U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529–2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: JUL 09 2014 Office: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Applicant: [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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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.

Ron Rosenberg
Chief, Administrative Appeals Office

CC: [redacted]

DISCUSSION: The application for temporary resident status, pursuant to Section 245A of the Immigration and Nationality Act (the Act or INA), 8 U.S.C. § 1225a, was denied. The decision is now before the Administrative Appeals Office (AAO) on certification. The director's decision will be affirmed and the application will remain denied.

On August 13, 1987, the applicant submitted an Application for Temporary Resident Status (Form I-687), pursuant to Section 245A of the Immigration and Nationality Act (the Act or INA), 8 U.S.C. § 1225a, which was denied by the Western Service Center Director. The applicant filed a Form I-290B, Notice of Appeal. The record reflects that the Form I-290B was treated as a motion to reopen. The motion was rejected, reopened and then granted. On April 5, 2013, the Nebraska Service Center Director (director) denied the Form I-687 application and certified its decision to us for review. The director denied the application, finding that the applicant's January 8, 1982 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).[1] Also on April 5, 2013, the director reopened the Form I-690, Application for Waiver of Grounds of Inadmissibility, and granted the request for a waiver.

Based on review of the record, the director's decision will be affirmed and the applicant's Form I-687 application will be denied.

Deportation Proceedings

The first issue in this proceeding is whether the evidence is sufficient to determine that the applicant has made a *prima facie* showing that the proceedings which resulted in the applicant's deportation was not in compliance with the governing regulations and, as a result, USCIS cannot use the prior deportation order as evidence to support a denial of legalization benefits. A review of the record reveals that, pursuant to the terms of the 2007 amended *Proyecto* order, we are constrained to find that the applicant has overcome the particular basis of the denial cited by the director. 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

[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."

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.

In a June 4, 2013 legal brief in support of legalization, counsel states that although she and prior counsel have filed 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. On January 27, 1989, USCIS fulfilled the FOIA request, number [redacted] and released to the applicant an unknown number of pages of record material. On June 19, 2003, USCIS fulfilled the FOIA request, number [redacted] and released to the applicant 198 pages of record material in their entirety. However, the applicant asserted that he had not received a tape recording and/or transcript of the January 8, 1982 deportation hearing. In support, counsel submitted a letter dated June 10, 2012 by Jill Eggleston, Director, FOIA Operations. In her letter, Ms. Eggleston acknowledges that on November 8, 2011 counsel submitted a FOIA request for the tape recording and/or hearing transcripts of the applicant's January 1982 deportation hearing. Ms. Eggleston indicates that the tape recording and/or hearing transcripts of the applicant's deportation hearing could not be located. From the documentary evidence in the record, it does not appear that the applicant ever received a tape recording and/or transcript of his deportation hearing. Further, the physical file (currently in the possession of the AAO) contains no such tape and/or transcripts. 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.

To invoke a shift in the burden of proof from the applicant to USCIS, he 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 AAO granted the applicant's Motion to Reopen and the director approved his Form I-690, Application for Waiver of Grounds of Inadmissibility, on humanitarian grounds. However, the director found the applicant failed to satisfy the continuous residence requirement of section 245A(a)(2)(A) of the Act due to his January 8, 1982 departure pursuant to a deportation order. The director therefore denied the application and certified the matter to us 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 (3d Cir. 2004) (same).

In this case, the record evidence includes the Order to Show Cause (OSC) dated January 3, 1982, which refers to the applicant by the alias [redacted] The OSC charges the applicant as being a native and citizen of Mexico who entered the United States without inspection. The OSC reflects that it was personally served upon the applicant on January 3, 1982. It further reflects that the applicant requested a prompt hearing to expedite determination of his case. At the deportation hearing convened on January 8, 1982, the immigration judge found the applicant deportable pursuant to former INA section 241(a)(2) of the Act (now 237(a)(1)) by clear, unequivocal, and convincing evidence.[2]

The record also includes a Notice of Order of Deportation (Form I-294), which is dated January 8, 1982 and instructs the applicant that he has been ordered deported to Mexico. The Notice contains a Spanish language translation and the corresponding warnings related to returning to

[2] There is documentation in the record suggesting that at the time the applicant was apprehended on January 1, 1982 he was involved in smuggling aliens to the United States. The record does not contain evidence of a conviction for this offense. Therefore, it will not be considered.

the United States without authorization. Further, the record includes a Warrant of Deportation, which reflects that the deportation order was executed on January 8, 1982 and that the applicant was deported from the United States to Mexico. Accordingly, the record contains sufficient documentary evidence establishing that the applicant left the United States pursuant to an order of deportation.

