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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: **SEP 18 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) and the matter is now before the Administrative Appeals Office (AAO) for review on certification. The director's decision to dismiss the Form I-687 application will be withdrawn and the application will be approved.

On April 28, 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. On December 5, 1988, the application was denied by the Director, California Service Center, finding that the applicant's February 23, 1983 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 August 16, 1989, an appeal of that decision was dismissed by the Legalization Appeals Unit (LAU), now the AAO. On January 29, 2003, the legacy Immigration and Naturalization Service (legacy INS), now the U.S. Citizenship and Immigration Services (USCIS), published a notice in the Federal Register to comply with the judgment entered on March 27, 2001 in the case *Proyecto San Pablo v. INS*, No. CIV 89-456-TUC-WDB (D. Ariz.) The legacy INS later mailed the notice to all aliens that it was aware of who could possibly benefit from the judgment. The notice stated, "The Service will not act to reopen your case unless you notify the Service that you want the Service to do so. If you want to exercise your rights under the *Proyecto* decision, you must file with the Service a motion to reopen, without fee."

The notice also stated, "You must file your motion no later than 1 year from the date you are personally served of this notice by the Service, as described below." The notice explained that if an alien is known to meet the *Proyecto* class definition, the notice will be mailed by certified mail, return receipt requested, to the alien's last known address contained in his or her file. Here, the INS mailed the notice on May 16, 2003 to the applicant's last known address at the time. The postal receipt, signifying notice receipt, was signed by [REDACTED] the applicant's daughter, on May 20, 2003.

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, "Effective immediately, DHS shall, upon request of the applicant, reopen the applicant's legalization application and treat such application as pending. The applicant shall be entitled to the same benefits and protections to which other legalization applicants with pending applications are entitled." On April 19, 2012, counsel submitted a Form I-290B, motion to reopen and a brief pursuant to the amended *Proyecto* order dated June 4, 2007.² However, in a decision dated March 21, 2013, the director denied

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."

² Defendants in the lawsuit are the Department of Homeland Security, et al.

counsel's motion to reopen, finding the applicant was no longer a *Proyecto* class member because he did not file a Form I-290B, motion to reopen, within the one-year period that ended on May 20, 2004. On May 10, 2013, the AAO issued a notice to the applicant and counsel that the matter was certified to the AAO for review.

Here, the record reflects that on August 22, 1992, legacy INS issued a decision declaring that the applicant qualified as a member of the class as defined in the *Proyecto San Pablo* lawsuit. Pursuant to the terms of the 2007 amended *Proyecto* order, USCIS shall, upon request of the applicant, reopen his or her Form I-687 temporary resident status application and treat such application as pending. On April 19, 2012, the applicant, through counsel, submitted the required Form I-290B, motion to reopen. Accordingly, the AAO withdraws the decision of the director and reopens this matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(i) for purposes of adjudicating the previously filed Form I-687 temporary resident status application.³

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 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 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

³ On April 19, 2012, counsel for the applicant filed a Form I-690, Application for Waiver of Grounds of Inadmissibility. The director denied the waiver application on the basis that the applicant was no longer a "qualifying class member." However, in a separate decision, the AAO reopened the director's decision pursuant to 8 C.F.R. § 103.5(a)(5)(i) and approved the applicant's Form I-690 waiver application.

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.

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. The record reflects that on March 28, 1989, the legacy INS released 43 pages of record material to the applicant pursuant to a FOIA request. Also, on February 17, 1998, legacy INS released 103 pages of record material to the applicant. From documentation in the record, it appears that USCIS received and processed the applicant's November 18, 2011 FOIA request. However, in a letter dated April 19, 2012, the EOIR informed the applicant that after a search of its database, the agency could locate no records responsive to the applicant's request in its files. 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 denied the Form I-687 and Form I-690 applications 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.

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 represented by counsel, was never afforded an opportunity to contest the charges filed against him, and was not afforded an opportunity to apply for relief from deportation.

The record reflects that on February 15, 1982, the applicant was served with an Order to Show Cause (OSC) charging the applicant with deportability pursuant to section 241(a)(2) for having entered the United States without inspection. Counsel states that the applicant was not represented by counsel at his deportation hearing. The AAO notes that 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.

In this case, the OSC issued against the applicant and personally served upon him on February 15, 1982 contains a notation indicating that the applicant was furnished a Notice of Appeal Rights (Form I-618) and a list of free legal service providers. Consequently, documentary evidence in the record indicates that the applicant was afforded a list of free legal service providers, as required by former section 242(b)(2) of the Act, and was advised of his right to counsel. However, 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 or whether the applicant was represented by counsel throughout his deportation proceeding.

Counsel contends that the applicant was not afforded an opportunity to contest the charges filed against him. It is noted that pursuant to the regulation, the immigration judge's finding of deportability must be based upon clear, unequivocal and convincing evidence, as required by 8 C.F.R. § 242.14(a) (1982). As there is no tape recording of the deportation hearing, the record is insufficient to determine that the applicant was afforded an opportunity to contest the charge of

deportability or that the immigration judge orally made the requisite findings of 8 C.F.R. § 242.14(a) to support the deportation order. Further, as the record does not contain a Form EOIR-37, Summary of Oral Decision-Deportation, it appears that the provisions of 8 C.F.R. § 242.18(a) apply, requiring a discussion on the record by the immigration judge of the evidence and the findings as to deportability. See 8 C.F.R. § 242.18(a) (1982) (“The decision of the immigration judge may be oral or written. Except when deportability is determined on the pleadings pursuant to § 242.16(b), the decision of the immigration judge shall include a discussion of the evidence and findings as to deportability.”) However, the record does not contain a verbatim recording to meet this regulatory requirement.

In relevant part, under the terms of the *Proyecto* amended order, counsel has requested complete copies of his client’s deportation file, including the tape recording and/or transcript of the deportation hearing. The relevant regulation in existence at the time of the applicant’s deportation hearing, 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 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 March 28, 1989, the legacy INS released 43 pages of record material to the applicant pursuant to a FOIA request. On February 17, 1998, legacy INS released 103 pages of record material to the applicant. Also, documentary evidence in the record indicates that USCIS received and processed the applicant’s November 18, 2011 FOIA request. However, in a letter dated April 19, 2012, the EOIR informed the applicant that after a search of its database, the agency could locate no records responsive to the applicant’s request in its files. The current entire USCIS record, which is before the AAO, does not contain a tape recording. Therefore, it appears that USCIS and EOIR have fully complied with the court’s order to provide the applicant with all existing 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.

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 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 of employment verification letters, two identification cards issued by [REDACTED] a company based in Los Angeles, California, witness affidavits, a landlord verification of rental letter, copies of U.S. income tax returns, copies of California Resident Personal Income Tax filings, an alias affidavit, copies of pay stubs and earnings statements, and a letter by the California Employment Development Department regarding the applicant's workman's compensation claim, 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.

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