



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: SEP 23 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", written over the "Thank you." text.

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 The director's decision to dismiss the Form I-687 application will be withdrawn and the matter will be remanded for proceedings consistent with this decision.

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. The director denied the application, finding that the applicant's November 13, 1986 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).<sup>1</sup>

On March 29, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status 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

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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.

Neither counsel nor the applicant responded to the certified denial. However, the AAO notes that in a legal brief in support of the applicant's motion to reopen dated May 5, 2005, counsel noted that although she has filed Freedom of Information Act (FOIA) requests, legacy INS and USCIS have failed to provide the applicant with a complete copy of files relating to his deportation proceeding, including the tape recording and/or transcript of the deportation hearing. The record shows that on February 9, 2004, USCIS released 246 pages of record material to the applicant. Though counsel acknowledges fulfillment of the FOIA request, she asserts that USCIS did not include a copy of the requested tape recording and/or transcript of the applicant's deportation hearing.

From the documentary evidence in the record, it does not appear that 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 and reopened his Form I-687 application. However, the director denied the applicant's Form I-687, Application for Temporary Resident Status, on March 29, 2013, finding 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 November 13, 1986. The director, therefore, denied the application and certified the matter to the AAO for a ruling. In rendering a decision, the director reviewed the documentary evidence in the record related to the applicant's 1986 deportation proceeding. Upon review, the director determined that based on the totality of the circumstances, the applicant failed to make a *prima facie* case 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).

In a declaration dated April 29, 2005, the applicant contends that the circumstances surrounding his November 10, 1986 deportation hearing shows it was defective and entered in violation of the governing regulations. The applicant states that he does not speak English and that he “had a hard time understanding what was happening” during his deportation hearing. The applicant further states that he did not know that voluntary departure was an option and that he was not advised of his right to appeal the immigration judge’s decision.

The applicant states that he was not informed during his deportation hearing of the privilege of voluntary departure or of his right to appeal the immigration judge’s decision to the Board. The AAO notes that the applicant was not entitled to voluntary departure as a matter of law. Instead, the Attorney General was allowed, in his discretion, to permit certain aliens in deportation proceedings to depart voluntarily from the United States at their own expense if they established they had maintained good moral character for at least five years immediately preceding application for voluntary departure. INA § 244(e), 8 U.S.C. § 1254(e) (1980).

Furthermore, the Board has noted that the regulations in effect before the passage of the 1996 amendments to the Act requiring immigration judges to inform aliens of apparent eligibility for relief did not include voluntary departure. *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999) (citing former 8 C.F.R. § 242.17(a), which required Immigration Judges “to inform the respondent of his or her apparent eligibility to apply for any of the benefits enumerated in *this paragraph* and . . . afford the respondent an opportunity to make application therefor during the hearing” (emphasis added)). The Board further noted that the opportunity to apply for voluntary departure was described in former 8 C.F.R. § 242.17(b), which contained no notification requirement. *Id.* In contrast, the current regulations require immigration judges to inform the respondent of apparent eligibility for all “benefits enumerated in *this chapter*,” which includes voluntary departure. 8 C.F.R. § 240.11(a)(2) (emphasis added). ). As the regulations in effect at the time of the applicant’s deportation hearing required no duty to inform an alien of voluntary departure as a form of relief, the applicant may not establish a violation by alleging that he had a right to be informed of such relief.

Additionally, documentary evidence in the record reflects that the applicant was informed of the possibility of an appeal of the immigration judge’s decision to the Board. It is noted that the

regulation in effect at the time of the applicant's deportation proceeding provided that the immigration judge advise the applicant of his right to appeal the decision. *See* 8 C.F.R. § 242.16(a) ("The Immigration Judge shall . . . ascertain that the respondent has received . . . a copy of Form I-618, Written Notice of Appeal Rights. . . .") In this case, the Order to Show Cause, dated November 7, 1986 and personally served upon the applicant on the same date, contains a notation indicating that the applicant was furnished a list of free legal service providers and a copy of Form I-618, Written Notice of Appeal Rights. Additionally, the record includes a Memorandum of Oral Decision, dated November 10, 1986 and signed by Immigration Judge [REDACTED] which reflects that the applicant was advised of his appeal rights and that he waived his right to appeal the decision of the immigration judge to the Board. As such, the applicant's assertion is contradicted by the documentary evidence in the record and is insufficient to establish a *prima facie* showing pursuant to the 2007 *Proyecto* order.

