



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: SEP 11 2013 OFFICE: NEBRASKA SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "R. Rosenberg", written over a circular stamp or mark.

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 June 30, 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 November 7, 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 April 9, 2013, the director granted the applicant's motion and reopened the Form I-687 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 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. 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).

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. 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 XPW900676,

was processed on May 29, 1990, and that 152 pages of record material were released to the applicant. The record also contains documentation indicating that a second request, number [REDACTED], was processed by legacy INS on March 1, 2001, and that “a copy of all material [legacy INS] located [was] released to [the applicant] with this letter.”

The record of proceedings (currently in the possession of the AAO) contains a cassette tape recording of the applicant’s October 27, 1983 deportation hearing.² The tape recording 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 tape recording of the hearing 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 recording of the hearing 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 suspension of deportation 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.”) Counsel originally indicated that the applicant would apply for suspension of deportation. However, as it was determined that the applicant did not meet the

² The record of proceedings reflects that the applicant’s FOIA requests were processed by the legacy INS in 1990 and 2001, and by USCIS in 2006, and that all material located was released to the applicant. Therefore, the AAO proceeds under the assumption that the applicant already received a copy of the cassette tape recording of his October 27, 1983 deportation hearing. It is noted that counsel has not requested a copy of the tape recording of the applicant’s deportation hearing. In compliance with the *Proyecto 2007* amended order, the AAO encloses a copy of the cassette tape recording of the applicant’s October 27, 1983 deportation hearing so as to ensure that the applicant has a complete copy of his deportation file in the event he is to challenge the deportation order.

seven year continuous physical presence requirement, the immigration judge determined that the applicant was not "apparently eligible" for this form of relief, as required by former 8 C.F.R. § 242.17(a). The immigration judge, however, granted the applicant voluntary departure in lieu of deportation. The recording of the hearing reflects that the order of the immigration judge was explained to the applicant in the Spanish language, and that counsel reserved his client's right to appeal the decision of the immigration judge to the Board on behalf of the applicant.

Although the applicant reserved appeal, none was filed to the Board. Instead, on January 25, 1984, counsel for the applicant filed a motion to reopen proceedings arguing the applicant was *prima facie* eligible for suspension of deportation. The immigration judge took oral argument on the motion and rendered an oral decision on January 26, 1984 finding that the documentary evidence submitted with the motion was insufficient to establish that the applicant was *prima facie* eligible for suspension of deportation. The applicant, through counsel, appealed the decision of the immigration judge to the Board. In a decision dated August 6, 1984, the Board determined that the motion to reopen was properly denied and dismissed the applicant's appeal. The applicant was deported from the United States to Mexico on November 7, 1984.

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

- The Order to Show Cause (OSC) is dated August 25, 1982 and the notes on the OSC 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 27, 1983, 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 December 27, 1982 and indicates that [REDACTED] entered an appearance as attorney for the applicant at his request. The Form G-28 is signed by [REDACTED] and by the applicant.
- The Memorandum of Oral Decision (Form I-167) Decision of the Immigration Judge (Form I-38) is dated October 27, 1983 and provides that the suspension of deportation was denied and that the applicant was granted voluntary departure on or before January 27, 1984. The Form I-167 reflects that the applicant reserved his right to appeal the decision of the immigration judge to the Board.
- An order by the Chairman of the Board of Immigration Appeals dated January 27, 1984 denying the applicant's request for a stay of deportation.

- The Notice of Order of Deportation (Form I-166) is dated March 2, 1984 and instructs the applicant that he has been ordered deported to Mexico. The Notice instructs the applicant to report to a United States Immigration Officer on March 14, 1984 at 9:00 am completely ready for deportation.
- The Warrant of Deportation is dated February 6, 1984 and states the applicant is subject to deportation under section 241(a)(2) of the INA. It indicates the applicant was deported at San Ysidro, California on November 7, 1984 and that he traveled by foot. The deportation was witnessed by deportation 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 applicant has been provided with his deportation record, we will not consider counsel's arguments regarding violations of the applicant's due process rights and ineffective assistance of counsel 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 Form I-687. 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 was deported from the United States to Mexico on November 7, 1984. 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 been waived. However, 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 November 7, 1984, 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.

ORDER: The director's April 9, 2013 decision is affirmed. The Form I-687 application is denied.