Counsel contends that the documentary evidence and the circumstances surrounding the applicant's January 8, 1982 departure pursuant to a deportation order shows it was defective and entered in violation of the governing statute and regulations. Counsel states that the applicant was not informed of his right to seek voluntary departure. However, 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, counsel may not establish a violation by alleging that the applicant had a right to be informed of such relief.

Counsel asserts that the applicant was not informed of his right to appeal the decision of the immigration judge to the Board. However, the Order to Show Cause (OSC) issued against the applicant and personally served upon him on January 3, 1982 contains a notation indicating that the applicant was furnished a Notice of Appeal Rights (Form I-618). As such, counsel's contention is contradicted by the documentary evidence in the record and is insufficient to establish a prima facie showing pursuant to the 2007 *Proyecto* order.

Counsel next states that the applicant was not informed of his right to counsel. At the time of his 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.

The Attorney General promulgated 8 C.F.R. § 242.16(a) to implement former section 292 of the Act. At the time of the applicant's deportation proceedings, 8 C.F.R. § 242.16(a) provided in pertinent part:

> The Immigration Judge shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; [and] advise the respondent of the availability of free legal services programs . . . in the district where the deportation hearing is being held[.]

8 C.F.R. § 242.16(a)(1987).

Here, the OSC issued against the applicant and personally served upon him on January 3, 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. However, we note that the statute and regulations provide that the alien respondent be notified of the right to counsel at various stages of the deportation proceeding, including in the OSC, *see* INA § 242B(a)(1)(E) (1982), and at the start of the deportation hearing itself, *see* 8 C.F.R. § 242.16(a) (1982).[3] 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.

Counsel contends that the record does not contain evidence to show that the immigration judge made a finding of deportability by clear, unequivocal and convincing evidence, as required by 8 C.F.R. § 242.14(a) (1982). Counsel indicates that as there is no tape recording of the deportation hearing, the record is insufficient to find that the immigration judge orally made the requisite findings of 8 C.F.R. § 242.14(a) to support the deportation order. Consequently, 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 immigration court maintained a recording 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 and/or transcript of the hearing. It is likely that the hearing was recorded, and possible

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[3] Section 242B(a)(1)(E) of the Act provides that in deportation proceedings, written notice shall be given in person to the alien specifying that he or she may be represented by counsel and that the alien will be provided with a list of persons who may be available to represent aliens in deportation proceedings *pro bono*. The regulation at 8 C.F.R. § 242.16(a) adds that, at the commencement of the deportation hearing, the immigration judge shall advise the alien of his or her right to counsel of his or her choosing at no expense to the government, shall require the alien to state then and there whether he or she desires representation, and shall advise the alien of the availability of free legal services programs. The immigration judge shall also ascertain that the alien has received a list of such programs.

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.

As stated previously, on January 27, 1989, USCIS fulfilled the applicant's FOIA request, number and released to him an unknown number of pages of record material. On June 19, 2003, USCIS fulfilled the applicant's FOIA request, number and released to him 198 pages of record material in their entirety. However, USCIS and the Executive Office for Immigration Review (EOIR) were unable to provide a tape recording and/or transcript of his deportation hearing. The current entire USCIS record, which is before the AAO, does not contain a tape recording or transcript. 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 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, we are constrained to find that the applicant has overcome the particular basis of the denial cited by the director.

Continuous Residence

The next issue to be determined in this proceeding is whether the applicant submitted sufficient evidence to establish by a preponderance of the evidence that he continuously resided in the United States for the duration of the requisite period.

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).

