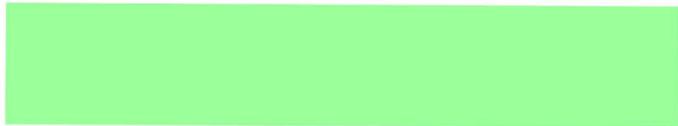


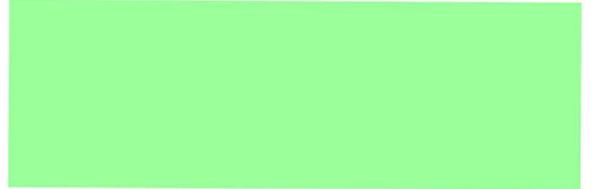


U.S. Citizenship  
and Immigration  
Services

(b)(6)



Date **JAN 08 2014** NEBRASKA SERVICE CENTER

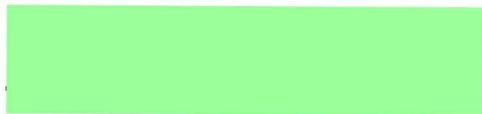


IN RE: Applicant:



APPLICATION: Application for Temporary Resident Status under Section 245A of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

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 "R. Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

cc: Gibbs, Houston, Pauw  
1000 Second Avenue, Suite 1600  
Seattle, WA 98104

**DISCUSSION:** The Nebraska Service Center Director (director) denied the Application for Temporary Resident Status (Form I-687) and certified its decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed. The application will be denied.

On April 13, 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), 8 U.S.C. § 1225a. On September 22, 1988, Legacy Immigration and Naturalization Service (Legacy INS) granted the applicant's application. However, on January 8, 1999, Legacy INS terminated the applicant's temporary resident status after finding that his January 22, 1985 and March 11, 1985 departures pursuant to deportation orders meant he failed to maintain the necessary continuous residence required by section 245A of the Immigration and Nationality Act (the Act). See Section 245A(g)(2)(b)(i) of the Act, 8 U.S.C. § 1255a(g)(2)(b)(i).<sup>1</sup>

On December 17, 2007, the applicant filed a Motion to Reopen pursuant to *Proyecto San Pablo v. INS*, No. 89-00456-WBD (D. Ariz.) (*Proyecto*). In the amended *Proyecto* order dated June 4, 2007, the United States District Court for the District of Arizona instructed the defendants<sup>2</sup> to:

prior to making a decision on the reopened legalization application, provide to legalization applicants complete copies of prior deportation files, including copies of the tapes and/or transcripts of the prior deportation hearings held before the Immigration Court, to enable them to bring a collateral challenge to the deportation order if appropriate.

On April 10, 2013, the director granted the applicant's motion and reopened the Form I-687 temporary resident status application. Previously, on April 5, 2013, the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility.

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-

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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."

<sup>2</sup> Defendants in the lawsuit are Department of Homeland Security, *et al.*

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, then the prior deportation or exclusion cannot be used as evidence to support a denial of legalization benefits.

The record reflects that the applicant's November 10, 2003 FOIA request for a copy of the record of proceedings was completed by U.S. Citizenship and Immigration Services (USCIS) on January 29, 2004. The record also contains a letter from the applicant dated March 5, 2004 addressed to USCIS Office of General Counsel, in which the applicant states he is a "Proyecto San Pablo class member" and confirms that he "received the results of my FOIA request." In addition, the record reflects that on January 13, 2005 and June 29, 2005, the applicant was provided "a certified copy of documentation that corroborates the U.S. Citizenship and Immigration Services' determination that you had been deported on January 22, 1985 . . . [and] on March 11, 1985." From the documentary evidence in the record, however, it does not appear that the applicant ever received a tape recording and/or transcript of his deportation 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 transcript and tape recording, 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, occurred in violation of due process, or was otherwise unlawful or involved a gross miscarriage of justice.

In this case, as stated previously, the director granted the applicant's motion. However, the director denied the applicant's Form I-687, Application for Temporary Resident Status, finding that the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his January 22, 1985 and March 11, 1985 departures pursuant to deportation orders. The director 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 (3rd Cir. 2004) (same).

