



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF L-M-R-

DATE: MAY 2, 2016

CERTIFICATION OF NEBRASKA SERVICE CENTER DECISION

**APPLICATION: FORM I-687, APPLICATION FOR STATUS AS A TEMPORARY
RESIDENT UNDER SECTION 245A OF THE IMMIGRATION AND
NATIONALITY ACT**

The Applicant, a native and citizen of Mexico, seeks status as a temporary resident. *See* Immigration and Nationality Act (the Act) § 245A, 8 U.S.C. § 1255(a). The Immigration Reform and Control Act of 1986 created a legalization program under section 245A of the Act, which allows eligible foreign nationals who entered the United States before January 1, 1982, and who continuously resided and were physically present in the United States during specified time periods, to adjust status to temporary residence, if they are admissible to the United States and have not been convicted of a felony or three or more misdemeanors in the United States. The application period for temporary resident status ended on May 4, 1988.

The Director, Nebraska Service Center, denied the application because the Applicant is inadmissible due to his criminal convictions and because he could not establish the requisite unlawful residence due to his having been deported from the United States.

The matter is now before us on certification. The record does not reflect a response to the Director's certified denial.

Upon *de novo* review, we will affirm the initial decision of the Director, Nebraska Service Center, and deny the application.

I. LAW

The Applicant is seeking to adjust status to that of a temporary resident. Section 245A of the Act provides:

(a) Temporary Resident Status.- The Attorney General [now Secretary of the Department of Homeland Security (Secretary)] shall adjust the status of an alien to that of an alien lawfully admitted for temporary residence if the alien meets the following requirements:

(1) Timely application.-

(A) During application period.-Except as provided in subparagraph (B), the alien must apply for such adjustment during the 12-month period beginning on a date (not later than 180 days after the date of enactment of this section) designated by the [Secretary].

(B) Application within 30 days of show-cause order.-An alien who, at any time during the first 11 months of the 12-month period described in subparagraph (A), is the subject of an order to show cause issued under section 242 (as in effect before October 1, 1996), must make application under this section not later than the end of the 30-day period beginning either on the first day of such 12-month period or on the date of the issuance of such order, whichever day is later.

(C) Information included in application.-Each application under this subsection shall contain such information as the [Secretary] may require, including information on living relatives of the applicant with respect to whom a petition for preference or other status may be filed by the applicant at any later date under section 204(a).

(2) Continuous unlawful residence since 1982.-

(A) In general.-The alien must establish that he entered the United States before January 1, 1982, and that he has resided continuously in the United States in an unlawful status since such date and through the date the application is filed under this subsection.

(B) Nonimmigrants.-In the case of an alien who entered the United States as a nonimmigrant before January 1, 1982, the alien must establish that the alien's period of authorized stay as a nonimmigrant expired before such date through the passage of time or the alien's unlawful status was known to the Government as of such date.

(C) Exchange visitors.-If the alien was at any time a nonimmigrant exchange alien (as defined in section 101(a)(15)(J)), the alien must establish that the alien was not subject to the two-year foreign residence requirement of section 212(e) or has fulfilled that requirement or received a waiver thereof.

(3) Continuous physical presence since enactment.-

(A) In general.-The alien must establish that the alien has been continuously

physically present in the United States since the date of the enactment of this section.

(B) Treatment of brief, casual, and innocent absences.- An alien shall not be considered to have failed to maintained continuous physical presence in the United States for purposes of subparagraph (A) by virtue of brief, casual, and innocent absences from the United States.

(C) Admissions.-Nothing in this section shall be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for adjustment of status under this subsection.

(4) Admissible as immigrant.-The alien must establish that he-

(A) is admissible to the United States as an immigrant, except as otherwise provided under subsection (d)(2),

(B) has not been convicted of any felony or of three or more misdemeanors committed in the United States,

(C) has not assisted in the persecution of any person or persons on account of race, religion, nationality, membership in a particular social group, or political opinion, and

(D) is registered or registering under the Military Selective Service Act, if the alien is required to be so registered under that Act.

For purposes of this subsection, an alien in the status of a Cuban and Haitian entrant described in paragraph (1) or (2)(A) of section 501(e) of Public Law 96-422 shall be considered to have entered the United States and to be in an unlawful status in the United States.

The Applicant has the burden of proving by a preponderance of credible evidence that he has resided in the United States for the requisite period, is admissible to the United States under the provisions of section 245A of the Act, and is otherwise eligible for adjustment of status.

The regulations at 8 C.F.R. § 245a.2(d) provide:

(5) *Burden of proof.* An alien applying for adjustment of status under this part 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 under this section. The inference to be drawn from the documentation provided shall

depend on the extent of the documentation, its credibility and amenability to verification as set forth in paragraph (d) of this section.