In his Form I-687 application, the applicant indicated that he entered the United States without inspection on May 8, 1980. He listed residences in California on from May 1980 to November 1982, and on from November 1982 through

the end of the requisite period. He listed employment in California as a mechanic, with from October 1981 to August 1982, from August 1982 to February 1983 and in Fountain Valley from 1983 to 1986. The applicant did not list any employment in the U.S in 1987 or 1988. Nor did he list any absences from the U.S. during the requisite period.

The applicant submitted employment verification letters and documents. The record contains employment verification letters from his uncle, d.b.a. the , and , President and Upon review, the record contains material inconsistencies regarding: when and where the applicant resided and worked and his absences from the United States during the requisite period.

In an employment verification letter, the applicant's uncle, stated that the applicant worked for him from October 23, 1981 to January 20, 1982. He does not provide a specific location where the applicant was employed or a description of his job duties during that period. The applicant failed to list any employment with in the above Form I-687 application.

states the applicant performed auto repair services "on a job-by-job or independent contract basis off and on" from February 1982 to March 1983. This letter is inconsistent with the information in the above Form I-687 application, in which the applicant indicated he worked for the company from October 1981 to August 1982.

In two letters, states the applicant worked for the company as a vehicle mechanic from February 1984 through December 1984 and from April 1986 to May 1986. This letter is inconsistent with the information in the above Form I-687 application, in which the applicant indicated he worked for the company from 1983 to 1986.

The employment verification letters of do not meet the requirements set forth in the regulations, which provide specific guidance on the sufficiency of documentation when proving residence through evidence of past employment. The regulation at 8 C.F.R. § 245a.2(d)(3)(i) provides that letters from employers must include: (A) Alien's address at the time of employment; (B) Exact period of employment; (C) Periods of layoff; (D) Duties with the company; (E) Whether or not the information was taken from official company records; and (F) Where records are located and whether the Service may have access to the records. If the records are unavailable, an affidavit-form letter stating that the alien's employment records are unavailable and why such records are unavailable may be accepted in lieu of subsections (E) and (F). The employment verification letters fail to comply with the above cited regulation because they lack considerable detail regarding the applicant's employment. For instance, the witnesses do not state the applicant's daily work duties, the number of hours or days he was employed, the location at which he was employed, or his address at the time of employment. Furthermore, the witnesses do not state how they were able to date the applicant's employment. The witnesses do not state

whether the information provided in the letters is based upon the witnesses' personal knowledge or whether they referred to any records they or the company may have maintained. For these reasons, the employment verification letters are of little probative value.

A review of the record also reveals the applicant failed to indicate in the Form I-687 that he had absences from the U.S. in 1981, 1982, and 1986, as more fully discussed below.

The record reveals the applicant was outside the U.S. prior to being apprehended on January 1, 1982 by officers of Customs and Border Patrol of the legacy Immigration and Naturalization Service (INS). The record contains a Form I-213, Record of Deportable Alien, which indicates that on January 1, 1982 the applicant was apprehended, using the name near California, at which time he indicated that his permanent residence was in , Mexico. In addition, the record reflects the applicant was deported from the U.S. to Mexico on January 8, 1982. In his affidavit on certification, the applicant stated he remained in Mexico for two or three months before returning to the U.S. The applicant's affidavit is also inconsistent with the employment verification letters of indicating he worked for the company beginning in February 1982, and his uncle, stating he worked for him until January 20, 1982.

The record contains pay stubs from from July 1983 through December 1983. However, these documents fail to provide any information that would serve to link them to the applicant, such as a name and address. Therefore these documents will be given no weight.

The record also contains a notice from stating that an annual insurance premium is due on November 2, 1983. The premium notice indicates the applicant's address is on which is inconsistent with the information in the above Form I-687 application, in which the applicant indicated that from November 1982 through the end of the requisite period he was living on The applicant also submitted a Form SSA-4002 sent to and requesting information pertaining to a 1983 Form W-2, Wage and Tax Statement, submitted on the applicant's behalf. This document is some evidence in support of the applicant's residence in the U.S. for some part of 1983.

