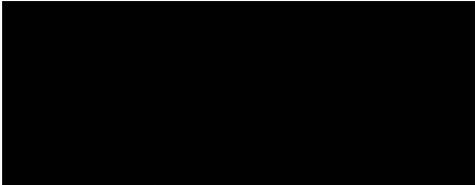




U.S. Citizenship  
and Immigration  
Services

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**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**



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FILE: [REDACTED]  
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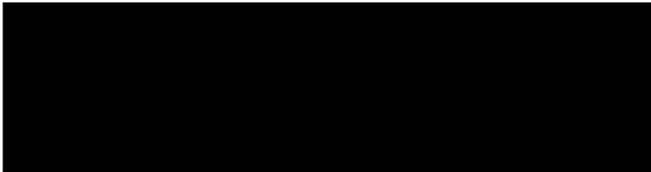
Office: Nebraska Service Center

Date: DEC 15 2006

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Inadmissibility pursuant to Section 245A of the  
Immigration and Nationality Act, as amended, 8 U.S.C. § 1255a

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned  
to the office that originally decided your case.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility within the legalization program was denied by the Director, Nebraska Service Center. It is now before the Administrative Appeals Office on certification. The decision will be affirmed.

The director denied the waiver application because the applicant was otherwise ineligible for temporary residence in the legalization program. The director determined that it would serve no purpose to grant a waiver that could not enable the applicant to gain temporary residence.

Neither the applicant nor counsel has responded to the certified denial. Earlier, counsel asserted the applicant was not inadmissible because he had not been deported, as he left the United States before the scheduled deportation hearing. The applicant insisted the immigration judge and immigration officers, during the deportation process, failed to explain the process to him. He contended they never told him he could appeal the deportation order. Although the applicant indicated that he was represented during the deportation proceedings, he claimed the judge did not inform him of his right to have an attorney of his choosing. The applicant also stated that it was his understanding that he signed a form consenting to voluntary departure.

In the alternative, counsel requested that the applicant be granted a waiver of his alleged inadmissibility for having been deported. Counsel explained that the applicant has lived in the United States since 1981 and has seven children, most of whom are United States citizens. Counsel contended that approval of the waiver application would also remedy the lack of continuous residence stemming from the deportation.

The applicant was deported from the United States on November 2, 1985. He is inadmissible under section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), which relates to aliens who were deported and reentered the United States without authorization. Pursuant to section 245A(d)(2)(B)(i) of the Act, 8 U.S.C. § 1255a(d)(2)(B)(i), such inadmissibility may be waived in the case of individual aliens for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.

The applicant states he has resided in the United States since 1981. Nevertheless, the director denied the waiver application because the applicant cannot otherwise qualify for temporary residence, as he fails to meet the "continuous residence" provision of the legalization program.

An applicant for temporary residence must establish entry into the United States before January 1, 1982, and continuous residence in the United States in an unlawful status since such date and through the date the application is filed. Section 245A(a)(2) of the Act, 8 U.S.C. § 1255a(a)(2). An alien shall not be considered to have resided continuously in the United States, if, during any period for which continuous residence is required, the alien was outside of the United States under an order of deportation. Section 245A(g)(2)(B)(i) of the Act, 8 U.S.C. § 1255(g)(2)(B)(i).

Counsel correctly points out that a notice in the record indicates the deportation hearing was scheduled for November 7, 1985. It is noted that the reverse of Form I-221S, Order to Show Cause, Notice of Hearing, and Warrant for Arrest of Alien, dated October 30, 1985, shows the applicant on that date requested an immediate hearing, and waived any right to more extended notice. Form EOIR-7, Order of the Immigration Judge, dated November 1, 1985, reveals the judge ordered the applicant to be deported to

Mexico, and that the applicant waived his appellate rights. The executed Warrant of Deportation, Form I-205, demonstrates the applicant was deported on November 2, 1985. There is no doubt that the applicant departed the United States under an order of deportation.

