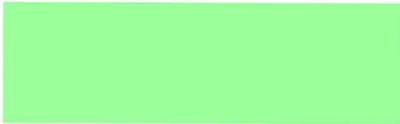


(b)(6)

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



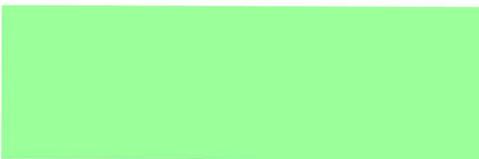
U.S. Citizenship  
and Immigration  
Services

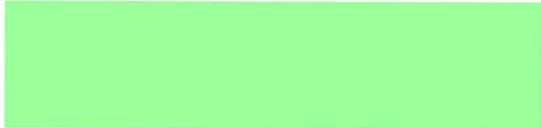


DATE: **OCT 31 2013** OFFICE: NEBRASKA SERVICE CENTER

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: 

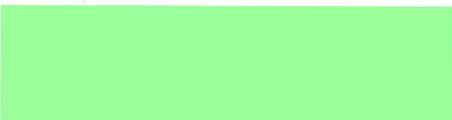
ON BEHALF OF APPLICANT: 

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,

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 December 8, 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 October 30, 1985 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).<sup>1</sup>

On April 10, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary residence application. Also on April 10, 2013, the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility.

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

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<sup>1</sup> 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 denied the applicant's Form I-690 waiver application, finding that it was not in the public interest to grant the applicant a waiver of inadmissibility due to his criminal convictions and immigration violations. 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 October 30, 1985 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. However, the record reflects that on December 27, 1989, legacy INS fulfilled the applicant's Freedom of Information Act (FOIA) request, number [REDACTED] and released 50 pages of record material to the applicant. Additionally, the applicant's physical file (currently in the possession of the AAO) contains the hearing transcripts of his October 1985 and January 1992 deportation proceedings. The record reflects that the applicant appealed the January 23, 1992 decision of the immigration judge to the

Board, and that the Executive Office for Immigration Review (EOIR) provided to the applicant hearing transcripts of his 1985 and 1992 deportation proceedings. It can therefore be concluded that the applicant has received the transcripts of the October 30, 1985 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 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 proceedings, 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 hearing transcript further 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 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 immigration judge explained the requirements for voluntary departure and offered the applicant an opportunity to submit an application for that 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 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 Order of the Immigration Judge (Form EOIR-7) 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 (OSC) is dated October 18, 1985 and the allegations and charges contained therein indicate that the applicant admitted to being a native and citizen of Mexico 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 October 30, 1985, the immigration judge found the applicant deportable pursuant to section 241(a)(1) of the Act by clear, unequivocal, and convincing evidence.
- The Order of the Immigration Judge (Form EOIR-7) is dated October 30, 1985, 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 EOIR-7 further reflects that the applicant waived his right to appeal the decision of the immigration judge to the Board.
- The Notice of Order of Deportation (Form I-294) is dated October 30, 1985, and instructs the applicant that he has been ordered deported to Mexico. The Notice explains the ramifications of this and includes a Spanish translation.
- The Warrant of Deportation (Form I-205) is dated October 30, 1985, and states the applicant is subject to deportation under section 241(a)(2) of the Act. It indicates the applicant was deported from the United States to Mexico on October 30, 1985. The manner of departure was afoot, and the departure was witnessed by an immigration officer. 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 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 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 EOIR having provided the applicant with a copy of the hearing transcript, 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 October 30, 1985. 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 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 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. The record shows that on September 23, 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, among others:

- On March 8, 1987, you were charged, under the name [REDACTED] with a violation of section 4-244.20 Arizona Revised Statutes (A.R.S.), *Willfully and Unlawfully Consuming Spirituous Liquor from a Broken Package in a Public Place*. On that date, you pled guilty and were convicted of the charge, a class 2 misdemeanor, for which you received a sentence of time served. (City of Phoenix Municipal Court, Maricopa County, Arizona, [REDACTED])
- On March 5, 1990, you were charged with a violation of 8 United States Code (USC), section 1325, *Illegal Entry into the United States*. On March 30, 1990, you pled guilty and were convicted of the charge, a misdemeanor, for which you received a sentence of time served. (United States District Court, District of Arizona, [REDACTED])
- On March 12, 2003, you were charged with a violation of 8 U.S.C. § 1325(a)(1), *Illegal Entry into the United States*. On March 20, 2003, you pled guilty and were convicted of the charge, a misdemeanor, for which you were sentenced to three years of probation. (United States District Court, Western District of Texas, El Paso Division, [REDACTED])

The applicant, through counsel, submitted documentary evidence in response to the NOID. In a letter dated October 22, 2013, counsel requests 87 days from the date of the NOID in order to appropriately respond and submit the requested documentation. However, as the applicant's A-file contains substantial, probative, and credible evidence showing that he has been convicted of three misdemeanors, it is unnecessary to grant counsel's request for an extension of time. Accordingly, counsel's request is hereby denied.