(6) *Evidence.* The sufficiency of all evidence produced by the applicant will be judged according to its probative value and credibility. To meet his or her burden of proof, an applicant must provide evidence of eligibility apart from his or her own testimony. In judging the probative value and credibility of the evidence submitted, greater weight will be given to the submission of original documentation.

The regulations at 8 C.F.R. § 245a.2(h) provide:

Continuous residence. (1) For the purpose of this Act, an applicant for *temporary resident status* shall be regarded as having resided continuously in the United States if, at the time of filing of the application:

(i) No single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between January 1, 1982 through the date the application for temporary resident status is filed, unless the alien can establish that due to emergent reasons, his or her return to the United States could not be accomplished within the time period allowed;

(ii) The alien was maintaining a residence in the United States; and

(iii) The alien's departure from the United States was not based on an order of deportation.

(2) An alien who has been absent from the United States in accordance with the Service's advance parole procedures shall not be considered as having interrupted his or her continuous residence as required at the time of filing an application under this section.

The regulations at 8 C.F.R. § 245a.2(k)(3) provide:

(3) *Grounds of exclusion that may not be waived.* Notwithstanding any other provision of the Act, the following provisions of section 212(a) may not be waived by the [Secretary] under paragraph (k)(2) of this section:

(i) Paragraphs (9) and (10) (criminals) [now sections 212(a)(2)(A)(i)(I) and 212(a)(2)(B)[.]

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The regulation at 8 C.F.R. § 245a.1(p) provides:

Felony means a crime committed in the United States, punishable by imprisonment for a term of more than one year, regardless of the term such alien actually served, if any, except: 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 such alien actually served. Under this exception, for purposes of 8 CFR Part 245a, the crime shall be treated as a misdemeanor.

The regulation at 8 C.F.R. § 245a.1(o) provides:

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 such alien actually served, if any, or (2) a crime treated as a misdemeanor under 8 CFR 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.

II. ANALYSIS

The issues to be determined in this proceeding are whether the Applicant has provided sufficient credible evidence that he has no disqualifying criminal convictions and is otherwise eligible for temporary resident status. We find that the Applicant is ineligible for temporary resident status as he has three misdemeanor convictions. The record reflects that the Applicant was sentenced to probation and fined for both of his convictions for his violations of California (Cal.) Penal Code §496(a). The record also includes a third misdemeanor conviction in 1983 for his illegal entry. The Applicant does not dispute his convictions. The Applicant's criminal history renders him ineligible for temporary resident status.

The next issue, assuming the Applicant's convictions had not rendered him ineligible, is whether he maintained the required continuous unlawful residence, given his 1983 deportation. The Applicant contends that his deportation did not disrupt his continuous residence in the United States. The Applicant requested that his application be reopened pursuant to the *Proyecto San Pablo v. INS* class-action lawsuit's amended order, which permits U.S. Citizenship and Immigration Services (USCIS or CIS) to find that continuous residence was not disrupted after deportation when an applicant makes a *prima facie* showing that the deportation 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. We find that the Applicant has not made such a showing, and that because of his deportation, he did not maintain the requisite continuous residence in the United States.

A. Conviction of a felony or three or more misdemeanors committed in the United States.

The record reflects that the Applicant was convicted of three misdemeanors in the United States. Specifically, court disposition records reflect that on [REDACTED] 2003, the Superior Court of California

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for the County of [REDACTED] convicted the Applicant of the offense of Buying, Receiving, Concealing, or Withholding Stolen Property, in violation of Cal. Penal Code §496(a) and, in a different matter on the same day, of Buying or Receiving Stolen Property in violation of Cal. Penal Code §496(a). Moreover, the record reflects that the Applicant also was convicted in federal court in 1983 of illegal entry.

Cal. Penal Code § 496(a), as in effect at the time of the Applicant's conviction, provided that:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars (\$400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year.

Cal. Penal Code § 17 states the following, in pertinent part:

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

For each of his convictions, the Applicant was sentenced to serve four months in the [REDACTED] Jail, placed on formal probation for three years, and fined. Under Cal. Penal Code § 17, both of the convictions are misdemeanor convictions, as each involved a sentence that did not include any term of confinement in the state prison.

In addition, on [REDACTED] 1983, the Applicant was convicted in the U.S. District Court for the [REDACTED] California of illegal entry in violation of 18 U.S.C. § 1325, a misdemeanor, for which a penalty of 30 days in jail was imposed before he was deported.

As stated above, an applicant who has been convicted of any felony or three or more misdemeanors in the United States is ineligible for temporary resident status. Section 245A(a)(4)(B) of the Act. Neither the Act nor the regulations provide for a waiver of this ineligibility. Accordingly, because the Applicant has been convicted of three misdemeanors in the United States, the Applicant is ineligible for adjustment of status to temporary resident under section 245A of the Act.

B. Continuous residence in an unlawful status since January 1, 1982

If the Applicant had not been ineligible based on his criminal convictions, he would also need to establish that he continuously resided in the United States in an unlawful status since January 1, 1982, and through the date of the application.

