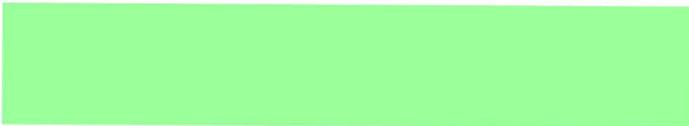


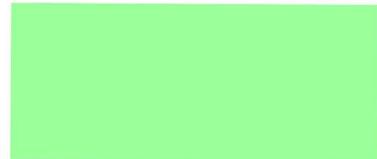


U.S. Citizenship  
and Immigration  
Services

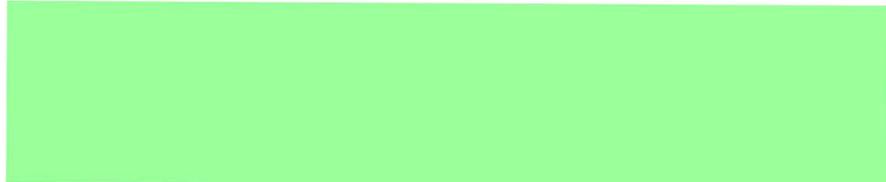
(b)(6)



Date: **JAN 15 2014** NEBRASKA SERVICE CENTER

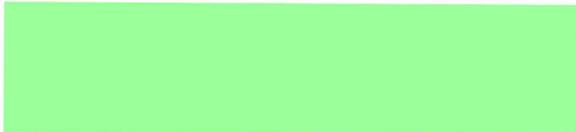


IN RE: Applicant:



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,

Ron Rosenberg  
Chief, Administrative Appeals Office

CC: Gibbs Houston Pauw 1000 Second Avenue Ste. 1600 Seattle WA 98104

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

On March 26, 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. The director denied the application, finding that the applicant's December 6, 1982 departure pursuant to a deportation order 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 July 10, 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. Also on that date the director approved the applicant's Form I-690 application for a waiver.

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

---

<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."

In his legal brief, counsel for the applicant states that although he has filed three Freedom of Information Act (FOIA) requests on the applicant's behalf, the Executive Office for Immigration Review (EOIR) and USCIS have failed to provide the applicant with a copy of the tape recording and/or transcript of his deportation proceeding. The record shows that on June 16, 1999, legacy INS fulfilled the applicant's FOIA request, number [REDACTED] and released record material to the applicant. Counsel asserts, however, that previous FOIA requests have secured only an incomplete deportation record. In support, the applicant submitted a letter dated April 16, 2008, by [REDACTED], Associate General Counsel of the EOIR. In the letter, [REDACTED] indicates that after conducting an extensive manual search of its files in the [REDACTED] [REDACTED] the agency was unable to locate any filed relating 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 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, the director granted the applicant's Motion to Reopen and approved the applicant's Form I-690, Application for Waiver of Grounds of Inadmissibility. On July 10, 2013, 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 the applicant's December 6, 1982 departure pursuant to a deportation order. 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.

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).

Counsel for the applicant states that the evidence and circumstances surrounding the applicant's deportation proceeding show that it was defective and the deportation order was entered in violation of the statute and regulation. 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 1982, 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 June 16, 1999, legacy INS fulfilled the applicant's FOIA request, number [REDACTED] and released record material to the applicant. However, the current entire USCIS record, which is before the AAO, does not contain a tape recording or hearing transcript. It therefore 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.

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 as there is no evidence that the 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 is 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).

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). In addition, an applicant for temporary

resident status must establish that he or she is not ineligible for admission under one or more of the categories listed in the Act. Section 245A(a)(4)(A), 8 U.S.C. § 1255a(a)(4)(A).

Furthermore, it is noted that an applicant who has been convicted of a felony or three or more misdemeanors in the United States is ineligible for adjustment to temporary resident status. Section 245A(a)(4)(B) of the Act; 8 U.S.C. § 1255a(a)(4)(B). There is no waiver available to an applicant convicted of three or more misdemeanors committed in the United States. The regulations provide relevant definitions at 8 C.F.R. § 245a.