Here, the record contains the Form I-294, which is dated January 22, 1985 and indicates that the applicant has been ordered deported to Mexico. The record also contains the Form I-205, Warrant of Deportation, which indicates that on January 22, 1985 the applicant was deported at the [REDACTED] port of entry on foot. The departure was witnessed by deportation officer [REDACTED] and the Form I-205 bears the applicant's signature and right thumb print. The record further contains the Form I-294, which is dated March 11, 1985 and indicates that the applicant has been ordered deported to Mexico under the name [REDACTED]. The record also contains the Form I-205, Warrant of Deportation, which indicates that on March 11, 1985 the applicant under the name [REDACTED] Arizona port of departure on foot. The departure was witnessed by a deportation officer, and the Form I-205 bears the applicant's signature and right thumb print.

In relevant part, pursuant to the terms of the *Proyecto* amended order, counsel has requested a copy of the applicant's complete deportation file, including the tape recording and/or transcript of his client's deportation proceedings. The relevant regulation in existence at the time of the applicant's deportation hearings, 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." 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 January 29, 2004, January 13, 2005 and June 29, 2005 USCIS fulfilled the applicant's FOIA requests and released a copy of documentation of the applicant's 1985 deportation proceedings. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. Therefore, it appears that USCIS has fully complied with the court's order to provide the applicant with all available 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 orders appear valid under current ninth circuit case law (and have 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 deportations were not in compliance with the governing regulations as there is no evidence that the immigration court maintained a tape recording of the applicant's deportation hearings. Consequently, pursuant to the terms of the 2007 amended *Proyecto* order, USCIS cannot use the prior deportation orders as evidence to support a denial of legalization benefits.

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).

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 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).

“Misdemeanor” means a crime committed in the United States, either (1) punishable by imprisonment for a term of one year or less, regardless of the term actually served, if any; or (2) a crime treated as a misdemeanor under 8 C.F.R. § 245a.1(p). For purposes of this definition, any crime punishable by imprisonment for a maximum term of five days or less shall not be considered a misdemeanor. 8 C.F.R. § 245a.1(o).

“Felony” means a crime committed in the United States punishable by imprisonment for a term of more than one year, regardless of the term actually served, if any. There is an exception when the offense is defined by the state as a misdemeanor and the sentence actually imposed is one year or less, regardless of the term actually served. Under this exception, for purposes of 8 C.F.R. § 245a, the crime shall be treated as a misdemeanor. 8 C.F.R. § 245a.1(p).

The remaining issue to be determined in this proceeding is whether the applicant has furnished sufficient credible evidence that he has no disqualifying criminal convictions, and is thus otherwise admissible to the United States. A review of the record reveals that the applicant has failed to meet this burden due to his criminal conviction record.

The record shows that on October 23, 2013, the AAO issued a Notice of Intent to Deny (NOID) the Form I-687 application, informing the applicant of deficiencies in the record and providing him with an opportunity to respond. Specifically, the AAO requested that the applicant provide a full criminal disposition regarding the following matter:

- On December 21, 1987, the applicant was arrested under the name [REDACTED] in [REDACTED] Washington and charged with *Shoplifting*. On December 22, 1987 the applicant pled guilty to the charge, a gross misdemeanor, and was sentenced to ten days of imprisonment, incarceration deferred, and ordered to pay a \$150 fine. (Police Department, [REDACTED])

In response to the NOID counsel submitted a “No Record” clearance letter dated November 12, 2013, from the deputy clerk for [REDACTED] Washington, pertaining to a criminal records search. The “No Record” clearance letter states that it does not include, “any criminal history prior to 1995 in the [REDACTED] or 1992 in the [REDACTED]”

branch.” In addition, upon review the criminal records search indicates it was performed using the applicant’s name, rather than the alias under which he was prosecuted.

Section 9.92.020 of the Revised Code of Washington provides that: “[e]very person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days, or by a fine in an amount fixed by the court of not more than five thousand dollars, or by both such imprisonment and fine.” Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant’s conviction for *shoplifting* in violation of the Revised Code of Washington qualifies as a misdemeanor conviction.<sup>3</sup>

The applicant has other misdemeanor convictions. The record reflects the following matters:

- On May 2, 1983, the applicant was charged under the name [REDACTED] with a violation of 8 United States Code (U.S.C.) Section 1325, *Illegal Entry into the United States* and 18 U.S.C. Section 2, *Aiding and Abetting*. On May 24, 1983, the applicant pled guilty and was convicted of the charges, both misdemeanors, for which he received a sentence of ninety days of imprisonment. (United States District Court, District of [REDACTED])<sup>4</sup>

The statutory provision, 8 U.S.C. § 1325, provides, in pertinent part, that: “[a]ny alien who enters or attempts to enter the United States at any time or place other than as designated by immigration officers, . . . , shall, . . . , be fined under Title 18 [U.S.C.] or imprisoned not more than six months . . . .”<sup>5</sup> Therefore, the applicant’s *illegal entry* conviction in violation of 8 U.S.C. § 1325 qualifies as a misdemeanor under the temporary resident status eligibility standards set forth at 8 C.F.R. § 245a.1(o).