Regarding the applicant's March 8, 1987 conviction for "willfully and unlawfully consuming spirituous liquor from a broken package in a public place," the record contains the certified Complaint and Judgment of the City of Phoenix Municipal Court, Maricopa County, Arizona. (Case number [REDACTED] complaint number [REDACTED]) It reflects that on March 8, 1987, the applicant, under the name [REDACTED] pled guilty to and was convicted of one count of willfully and unlawfully consuming spirituous liquor from a broken package in a public place, a class 2 misdemeanor in violation of section 4-244.20 of the A.R.S. For this offense, the applicant was sentenced to time served.

At the time of the applicant's conviction, section 4-244.20 of the A.R.S. provided, in pertinent part, that: "[i]t is unlawful for a person to consume spirituous liquor in a public place, thoroughfare or gathering." Additionally, section 13-707(A)(2) of the A.R.S. provides that the maximum sentence for a class 2 misdemeanor is four months of imprisonment. Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant stands convicted of a misdemeanor.

The applicant has other misdemeanor convictions. Regarding the applicant's March 30, 1990 conviction for illegal entry into the United States, the record contains the Judgment in a Criminal Case rendered by [REDACTED] United States Magistrate Judge of the United States District Court for the District of Arizona. The Judgment reflects that on March 30, 1990, the applicant pled guilty to and was convicted of illegal entry into the United States, a misdemeanor in violation of 8 U.S.C. § 1325. The Judgment further reflects that the applicant was sentenced to time served.

The relevant statutory provision, 8 U.S.C. § 1325, provides, in pertinent part, that: "[a]ny alien who enters or attempts to enter the United States at any time or place other than as designated by immigration officers, . . . , shall, . . . , be fined under Title 18 or imprisoned not more than 6 months." Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant's March 30, 1990 illegal entry conviction in violation of 8 U.S.C. § 1325 qualifies as a misdemeanor.

With regards to the applicant's March 20, 2003, misdemeanor conviction for illegal entry into the United States, the record contains the Judgment in a Criminal Case rendered by [REDACTED] a United States Magistrate Judge at the United States District Court for the Western District of Texas. This Judgment reflects that on March 20, 2003, the applicant pled guilty to and was convicted of illegal entry into the United States, a misdemeanor offense in violation of 8 U.S.C. § 1325(a)(1). For this offense, the applicant was sentenced to probation for a term of three years and was ordered to pay an assessment fee of \$10.00. As the applicant was convicted of an offense for which the maximum sentence is imprisonment for no more than six months, his conviction qualifies as a misdemeanor under the temporary resident status eligibility standards set forth at 8 C.F.R. § 245a.1(o).

Therefore, for immigration purposes, the applicant stands convicted of willfully and unlawfully consuming a spirited liquor from a broken contained in a public place, a misdemeanor under the Arizona Revised Statutes, and of illegal entry into the United States on March 30, 1990 and March 20, 2003, misdemeanors under 8 U.S.C. § 1325. As the applicant has been convicted of three misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act.<sup>2</sup> See also 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant

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<sup>2</sup> The record contains a Form I-256A, Application for Suspension of Deportation. On the Form I-256A, at number 25, the form states that the applicant was twice convicted in 1985 in Arizona of misdemeanor DWI, in the cities of [REDACTED] and [REDACTED] respectively, and that the applicant paid all fees and costs associated with these criminal convictions. Additionally, the record contains a January 31, 1992 transcript of the applicant's sworn testimony in deportation proceedings, in which he confirms the fact of these two convictions. In response to the NOID, counsel submitted a certified letter from the [REDACTED] Arizona Municipal Court indicating that no criminal record was found for the applicant. Regardless, as the applicant has already been found ineligible for temporary resident status on other grounds, it is unnecessary to consider the existence or consequences of these criminal convictions at this time.

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.<sup>3</sup>

**ORDER:** The director's April 10, 2013 decision is affirmed. The Form I-687 application is denied.

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<sup>3</sup> The record reflects that the applicant provided sworn testimony before immigration officers and during deportation hearings that he attempted to smuggle his mother and brother into the United States on two occasions on March 3, 1990. The transcript of the immigration judge's oral findings, issued on February 3, 1992, reflects that the applicant attempted to smuggle both his mother and brother into the United States, as evidenced by his testimony under oath. While the applicant's mother is an alien who falls under the exception to section 212(a)(6)(E)(ii) of the Act, the applicant's brother does not and must be considered an alien, the applicant assisted, aided, and abetted in entering the United States in violation of law. Consequently, the applicant is inadmissible under section 212(a)(6)(E) of the Act, 8 U.S.C. 1182(a)(6)(E). He is also ineligible for the exception set forth in section 212(a)(6)(E)(ii) of the Act or the section 212(d) waiver of inadmissibility for alien smuggling. Moreover, as the director denied the applicant's Form I-690 waiver application, his inadmissibility pursuant to section 212(a)(6)(E) of the Act also renders him ineligible for temporary resident status.

In addition, the record reflects that at the time of the applicant's apprehension by immigration officials on October 18, 1985, he made several oral false claims to U.S. citizenship before admitting that he was not entitled to enter the United States. The applicant filed a Form I-690 waiver application, which included that this grounds of inadmissibility under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C) be waived. The AAO notes that if the false claim to United States citizenship was made prior to the enactment of IIRARA, September 30, 1986, it is treated as a misrepresentation under section 212(a)(6)(C)(i) of the Act. Here, however, the director denied the applicant's waiver application. Accordingly, this misrepresentation further renders the applicant ineligible for temporary resident status.