“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 November 19, 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 full criminal dispositions regarding the following criminal matters<sup>2</sup>:

- The record contains an FBI rap sheet which shows that on February 9, 1984, the applicant was arrested under the name [REDACTED] and charged with a violation of section 4663 of the California Vehicle Code, “*forge/alter*

---

<sup>2</sup> The record also shows that on May 20, 1990, the applicant was arrested in San Diego and charged with battery in violation of section 243(a) of the California Penal Code. However, the FBI rap sheet shows that on May 22, 1990, the charge was dismissed by the prosecutor for lack of sufficient evidence. Consequently, this charge will not be considered. The record further shows that on August 27, 2009, the applicant was arrested in San Diego and charged with lewd and lascivious acts with a child in violation of sections 288(c)(1) and 657.6(a)(1) of the California Penal Code. Counsel submitted a letter from the San Diego District Attorney’s Office which indicates that no formal charges were filed by the District Attorney’s Office due to the case having been reviewed and rejected. As such, these charges will not be considered. It is noted that documentation in the record dated August 4, 2011 indicates that the applicant is still subject to the terms of a protective order pertaining to this arrest, although the applicant asserts to the contrary on certification.

vehicle registration.” ( [REDACTED] ) The final disposition for this arrest is unknown.

- The FBI rap sheet also shows that on May 31, 1985, the applicant was convicted under the name [REDACTED] of *illegal entry* into the United States, a misdemeanor violation of 8 U.S.C. § 1325. (Case number [REDACTED] ) For this offense, the applicant was sentenced to 45 days in jail.
- The FBI rap sheet further shows that on January 7, 2000, the applicant was arrested by officers of the [REDACTED] Sheriff's Office for *driving under the influence*, a misdemeanor in violation of section 23152(a) of the California Vehicle Code. (Agency case [REDACTED] ) On March 30, 2000, the applicant was convicted of this offense and was sentenced to 180 days imprisonment, sentence suspended, and placed on probation for a period of five years.

The NOID also noted that previous criminal court record searches performed at the applicant's request did not search under the applicant's full legal name, all of the aliases used by the applicant or all dates of birth used by the applicant.<sup>3</sup>

In response to the NOID, counsel submitted a “No Record” clearance letter dated December 9, 2013, from the records supervisor, National City Police Department, [REDACTED], regarding a search for criminal records, under the name [REDACTED] and date of birth June 2, 1963, pertaining to the applicant's February 9, 1984 arrest. The “No Record” clearance letter states that, “due to the age of the case number [the applicant] provided ([REDACTED]), it has been purged from our system or is not available to us.” This document does not provide a final disposition regarding the applicant's February 9, 1984 arrest by officers of the [REDACTED] for “*forge/alter vehicle registration.*”

Counsel submitted a letter dated December 5, 2013, from the Deputy Clerk of Court, U.S. District Court, Southern District of California, San Diego County, regarding a search for criminal records, under the name [REDACTED] and dates of birth June 2, 1963 and June 2, 1964, pertaining to the applicant's May 1985 arrest. The letter states that the case file “has been disposed of and is no longer available.” This document does not provide a final disposition regarding the applicant's May 1985 arrest for *illegal entry*. The applicant concedes he was convicted on this violation.

Counsel submitted a “No Police Report” statement dated December 2, 2013, from the records division, City of [REDACTED] Police Department, regarding a search for criminal records pertaining to the applicant's January 7, 2000 arrest. The letter states that, “[The] [r]eport has been purged. Crime and arrest reports are retained back to May 2004.” This document does not provide a final disposition regarding the applicant's January 7, 2000 arrest by officers of the [REDACTED] Sheriff's Office for *driving under the influence*.

Counsel also submitted a “No Record” clearance letter dated December 9, 2013, from the Deputy Clerk of Court, Superior Court of California, County of [REDACTED], pertaining to a search for criminal records under the applicant's full legal name and under aliases and dates of birth used by the

---

<sup>3</sup> According to evidence in the record, the applicant has used two dates of birth: June 25, 1965 and June 2, 1963.

applicant. The “No Record” clearance letter states that after a search of electronic court records, no criminal cases or traffic/minor offense cases were found. This document does not provide a final disposition regarding the arrests listed in the NOID.

Counsel further submitted additional witness affidavits from [REDACTED] [REDACTED] states he has known the applicant since 1981 and resided with him beginning in 1983 for five years. Regarding the applicant’s arrests stated in the NOID, [REDACTED] [REDACTED] states as follows:

We were living together when [the applicant] was arrested in 1984 – that is how I knew he had been arrested. He had bought a car but the registration wasn’t changed to his name. The case was dismissed, though, when he fixed that problem. We were still living together when [the applicant] was arrested in 1985 by the Border Patrol. He was convicted of illegal entry. In 2000, [the applicant] was arrested and convicted for a DUI. We weren’t living together at that time, but we were working together . . . [The applicant] told me about being arrested and going to court and being fined and taking classes.