In addition the statutory provision, 18 U.S.C. § 2, provides, in pertinent part, that: “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” Pursuant to the Federal Sentencing Guidelines (USSG), § 2X2.1, 18 USCA, the offense level for a violation of 18 U.S.C. § 2 is the same level as that for the underlying offense (the offense the defendant is convicted of aiding or abetting, in this instance *illegal entry*). Therefore, the applicant’s

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<sup>3</sup> It is not necessary to determine whether the theft offense committed by the applicant constitutes a crime involving moral turpitude (CIMT). Even if the applicant’s theft conviction were found to be a conviction for a CIMT, it would be subject to the petty offense exception found in section 212(a)(2)(A)(ii)(II) of the Act and would not bar the applicant’s admission to the United States.

<sup>4</sup> On March 26, 2013, the applicant’s Form I-485, Application to Adjust Status to Permanent Resident, on the basis of his being the beneficiary of an approved Form I-130, Petition for Alien Relative, as an immediate relative was denied based upon his inadmissibility under section 212(a)(6)(E)(i) of the Act for *alien smuggling*.

<sup>5</sup> We note that 8 U.S.C. § 1325 is at section 275 of the Act, but in view of the fact that the conviction record refers to the statute as it appears in the United State Code, we will do likewise.

*aiding and abetting* conviction in violation of 18 U.S.C. § 2 qualifies, under the temporary resident status eligibility standards set forth at 8 C.F.R. § 245a.1(o), as his third misdemeanor conviction.

Therefore, for immigration purposes, the applicant stands convicted of *shoplifting* on December 22, 1987, a misdemeanor under the Revised Code of Washington, and of *illegal entry* into the United States and *aiding and abetting* on May 24, 1983, misdemeanors under 8 U.S.C. § 1325 and 18 U.S.C. § 2, respectively. As the applicant has been convicted of three misdemeanors, he is ineligible for temporary resident status pursuant to section 245A(a)(4)(B) of the Act, 8 U.S.C. § 1255a(a)(4)(B). *See also* 8 C.F.R. § 245a.11(d)(1). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. The applicant is also ineligible for temporary resident status as he is inadmissible. He reentered the United States without permission after he was deported. As stated previously, on April 5, 2013 the director denied the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility.<sup>6</sup>

Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act and the AAO will not disturb the director's denial of the application.

**ORDER:** The director's April 10, 2013 decision is affirmed. The Form I-687 application is denied.

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<sup>6</sup> The record reflects that the applicant's conviction for *illegal entry* and *aiding and abetting* concerned the applicant smuggling his cousin and another individual into the United States on May 24, 1983. As previously noted, on March 26, 2013, the applicant's Form I-485, Application to Adjust Status to Permanent Resident, on the basis of his being the beneficiary of an approved Form I-130, Petition for Alien Relative, as an immediate relative was denied based upon his inadmissibility under section 212(a)(6)(E)(i) of the Act for *alien smuggling*. According to the record, neither of the persons smuggled into the U.S. by the applicant is an alien who falls under the exception to section 212(a)(6)(E)(ii) of the Act, and therefore they must be considered aliens the applicant assisted, aided, and abetted in entering the United States in violation of law. Consequently, the applicant is inadmissible under section 212(a)(6)(E) of the Act, 8 U.S.C. 1182(a)(6)(E), for alien smuggling, and is ineligible for temporary residence on this additional basis.

In addition, the record reflects that at the time of the applicant's apprehension by immigration officials on January 18, 1985 and March 6, 1985, respectively, he made several oral false claims to U.S. citizenship before admitting that he was not entitled to enter the United States. The AAO notes that if the false claim to United States citizenship was made prior to the enactment of IIRAIRA, September 30, 1996, it is treated as a misrepresentation under section 212(a)(6)(C)(i) of the Act. Consequently, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for having sought a benefit under the Act through fraud or willful misrepresentation of a material fact, and is ineligible for temporary resident status on this additional basis.