The Applicant shall be regarded as having resided continuously in the United States if, at the time the application for temporary resident status is considered filed, he shows that no single absence from the United States exceeded 45 days and the aggregate of all absences did not exceed 180 days during the requisite period, unless the Applicant can establish that due to emergent reasons his return to the United States could not be accomplished within the time period allowed. The Applicant also must show he was maintaining a residence in the United States and the departure was not based on an order of deportation. 8 C.F.R. § 245a.2(h).

According to the U.S. District Court for the District of Arizona's judgment in *Proyecto San Pablo v. INS*, No. Civ 89-456-TUC-WDB, individuals whose legalization applications were denied based on lack of continuous residence because of departure under an order of deportation could apply for a copy of deportation or exclusion documents under the Freedom of Information Act (FOIA), and then submit a Form I-690, Application for Waiver of Grounds of Excludability, to overcome ineligibility. On June 4, 2007, the court further ordered USCIS to reopen the denied applications of class members, using the following standard:

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, showing that the prior deportation or exclusion did not violate the governing statute or regulations, due process, or other provision of law, or was not a gross miscarriage of justice. If CIS produces such evidence, then the applicant must show by a preponderance of the evidence that the prior deportation or exclusion violated the governing statute, regulations, due process, or was otherwise unlawful or a gross miscarriage of justice. 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.

Proyecto San Pablo v. DHS, at 14-15, No. CV 89-456-TUC-RCC (D. Ariz. June 4, 2007)

Continuous unlawful residence is broken if an absence from the United States is more than 45 days on any one trip unless return could not be accomplished due to emergent reasons. 8 C.F.R.

§ 245a.2(h)(1)(i). The term “emergent reasons” has been defined as “coming unexpectedly into being.” *Matter of C-*, 19 I&N Dec. 808 (Comm’r 1988).

The Applicant is ineligible for temporary resident status due to his departure pursuant to a deportation order, breaking his required continuous unlawful residence. The record establishes that the Applicant was deported to Mexico in 1983. The Applicant does not dispute his deportation. The Applicant, in his request to reopen his Form I-687 pursuant to the *Proyecto* amended order, asserted error in his deportation proceeding, claiming that the court did not provide him with procedural due process. He stated he was not represented by an attorney in his deportation proceeding and that the court did not advise him of the seriousness of the charges against him.

Pursuant to the amended *Proyecto* order, 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 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.

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, 600 n.6 (9th Cir. 2006) (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).

Under the terms of the *Proyecto* amended order, the Applicant requested a copy of his complete deportation file, including the tape recording or transcript of the deportation hearing. He also requested that a decision be held in abeyance until he had the opportunity to challenge the court record. The Applicant states that he also requested his deportation hearing record and transcript from the Executive Office of Immigration Review (EOIR). It is likely that the hearing was recorded and possible that it was included among other hearings on one tape; however, EOIR and USCIS searches have not produced a copy of the recording. The current record before us does not contain a tape recording or transcript. The Applicant acknowledges receiving record material of his legalization file from USCIS. Therefore, it appears that USCIS has fully complied with the court’s order to provide the Applicant with all records relating to his deportation proceeding.

The record does not show that the Applicant subsequently submitted a brief or additional evidence, nor does it reflect a response to the Director’s certification on denial. The documents in the record submitted to show that the Applicant’s deportation proceeding was not in compliance with governing regulations and violated his due process are limited to his unsigned statement from 2008; his attorney’s letter, dated January 8, 2008; and the accompanying Form I-290B, Notice of Appeal or Motion. The Applicant stated after he was arrested and charged with illegal entry, he did not consult a private attorney, because an attorney he believed was his public defender told him that if he did not plead guilty he would be imprisoned for three years. The Applicant also stated that he faced charges with 25 or more people at his deportation hearing.

We do not find the record sufficient to establish that the Applicant has made a *prima facie* showing that his deportation proceeding was not in compliance with the governing regulations, that it violated his due process rights, or that it resulted in a gross miscarriage of justice. The Applicant does not provide evidence to corroborate his statement that he was not properly represented or informed of the charges he faced, or to show that his immigration proceedings did not comply with regulations. Consequently, the Applicant has not overcome the Director's finding that because of his 1983 departure pursuant to a deportation order, the Applicant did not maintain the required continuous residence.

Therefore, based upon the foregoing, the Applicant has not established 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 8 C.F.R. § 245a.2(d)(5). For this additional reason the application is denied.

III. CONCLUSION

An applicant applying for adjustment of status under this part has the burden of proving by a preponderance of evidence that he or she is eligible for adjustment of status under section 245a of the Act. 8 C.F.R. § 245a.2(d)(5). The Applicant has not met his burden.

ORDER: The initial decision of the Director, Nebraska Service Center, is affirmed, and the application is denied.

Cite as *Matter of L-M-R-*, ID# 15810 (AAO May 2, 2016)