



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **SEP 23 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 Avenue, Suite 1600
Seattle, WA 98104

DISCUSSION: The director of the Nebraska Service Center denied the application for temporary resident status and certified the decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The application will be denied.

On January 11, 1988, the applicant filed a Form I-687, Application for Status as a Temporary Resident pursuant to Section 245A of the Immigration and Nationality Act (Act). The director denied the application, finding the applicant's February 19, 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 April 1, 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 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 and the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. 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 at a later time establish the issue in question. *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).

The record reflects that the applicant's Freedom of Information Act (FOIA) request, number [REDACTED] was processed by U.S. Citizenship and Immigration Services (USCIS) on January 20, 2004, and that 107 pages of record material were released in full to the applicant. The AAO notes that the applicant did not receive audio tapes or hearing transcripts at that time. The record indicates that in 2008, the applicant attempted to obtain, through a FOIA request, the audio cassette tape and/or hearing transcript from the Executive Office of Immigration Review (EOIR). In support, in his legal brief, dated April 30, 2013, counsel for the applicant submitted a copy of a letter dated April 16, 2008 from the Associate General Counsel for the EOIR in response to the applicant's FOIA request. In the letter, the EOIR stated that after an "extensive manual search,"

the office was unable to locate any file, tape, or transcript under any of the A-numbers provided by counsel.

However, the record further reflects that USCIS located the cassette tape containing the recording of the applicant's deportation hearing in his father's record of proceedings. On August 30, 2013, the FOIA unit at the National Records Center created supplemental case number [REDACTED] for the applicant's FOIA request and mailed a copy of the cassette tape to counsel of record. The tape recording reflects that at his deportation hearing, the applicant was represented by counsel, 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* Section 242B of the Act (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 also read the factual allegations and the charges in the order to show cause to the applicant in nontechnical language, and entered the order to show cause as an exhibit in the record. *See* 8 C.F.R. § 242.16(a). 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 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.") The recording of the deportation hearing reflects that counsel and the legacy INS trial attorney stipulated to a grant of voluntary departure for the applicant. The applicant stated on the record that he understood the terms of the voluntary departure grant. Based on the evidence in the record, the immigration judge granted voluntary departure to the applicant. As the voluntary departure resulted from a stipulation by the applicant and legacy INS, the applicant waived his right to appeal the decision of the immigration judge to the Board.

In his legal brief, counsel asserts that the applicant was 17 years of age at the time of his deportation and that there is no legal basis in the Act to impose penalties to a child for a failure to timely depart the United States pursuant to a voluntary departure order. Counsel points to no authority, by way of statutory, regulatory, or precedential case law, in support of this assertion.

Further, the AAO is unaware of any section of the Act or regulation at the time of the applicant's deportation proceeding imposing restrictions on a 17-year-old child regarding the service of an Order to Show Cause, the grant of voluntary departure, or the effectiveness of deportation order when an alien fails to voluntarily depart the United States as required. *See e.g.*, former 8 C.F.R. § 242.5(a)(2) ("Voluntary departure may be granted to *any alien* who is statutorily eligible.") (emphasis added); 8 C.F.R. § 242.5 (b) ("Any alien who believes himself or herself to be eligible for voluntary departure under section 242(b) of the Act may apply therefore at any office of the Service any time prior to the commencement of deportation proceedings against him or her.") Rather, service of the Order to Show Cause on the applicant during his detention by immigration authorities on September 3, 1982, supports a finding that he was aware that he had been placed in deportation proceedings. *See* former section 242B(1) of the Act. Additionally, the September 14, 1982 decision of the immigration judge reflects that copy of the order was served on the applicant, giving rise to a presumption that he was aware of his obligation to depart the United States on or before February 14, 1983.

The record evidence establishes that in a decision dated September 14, 1982, the immigration judge presiding over the applicant's deportation proceeding granted the applicant until February 14, 1983 to depart the United States voluntarily. In the decision, the immigration judge further ordered that, should the applicant not depart within that period, an order of deportation would immediately and automatically become effective without further notice to the applicant. The record also includes a warrant of deportation, advising immigration officers that the applicant was subject to deportation pursuant to former section 241(a)(1) of the Act. The warrant of deportation provides that on February 19, 1983, the applicant departed the United States afoot at the San Ysidro, California port of departure and that a Form I-39 port stamp corroborated the applicant's departure on that date.

Therefore, the documentary evidence in the record establishes that the applicant's voluntary departure order immediately turned into an order of deportation to Mexico when he failed to voluntarily depart the United States by February 14, 1983. *See* 8 C.F.R. § 243.5 (1983). While the applicant's departure was not witnessed by an immigration officer, the documentation in the record establishes that a Form I-39 stamp served as evidence of the applicant's departure after the voluntary departure period expired. There is also no evidence in the record suggesting that the applicant filed a request to extend the time within which to voluntarily depart the United States, as required by former 8 C.F.R. § 244.2 (1983).

As the documentary evidence establishes that the applicant departed the United States on February 19, 1983, some five days after the voluntary departure deadline, he departed the United States under an outstanding order of deportation. Consequently, the applicant "self-deported" pursuant to the regulations in effect at the time. *See* former 8 C.F.R. § 243.5 (1983). ("Any alien who has departed from the United States while an order of deportation is outstanding shall be considered to have been deported in pursuance of law, except that an alien who departed before the expiration of the voluntary departure time granted in connection with an alternate order of deportation shall not be considered to have been so deported.")

Counsel further contends that a prior FOIA response from CIS did not contain “any removal [deportation] order against [the applicant].” Though counsel states that the applicant “has not had an opportunity to even see the alleged voluntary departure or removal order,” the record evidence reflects that USCIS disclosed 107 pages in full pursuant to a FOIA request from prior counsel. Included in the January 20, 2004 FOIA response was the voluntary departure order, a copy of which prior counsel submitted in support of the applicant’s 2004 motion to reopen. Accordingly, USCIS complied with the FOIA requests submitted to this agency and the applicant was provided with a copy of the September 14, 1982 Decision of the Immigration Judge granting him voluntary departure until February 14, 1983.

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 the entire deportation record, we will not consider counsel’s arguments regarding violations of the applicant’s due process rights 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.

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 left the United States pursuant to an order of deportation on February 19, 1983. There is no authority in the Act given to the USCIS Director to waive the statutory requirement of continuous residence in the United States.

As previously determined by the director, due to the applicant's departure from the United States pursuant to an order of deportation on February 19, 1983, the applicant lacks the necessary continuous residence. The applicant is therefore ineligible for legalization and the AAO will not disturb the director’s denial of the application.

ORDER: The director’s April 1, 2013 decision is affirmed. The Form I-687 application is denied.