



U.S. Citizenship
and Immigration
Services

(b)(6)

[REDACTED]

DATE: SEP 12 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,

Ron Rosenberg
Chief, Administrative Appeals Office

CC: Gibbs Houston Pauw
1000 Second Ave., Ste. 1600
Seattle, WA 90010

(b)(6)

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

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 23, 1986 departure pursuant to a deportation order 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 15, 2013, the director granted the applicant's motion and reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and 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

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.

In his April 10, 2013 legal brief, counsel for the applicant states that although he has filed Freedom of Information Act (FOIA) requests on the applicant's behalf, legacy INS and USCIS has failed to provide the applicant with a copy of files relating to the applicant's deportation proceeding, including the tape recording and/or transcript of the alleged deportation hearing. The record reflects that in a letter dated June 27, 2008, EOIR Associate General Counsel noted that the agency could not find the applicant's immigration files through its integrated electronic database. EOIR counsel also indicated that after an "extensive manual search of [their] files in the New Orleans and Oakdale, LA, Immigration Courts," the agency was unable to locate any file under the alien number counsel provided.

Consequently, the record does not indicate that the applicant ever received a copy of the files, tape recordings and/or the transcripts of his deportation hearing. The applicant's physical file (currently in the possession of the AAO) contains no documentation related to the applicant's deportation proceedings, tape recordings, or transcripts. As a result of the missing documentation and tape recordings, 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 to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. 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 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 (3d Cir. 2004) (same).

Counsel for the applicant contends that the circumstances surrounding the applicant's October 23, 1986 deportation shows it was defective and entered in violation of the governing statute and regulations.

Counsel states that the record does not contain any evidence to establish that the applicant departed the United States in 1986 pursuant to an order of deportation. Counsel further states that the record does not reflect that the applicant was "informed and accepted the terms of the deportation as the Service alleges." Counsel contends that even though documentation in the record suggests the applicant was detained by immigration officials in 1986, the record is unclear as to whether the applicant was actually deported from the United States or detained while departing the country voluntarily.

It is noted that the version of the Act in effect at the time of the applicant's alleged deportation proceeding required the alien be provided with written notice of the time and place at which the deportation hearing would be held. *See* INA § 242B(a)(2)(A) (1986) ("Written notice shall be given in person to the alien (), in the order to show cause or otherwise, of the time and place at which the proceedings will be held...."). The Act also required a subsequent written notice of the new time and place of the proceeding in the case of any change or postponement of the original hearing date. *See* section 242B(a)(2)(B) of the Act. Here, the record does not contain either the original or copy of an Order to Show Cause informing the applicant of the charges against him, his rights, obligations, and the time and place of the deportation hearing.

As the record contains no documentation related to the 1986 deportation proceeding, the AAO cannot determine whether proceedings were convened in accordance with 8 C.F.R. § 242.16, namely, whether the applicant was read the factual allegations and the charges in the OSC and if they were explained in nontechnical language; whether the applicant was advised of his 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; if the applicant pled to the order to show cause by stating his admission or denial of the allegations and charges contained therein; or if the immigration judge made a finding of deportability by clear, unequivocal, and convincing evidence. Additionally, the record does not include any decision of the immigration judge ordering the applicant deported from the United States, as required by 8 C.F.R. § 242.18 (1986).

In relevant part, counsel asserts that, under the terms of the *Proyecto* amended order, the deportation order occurred in violation of the governing regulations because there is no evidence that the court maintained a recording of the deportation hearing. The relevant regulation in existence at the time of the applicant's deportation hearing in 1986, 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." Counsel has repeatedly requested a copy of the tape recording and/or transcript of the hearing. 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. However, documentation in the record suggests that the applicant's deportation file is unavailable. The current entire USCIS record, which is before the AAO, does not contain documentation relating to the applicant's 1986 deportation file under alien number [REDACTED], nor does it contain the tape recordings and/or transcripts of the deportation hearings. 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, we are obliged to follow, to the letter, the 2007 amended *Proyecto* order.

In light of the foregoing, we 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 a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order the AAO is constrained to find that the applicant has overcome the particular basis of the denial cited by the director.

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 adjustment to 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).

In support of his Form I-687 legalization application, the applicant submitted sufficient documentary evidence in the form of an employment verification letter, witness affidavits, verification of residence letters, a California issued driver's license, and a birth certificate for his United States-born son, all dated during the requisite period. In response to a Request for Evidence dated August 7, 2013, the applicant submitted sealed certified and official high school transcripts and cumulative records, which indicate that the applicant attended [REDACTED] Los Angeles, California, from January 31, [REDACTED] to September 10, [REDACTED]. The contemporaneous documents submitted by the applicant are credible. Upon review, the AAO finds that the documents furnished in this case may be accorded sufficient evidentiary weight to meet the applicant's burden of proof of establishing his continuous unlawful residence in the United States for the requisite period.

The AAO finds that the applicant has met his burden of proof of establishing his eligibility for temporary resident status under section 245A of the Act.² The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of Grounds of Inadmissibility, was approved on humanitarian grounds. He has established his eligibility for temporary resident status under section 245A of the Act.

ORDER: The director's decision denying the applicant's Form I-687 application is withdrawn. The application is approved.

² The applicant was arrested on January 1, 1990 for robbery in violation of section 211 of the California Penal Code. However, the record reflects that the case was dismissed and, therefore, will not be considered. The record shows, however, that in December 1984 the applicant was convicted in the Municipal Court of Burbank, California, of hit and run with property damage, a misdemeanor in violation of section 20002(a) of the California Vehicle Code. For this offense, the applicant was sentenced to 10 days imprisonment and was placed on probation for a period of one year. A single misdemeanor conviction does not affect the applicant's eligibility for temporary resident status. See section 245A (a)(4)(B) of the Act.