The applicant has submitted a 1984 Form 1099-INT, pertaining to interest income earned on a savings account at The applicant has also submitted a 1984 Form W-2, Wage and Tax Statement, listing his wages from The applicant has further submitted pay stubs from for the period from March 24, 1984 to December 14, 1984. These documents are some evidence in support of the applicant's residence in the U.S. for some part of 1984.

The applicant submitted a Form SSA-4002 sent to him requesting information pertaining to a 1985 Form W-2, Wage and Tax Statement, submitted by on his behalf. This document is inconsistent with the employment verification letter from

discussed previously, which indicates the applicant was employed with the company in 1984 and 1986. The record also contains a birth certificate for the applicant's daughter, indicating she was born on July 4, 1985 at the This document is some evidence in support of the applicant's residence in the U.S. for some part of 1985.

The applicant submitted pay stubs from for the period from April 5, 1986 to May 30, 1986 and a 1986 Form W-2, Wage and Tax Statement, submitted by on his behalf. The applicant has also submitted a checking account statement, dated August 6, 1986, from the These documents are some evidence in support of the applicant's residence in the U.S. for some part of 1986.

The record also reflects that in October 1986, the applicant was convicted, under the name of attempted illegal entry into the United States in violation of 8 U.S.C. § 1325. However, as stated above, the applicant failed to indicate in his Form I-687 that he had an absence from the U.S. in 1986. The applicant was sentenced to 45 days confinement. A single misdemeanor conviction does not disqualify the applicant for temporary resident status. *See* section 245A(a)(4)(B) of the Act. The record reflects he was deported back to Mexico.

The remaining evidence in the record is comprised of the I-687 application and the applicant's statements. As stated previously, the sufficiency of all the evidence produced by the applicant will be judged according to its probative value and credibility. 8 C.F.R. § 245a.2(d)(6). Here, the applicant has failed to provide sufficient probative and credible evidence of his continuous residence in the United States for the duration of the requisite period.[4]

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[4] The record contains an FBI rap sheet showing that on June 12, 1979, the applicant was arrested by officers of the legacy INS in California, and charged with one count of fraud for *Attempted Entry with Document of Another*, in violation of 18 U.S.C. § 1546. However, the record reflects that the case against the applicant was declined and, therefore, will not be considered. The record reflects that the applicant was deported back to Mexico. In his affidavit on certification the applicant indicated that in 1979 he was detained briefly before being returned to Mexico.

In addition, the record reflects that in January 2000 the applicant was apprehended and charged with *Oral False Claim to U.S. Citizenship* and *Attempted Illegal Entry*, in violation of 8 U.S.C. § 1325 and 18 U.S.C. § 911. A memorandum in the file indicates the charge of *False Claim to U.S. Citizenship* was in error because the record reflects the applicant indicated at the time of his apprehension that he was a citizen of Mexico, who had lost his Form I-551, Permanent Resident Card, in Mexico. However, the record does not contain evidence of a conviction for these offenses. The record shows that the charges resulted in the applicant being expeditiously removed from the United States pursuant to section 235(b)(1) of the Act. The record also reflects that on April 2, 2000, the applicant was apprehended and charged with attempted illegal entry into the U.S with a counterfeit Form I-551, in violation of 8 U.S.C. § 1325 and 18 U.S.C. § 1546(a). However, the record does not contain evidence of a conviction for these

As discussed above, the record contains materially inconsistent testimony regarding the dates the applicant resided and worked at particular locations in the U.S. during the requisite period, and his absences from the United States during the requisite period. It is incumbent upon the applicant to resolve any inconsistencies in the record by independent, objective evidence pointing to where the truth lies. Doubt cast on any aspect of the applicant's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. *Matter of Ho,* 19 I & N Dec. 582, 591-592 (BIA).

On February 11, 2014, the applicant was issued a Notice of Intent to Deny / Request for Additional Evidence (NOID/RFE) and given an opportunity to reconcile the inconsistencies in the record noted above. The applicant was asked to provide a list of all of his entries and exits from the United States, since the date of his initial entry to date. The applicant was also asked to provide copies of all pages of any passports or other documents with which he traveled during the requisite period, if applicable.

On April 14, 2014, in response to the NOID/RFE, counsel submitted an affidavit from the applicant, an affidavit and a copy of an email from counsel's legal assistant, and a copy of the applicant's legalization/SAW examination worksheet.