[REDACTED] states that he has known the applicant in the U.S. since 1983, and that they lived together in San Diego beginning in 1983 for one year. [REDACTED] acknowledges he was not living with the applicant at the time of his arrests and further states as follows:

I wasn’t living with [the applicant] when he was arrested in 1984, but I knew about it, since we were friends. He told me it was a misunderstanding because the registration hadn’t been changed to his name after he purchased a car. The case was dismissed when he completed the registration change. I also remember that [the applicant] was arrested in 1985 by the Border Patrol near San Diego. He was held for more than a month and sent (sic) [REDACTED] California. He was convicted of illegal entry. In 2000, [the applicant] was arrested for a DUI. We were working together . . . He was convicted . . . .

Upon review, the witness affidavits do not indicate that the witnesses have direct knowledge of the applicant’s arrests stated in the NOID and the dispositions of those arrests, other than what the witnesses were told by the applicant.

Counsel further submitted the applicant’s affidavit regarding the arrests stated in the NOID. Regarding his arrest in 1984 for “*forge/alter vehicle registration*,” the applicant explained that he failed to register a vehicle in his name after purchasing it. He further stated that subsequent to his arrest, “I went to traffic court, and explained what had happened. The judge dismissed the case and I immediately registered the car in my name. That was the end of the problem.” Regarding the applicant’s May 1985 arrest for *illegal entry*, the applicant stated that he was held for 45 days, went to court, and “I was convicted of illegal entry.” Regarding the applicant’s January 2000 arrest for *driving under the influence of alcohol or drugs* and *DUI/BAC .08 or more*, the applicant stated that he pled guilty to driving under the influence of alcohol.

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>4</sup> Therefore, the applicant’s conviction in 1985 for *illegal entry* in violation of 8 U.S.C. § 1325 qualifies as a misdemeanor conviction under the temporary resident status eligibility standards set forth at 8 C.F.R. § 245a.1(o).

Section 23152 of the California Vehicle Code provides, in pertinent part, that:

- (a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

Section 19 of the California Penal Code adds that: “every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding one thousand dollars (\$1,000), or by both.” Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant’s conviction in 2000 for *driving under the influence* in violation of section 23152(a) of the California Vehicle Code qualifies as the applicant’s second misdemeanor conviction.

Section 4463(a) of the California Vehicle Code provides that the violation of section 4463, “*forge/alter vehicle registration*,” is punishable by 16 months, 2 years or 3 years in state prison, or by imprisonment in county jail for not more than 1 year. Therefore, by the standards set forth in the regulation at 8 C.F.R. § 245a.1(o), the applicant’s conviction in 1984 for “*forge/alter vehicle registration*” would qualify as the applicant’s third misdemeanor conviction. The applicant has failed to provide a final disposition regarding his February 9, 1984 arrest by officers of the National City Police Department for “*forge/alter vehicle registration*.”

Upon review, the documentation and affidavits submitted by the applicant on certification are not sufficient to establish eligibility for temporary residence if other information in the record reveals an arrest record. If the evidence of an ultimate disposition is unavailable, the burden is on the applicant to submit credible, probative evidence of unavailability. Federal regulations provide that, in all applications or petitions for immigration benefits (temporary resident status in this case) the applicant must show that the requested evidence is unavailable. In the absence of primary evidence, the applicant must then submit relevant “secondary evidence.” If the applicant does not submit secondary evidence, they must submit at least two affidavits from persons who are not party to the application and who have direct knowledge of the event and circumstances. In criminal record cases, this would include affidavits from the prosecuting attorney, the defense attorney, the judge, or some other individual (other than derivative family members) who has direct knowledge of the disposition of the arrest. *See* 8 C.F.R. § 103.2(b)(2)(i) and (ii). Despite the request for evidence contained in the NOID, the applicant failed to provide final criminal dispositions for the arrests listed in the NOID and this deficiency has not been overcome on certification.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

---

<sup>4</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.



Therefore, based on the foregoing, the applicant is ineligible for temporary resident status under section 245A of the Act.

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