and on June 19, 2009, the applicant was charged with violating section 22350VC, unsafe speed (case number [REDACTED]). The Certificate of Search states that each of the cases was dismissed.

not party to the application and who have direct knowledge of the events and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. *See* 8 C.F.R. § 103.2(b)(2)(i) and (ii).

The AAO notes that, despite the request for evidence contained in the NOID, the applicant failed to provide a final court disposition for his arrest in October 1993 and this deficiency has not been overcome on appeal. Convictions under those sections of the California Penal Code may constitute crimes involving moral turpitude under the Board's holding in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705 (AG 2008) (705 (finding that "so long as the perpetrator knew or should have known that the victim was a minor, any intentional sexual contact by an adult with a child involves moral turpitude"). *See also Morales-Alvarado v. INS*, 655 F.2d 172 (9th Cir. 1981) (indecent liberties conviction in the State of Washington held to be a crime involving moral turpitude where the victim was an 8-year-old girl).

In addition, on appeal counsel has submitted evidence of the applicant's arrest in July 1991 for three additional misdemeanor charges, however the applicant failed to provide final court dispositions for these charges. Thus, the applicant has also not met his burden of proof in establishing his eligibility for temporary resident status.

The applicant has failed to establish the required continuous residence, his admissibility and eligibility for adjustment to temporary resident status. The director's decision shall be affirmed.

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