The affidavit from counsel's legal assistant states that she attempted to contact the applicant's past employer and obtain his employment records; however, she was unsuccessful. While this document and her accompany email reflect her attempt to obtain the requisite evidence, it carries no probative value and is insufficient evidence to establish the applicant's presence in the U.S. during the requisite period.

In an affidavit, the applicant states he first arrived in the United States in 1980. He contends that the inconsistencies in the record are due to his recollection at the time and that he was not very involved in the application process, suggesting that his previous counsel failed to check the accuracy of the

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offenses. Rather, the record shows that the charges resulted in the applicant being expeditiously removed from the United States pursuant to section 235(b)(1) of the Act.

The director has granted the waiver of the applicant's inadmissibility under sections 212(a)(6)(C)(i) and (ii) of the Act, for fraud or misrepresentation of a material fact in attempting to procure an immigration benefit and false claim to U.S. citizenship. Accordingly, these misrepresentations do not render the applicant ineligible for temporary resident status. Further, although the record reflects that the applicant was removed from the U.S. in January 1982, October 1986, January 11, 2000 and on April 3, 2000, as noted previously his inadmissibility under section 212(a)(9)(A)(ii) for having been deported and having returned to the United States without authorization has been waived. Accordingly, these unlawful entries do not render the applicant ineligible for temporary resident status.

dates on his application. He further states that, during the requisite period, he departed the United States to Mexico on December 20, 1981 through January 1, 1982, from December 1982 to January 1983 for approximately two weeks, and from August 1986 to October 1986 for approximately two weeks. He does not submit any independent, objective evidence to corroborate his affidavit and, in fact, his statements raise additional inconsistencies in the record. In his affidavit, the applicant states that he departed the United States to Mexico on December 20, 1981 through January 1, 1982. However, as previously noted, the record reflects that the applicant was outside the U.S. prior to being apprehended on January 1, 1982 by officers of Customs and Border Patrol of the legacy Immigration and Naturalization Service (INS). He was deported to Mexico on January 8, 1982 and in a previous affidavit he stated he remained in Mexico for two or three months before returning to the United States. This absence is not listed in his affidavit. The instant affidavit is inconsistent with the record and the applicant's previous affidavit. Further, the applicant's previous affidavit was inconsistent with the employment verification letters of indicating he worked for the company beginning in February 1982, and his uncle, stating he worked for him until January 20, 1982. The applicant failed to reconcile these previously noted inconsistencies in the record.

Also, as noted in the NOID, the applicant also failed to address the inconsistency regarding his address on a premium notice from The premium notice indicates the applicant's address is on which is inconsistent with the information in the Form I-687 application, which indicates that the applicant he was living on from November 1982 through the end of the requisite period.
Counsel also submits a copy of the applicant's legalization/SAW examination worksheet, dated August 20, 1987. Counsel asserts that it is appropriate to rely on the examining officer's contemporaneous findings and recommendation that the application be granted. Counsel suggests that the applicant could have presented additional documents that were returned and not kept in the file. While counsel's assertion is noted, it is the applicant's burden to establish his claim with independent, objective evidence. Here, while the record contains evidence of the applicant's presence in the United States for portions of 1983, 1984, 1985 and 1986, the record lacks independent, objective evidence to support the applicant's claim of continuous residence throughout the requisite period, specifically prior to 1983. Combined with the unreconciled inconsistencies in the record, the applicant has failed to meet his burden to establish his claim of continuous residence during the requisite period.

Based on the foregoing, the applicant has failed to submit evidence in support of his claim and to resolve the inconsistencies in the record with independent, objective evidence. Thus, the applicant has failed to establish by a preponderance of the evidence that he entered the United States before January 1, 1982 and continuously resided in an unlawful status in the United States for the requisite period as required under both 8 C.F.R § 245a.2(d)(5) and *Matter of E- M-, supra*. The applicant is, therefore, ineligible for temporary resident status under section 245A of the Act on this basis.

ORDER: The director's decision is affirmed and the motion remains denied. This decision constitutes a final notice of ineligibility.