Because he was deported, the applicant did not reside continuously in the United States for the requisite period. As a result, he is statutorily ineligible for temporary residence.

Counsel maintains that Citizenship and Immigration Services, in this proceeding, has the authority to review past actions of an immigration judge. He contends that a review of the deportation proceedings will result in a finding that the applicant was unlawfully deported. However, it is not within the authority of this office to render a judgment on judicial proceedings. The claim that the order of deportation itself may now be reviewed or appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was appealable at the time to the Board of Immigration Appeals.

Congress provided no relief in the legalization program for failure to maintain continuous residence due to a departure under an order of deportation. Relief is provided in the Act for absences based on factors other than deportation, namely absences due to emergencies and absences approved under the advance parole provisions. Clearly, with respect to maintenance of continuous residence, it was not congressional intent to provide relief for absences under an order of deportation.

The general grounds of inadmissibility are set forth in section 212(a) of the Act, and relate to any alien seeking a visa or admission into the United States, or adjustment of status. An applicant's inadmissibility under section 212(a)(9)(A)(ii)(II) for having been deported and having returned to the United States without authorization may be waived. However, an alien's inadmissibility under section 212(a) of the Act is an entirely separate issue from the continuous residence issue discussed above. Although the applicant's failure to maintain continuous residence, and his inadmissibility for having been deported and having returned without authorization, are both based on the deportation, a waiver is available only for the inadmissibility.

Counsel asks why the law would allow for a waiver of inadmissibility in the case of a deported alien and yet provide no waiver for a lack of continuous residence, also based on a deportation. Not all aliens who were deported in the past failed to meet the continuous residence requirement. As an example, an alien who was deported in 1979 and reentered the United States before January 1, 1982 would be inadmissible because of the deportation and yet would not be ineligible for legalization on the continuous residence issue.

Counsel points out that the district court in *Proyecto San Pablo v. INS*, 784 F.Supp 738, 747 (D. Ariz. 1991) concluded that a waiver would cover both the inadmissibility and the continuous residence issue. Nevertheless, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9<sup>th</sup> Cir. 1999) the court of appeals ruled that the district court lacked jurisdiction to compel the Immigration and Naturalization Service (INS), now Citizenship and Immigration Services, to alter its interpretation of the statute.

The July 31, 2001 letter submitted by counsel from the United States Senate Committee on the Judiciary is noted. The senators urged INS to consider an approved waiver application to overcome both the

ground of inadmissibility and the failure to maintain continuous residence. Although it is true that the entire premise of the legalization program is ameliorative, and that the generous waiver provisions are as well, for the reasons stated above we cannot conclude that a waiver of a ground of inadmissibility impacts on the continuous residence requirement.

Concerning waivers of grounds of inadmissibility, counsel cites H.R. Rep. No. 98-115, 98<sup>th</sup> Cong. 1<sup>st</sup> Sess., 69-70, in which it was stated that, normally, denials of legalization on the basis of the waivable exclusions should only occur when the applicant is also ineligible for legalization on other grounds. The director's denial of the waiver application, because the applicant cannot otherwise qualify for legalization due to the "continuous residence" provision of the legalization program, is not inconsistent with that statement.

In support of his decision to deny the waiver application because the applicant is otherwise ineligible for legalization, the director cited *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) and *Matter of J-F-D-*, 10 I&N Dec. 694 (Reg. Comm. 1963). While those decisions relate to applications for permission to reapply for admission after deportation, the decisions are on point and relevant to the current proceeding. In each case the Regional Commissioner found that no purpose would be served in waiving inadmissibility because the alien was ineligible for the overall benefit of lawful residence.

It is concluded that the director's decision to deny the waiver application because no purpose would be served in granting it was proper, logical and legally sound. Therefore, it shall remain undisturbed.

**ORDER:** The decision is affirmed, and the application remains denied.