The applicant further asserts that he does not understand English and had difficulty understanding the nature of the deportation hearing. It is well-established that due process requires that an applicant in a deportation proceeding be given competent translation services. *See He v. Ashcroft*, 328 F.3d 593, 598 (9th Cir. 2003); *see also Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) ("If an alien does not speak English, deportation proceedings must be translated into a language the alien understands"); *see generally* former 8 C.F.R. § 242.12. However, with the tape recording being unavailable, the AAO is unable to corroborate whether the deportation proceeding was translated into a language the applicant understands.

In relevant part, counsel asserts that pursuant to 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 recorded the November 10, 1986 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 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. The record reflects that on February 9, 2004, USCIS released 246 pages of record material to the applicant. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Therefore, it appears that USCIS and EOIR have fully complied with the court's order to provide the applicant with all available 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.

We therefore 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 there is no evidence that the applicant's deportation hearing was recorded. 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 assertion that he resided continuously in the United States during the requisite period of time Form I-687 legalization application, the applicant submitted documentary evidence in the form of an Illinois identification card issued on July 13, 1983, an affidavit of tenancy, a verification of employment affidavit, copy of a Social Security Estimate letter, employment reference letters in official employer letterhead, copies of income tax returns, copy of the applicant's Allied Production Workers Union Identification Card, dated September 1983, and W-2 wage and tax statements, 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. However, the record reflects that the applicant is inadmissible to the United States under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182 (a)(9)(A)(ii)(II), as an alien who was deported and returned to the United States without permission. Congress set forth, at section 245A(d)(2) of the Act, 8 U.S.C. § 1255a(d)(2), a provision to waive certain grounds of inadmissibility under section 212(a) of the Act, including inadmissibility under section 212(a)(9)(A)(ii)(II). It is noted that pursuant to the terms of the *Proyecto* amended order, the AAO cannot use the prior deportation order as evidence to support a denial of the Form I-687. However, section 245A(g)(2) of the Act, concerning continuous residence, is a separate section of the Act unrelated to the waiver provisions. The applicant is therefore inadmissible under 212(a)(9)(A)(ii)(II) of the Act. That ground of inadmissibility may be waived. No waiver application has been filed in this matter.

The applicant has the right to submit a waiver application on Form I-690, Application for Waiver of Grounds of Inadmissibility, with fee and have his waiver application adjudicated pursuant to the District Court's June 6, 2007 *Proyecto* amended order. Any such waiver application on Form I-690 must be mailed with the correct filing fee and with a copy of his previously filed motion to reopen to: Proyecto MTR, USCIS NCS, PO Box 87687, Lincoln, NE 68501-7687. To complete the processing of this matter, the applicant should submit the corresponding Form I-690 waiver application and a statement regarding the reasons the applicant assert for such a waiver with supporting documentation, e.g., proof of United States citizen or lawful permanent resident family members, proof of the existence of a "family group" as defined in the regulation, proof of current marital status, proof of current employment, etc. On remand, the director will adjudicate the Form I-690 application on the merits in the same manner that waiver applications filed by other legalization applicants are adjudicated. The waiver application must be adjudicated in accordance with the standards established in *Matter of P-*, 19 I&N Dec. 823, 828 (Comm. 1988) (waivers should be "granted liberally"), and *Matter of N-*, 19 I&N Dec. 760, 762 (Comm. 1988) (stating that Congress intended the legalization program to be administered in a liberal and generous fashion). If the director approves the applicant's Form I-690 waiver application, the applicant will have established his eligibility for temporary resident status under section 245A of the Act. Conversely, if the director's decision is adverse to the applicant, it shall be certified to the AAO for review pursuant to 8 C.F.R. § 103.4(a)(1).

**ORDER:** The decision of the director is withdrawn. The application is remanded to the director for further proceedings and action in accordance with this decision.