



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **SEP 16 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".

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

On April 15, 1988, the applicant filed a Form I-687, Application for Temporary Resident Status, pursuant to Section 245A of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1225a. The director denied the application, finding that the applicant's March 22, 1984 departure pursuant to a deportation order meant he 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-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. June 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 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 have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. Counsel asserts that previous FOIA requests have secured only an incomplete deportation record. In support, counsel submitted a letter dated October 28, 1994 by [REDACTED] [REDACTED] states in the letter that after a search of legacy INS records, the agency was unable to find the cassette tape of the applicant's deportation hearing. [REDACTED] further indicates that she "checked with the Executive Office for Immigration Review's FOIA office and the record was not there." [REDACTED] legacy INS released 43 pages of record material to the applicant. Further, the record reflects that on [REDACTED], legacy INS released 87 pages of record material to the applicant. From the documentary evidence in the record, it does not appear that the applicant ever received a tape recording and/or transcript of the 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 tape and/or transcript, 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 to Reopen but denied the applicant's previously filed Form I-690, Application for Waiver of Grounds of Inadmissibility.² The director denied the applicant's Form I-687, Application for Temporary Resident Status, on March 29, 2013, because it found that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to the applicant's departure pursuant to a deportation order dated August 22, 1984. The director, therefore, denied the application and certified the matter to the AAO for a ruling. The AAO notes that 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.

² In a separate decision, the AAO approved the Form I-690 waiver application.

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 states that the evidence and circumstances surrounding the applicant's deportation proceeding shows it was defective and entered in violation of the statute and regulation. Counsel contends that the applicant was not advised of his right to counsel, was not informed of his appeal rights, and that "as far as the [applicant] can remember, neither a lawyer nor an interpreter was present" during the applicant's deportation hearing.

Counsel asserts that the applicant was not informed of his right to appeal the decision of the immigration judge to the Board. However, a copy of the Order to Show Cause (OSC) issued and served upon the applicant on March 19, 1984 contains a notation by the Special Inquiry Officer indicating that the applicant waived his right to appeal to the Board. As such, the counsel's contention is contradicted by the documentary evidence in the record and is insufficient to establish a *prima facie* showing pursuant to the 2007 *Proyecto* order.

Counsel next states that the applicant was not informed of his right to counsel. At the time of the applicant's deportation proceeding, section 292 of the Act provided as follows:

In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. § 1362.

The Attorney General promulgated 8 C.F.R. § 242.16(a) to implement former section 292 of the Act. At the time of the applicant's deportation proceedings, 8 C.F.R. § 242.16(a) provided in pertinent part:

The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; [and] advise the respondent of the availability of free legal services programs . . . in the district where the deportation hearing is being held[.]

8 C.F.R. § 242.16(a) (1987).

We note that the statute and regulations provide that the alien respondent be notified of the right to counsel at various stages of the deportation proceeding, including in the OSC, *see* INA § 242B(a)(1)(E) (1982), and at the start of the deportation hearing itself, *see* 8 C.F.R. § 242.16(a) (1982).³ As the tape recording of the applicant's deportation hearing is unavailable, the AAO is unable to determine whether the immigration judge advised the applicant of his right to counsel at the commencement of the deportation hearing. We further note that the OSC issued against the applicant does not contain a notation indicating that the applicant was furnished a list of free legal service providers.

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 1984, 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.

On [REDACTED] legacy INS released 43 pages of record material to the applicant. The record further reflects that on [REDACTED], legacy INS released 87 pages of record material to the applicant. Counsel asserts that previous FOIA requests have secured only an incomplete deportation record. In support, counsel submitted documentation by the legacy INS indicating that the agency was unable to find the cassette tape of the applicant's deportation hearing. The current entire USCIS record, which is before the AAO, does not contain a tape recording. It appears that

³ Section 242B(a)(1)(E) of the Act provides that in deportation proceedings, written notice shall be given in person to the alien specifying that he or she may be represented by counsel and that the alien will be provided with a list of persons who may be available to represent aliens in deportation proceedings *pro bono*. The regulation at 8 C.F.R. § 242.16(a) adds that, at the commencement of the deportation hearing, the immigration judge shall advise the alien of his or her right to counsel of his or her choosing at no expense to the government, shall require the alien to state then and there whether he or she desires representation, and shall advise the alien of the availability of free legal services programs. The immigration judge shall also ascertain that the alien has received a list of such programs.

USCIS and EOIR have fully complied with the court's order to provide the applicant with all existing records relating to his deportation proceeding. 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.

Consequently, 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 because there is no evidence that the immigration court maintained a recording of the deportation hearing. 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).

In support of his Form I-687 legalization application, the applicant submitted documentary evidence in the form a verification of residence letter prepared by [REDACTED] indicating that the applicant lived on [REDACTED] in [REDACTED] from the spring of 1982 through the spring of 1985, W-2 wage and tax statements, a W-4 form dated March 4, 1985, certified employer wage records from 1980 to 1986, and employment verification letters, all dated during the requisite period. 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. The applicant established his continuous unlawful residence throughout the requisite period. His Form I-690, Application for Waiver of

Grounds of Inadmissibility, was approved by the AAO in a separate decision. He has established his eligibility for temporary resident status under section 245A of the Act. Consequently, the applicant's Form I-687 application will be approved.⁴

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

⁴ The record shows that on March 18, 1984, the applicant was convicted in the United States District Court for the Southern District of California of misdemeanor illegal entry in violation of 8 U.S.C. § 1325. For this offense, the applicant was sentenced to time served and was fined \$50.00. The record reflects that on January 10, 2002, the applicant was charged with attempted illegal entry into the United States in violation of 8 U.S.C. § 1325. However, the record does not contain evidence of a conviction for this offense. Rather, the record shows that the illegal entry charge resulted in the applicant being expeditiously removed from the United States pursuant to section 235(b)(1) of the Act. A single misdemeanor conviction does not disqualify the applicant for temporary resident status. See section 245A(a)(4)(B) of the Act.