



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: OFFICE: NEBRASKA SERVICE CENTER

OCT 3 11 2013

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

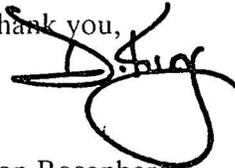
FILE: [Redacted]

ON BEHALF OF APPLICANT:

[Redacted]

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

[Redacted]

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 2, 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 February 4, 1986 departure 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 3, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status application. In a decision dated August 6, 2013, the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, for failure to comply with a request for evidence.

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

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."

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, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

The record reflects that on August 8, 2008, the applicant, through counsel, filed a Form I-290B, Notice of Appeal or Motion, requesting that USCIS reopen his temporary resident status application pursuant to the *Proyecto 2007* amended order. In Part 3 of the Form I-290B, counsel requested that USCIS provide the applicant with his complete deportation file, including the cassette tapes and/or transcripts of the deportation hearings. We note that on April 5, 2004, USCIS fulfilled the applicant's Freedom of Information Act (FOIA) request, number [REDACTED] and released 112 pages of record material to the applicant. However, from the documentary evidence in the record it does not appear that the applicant received a tape recording and/or transcript of his deportation 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 transcript and tape recording, 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 and reopened the applicant's Form I-687 temporary resident status application. 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 February 4, 1986 departure pursuant to an order of deportation. The director therefore 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).

In relevant part, pursuant to the terms of the *Proyecto* amended order, counsel has requested a copy of the applicant's complete deportation file, including the tape recording and/or transcript of his client's deportation proceedings. The relevant regulation in existence at the time of the applicant's deportation hearings, 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. On April 5, 2004, USCIS fulfilled the applicant's FOIA request, number [REDACTED] and released 112 pages of record material to the applicant. 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 available records relating to his deportation proceedings. 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 immigration court maintained a tape recording of the applicant's deportation hearing. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits.

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).

An alien who applies for temporary resident status must also 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).

“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).

An issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden due to his criminal conviction record.

On May 3, 2013, the director issued a Request for Evidence (RFE) regarding the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to submit documentation explaining these criminal charges and convictions. Counsel submitted the requested documentation on September 5, 2013. Since the director did not indicate the date by which the documentation must be received, the AAO will treat counsel’s submission as timely filed.

The record includes an FBI rap sheet, which shows that on June 4, 1982, the applicant was convicted in Bakersfield, California of “trespass/posted lands,” a misdemeanor in violation of section 602(k) of the California Penal Code. For this offense, the applicant was sentenced to jail. Neither counsel nor the applicant dispute the existence or the validity of this criminal conviction. At the time of the applicant’s conviction, section 602(k) of the California Penal Code provided, in pertinent part, that:

[E]very person who willfully commits a trespass by any of the following acts is guilty of a misdemeanor: (k) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent, or by the person in lawful possession.

Additionally, section 19 of the California Penal Code provides that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's June 4, 1982 trespass conviction in violation of section 602(k) of the California Penal Code qualifies as a misdemeanor.

The applicant has other criminal convictions. Regarding the applicant's May 9, 1983 conviction for illegal entry to the United States, the record includes the Judgment and Sentence of the United States District Court for the [REDACTED]. It reflects that on May 9, 1983, the applicant pled guilty to the crime of illegal entry, a misdemeanor in violation of 8 U.S.C. § 1325. For this offense, the applicant was sentenced to 30 days imprisonment and was fined \$50.00.

8 U.S.C. § 1325 provides, in pertinent part, that:

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months.

The record further reflects that the applicant was again convicted of illegal entry on December 9, 1985. The record includes the Judgment and Sentence of the United States District Court for the [REDACTED] which reflects that on December 9, 1985, the applicant pled guilty to illegal entry into the United States, a misdemeanor in violation of 8 U.S.C. § 1325. For this second illegal entry offense, the applicant was sentenced to 60 days imprisonment and was ordered to pay an assessment fee of \$25.00. (Case No. [REDACTED]) Based on the evidence in the record, the applicant's two illegal entry convictions qualify as misdemeanors under the standards set forth at 8 C.F.R. § 245a.1(o).

In response to the RFE, counsel submitted a certified letter by [REDACTED] Clerk of the Superior Court of California in and for the [REDACTED]. In his letter, Mr. [REDACTED] certified that a search of relevant records revealed that the applicant was charged on November 19, 1992 of the following: driving under the influence of alcohol, a misdemeanor in violation of section 23152(a) of the California Vehicle Code (CVC); driving with a blood alcohol content of over .08 percent, a

misdemeanor in violation of section 23152(b) of the CVC; driving with an open container in violation of law, an infraction in violation of section 23225 of the CVC; and operating a motor vehicle without a safety belt, an infraction in violation of section 27315(d) of the CVC. The certified letter reflects that on December 9, 1992, the applicant was convicted of a violation of section 23152(a). (Case No. [REDACTED]) He was sentenced to incarceration, was placed on probation, and was ordered to pay a fine.

Section 23152 of the CVC provides, in pertinent part, that:

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

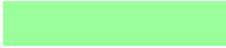
Section 19 of the California Penal Code adds that: "every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's December 9, 1992 driving under the influence conviction in violation of section 23152(a) of the California Penal Code qualifies as a misdemeanor.

Lastly, counsel submitted the Criminal Docket of the applicant in the Superior Court of California, [REDACTED]. The applicant's criminal docket shows that on April 20, 2005, the applicant was convicted of driving under the influence of alcohol or drugs, a misdemeanor in violation of section 23152(a) of the California Penal Code. For this offense, the applicant was sentenced to two days of jail work, was placed on probation for four years, and was fined \$1690. (Case No. [REDACTED])

Therefore, for immigration purposes, the applicant stands convicted of: criminal trespass, a misdemeanor under the California Penal Code; illegal entry on May 9, 1983 and December 9, 1985, misdemeanors in violation of 8 U.S.C. § 1325; and driving under the influence of alcohol or drugs on December 9, 1992 and May 5, 2005, misdemeanors in violation of the California Vehicle Code. As the applicant has been convicted of 5 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.

The applicant is also ineligible for temporary resident status as he is inadmissible. He reentered the United States without permission after he was deported. His Form I-690 waiver application was denied.

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NON-PRECEDENT DECISION

ORDER: The director's May 3, 2013 decision is affirmed. The Form I-687 application is denied.