



U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy**

[Redacted]

FILE:

[Redacted]

Office: Nebraska Service Center

Date: **APR 13 2007**

LIN-03-258-52585

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:

[Redacted]

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.

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 found that it would serve no purpose to grant a waiver that could not enable the applicant to obtain temporary residence.

In rebuttal, counsel explains that he has been unable to review the transcript of the deportation hearing. For that reason he states he is unable to determine if the hearing was fair. Counsel contends that, *if* the applicant is considered to have been deported, his failure to reside continuously in the United States may be waived in conjunction with a waiver of inadmissibility.

The applicant departed the United States under an order of deportation on January 31, 1994. 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 claims to have resided in the United States since 1978, and has reared his children here. 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).

The immigration judge, in a decision dated November 23, 1983, granted the applicant until January 6, 1984 in which to depart the United States voluntarily. The judge further ordered that, should the applicant not depart within that period, he would be deported to Mexico. On January 11, 1984, a Warrant of Deportation and a letter advising the applicant to report for deportation on January 31, 1984 were issued, as there was no evidence that the applicant had departed. Form I-392, Notification of Departure – Bond Case, was prepared on January 30, 1984, asking a U.S. Consular Officer or Immigration Officer to provide information as to when the applicant departed. On February 1, 1984 the Officer in Charge of the Immigration and Naturalization Service (INS) at Guadalajara, Mexico indicated on Form I-392 that the applicant presented his identification on that date and established that he departed the United States on January 31, 1984. The Warrant of Deportation was later noted on August 6, 1984 to the effect that the applicant was deported on January 31, 1984, based on the information on Form I-392. The applicant "self-deported" pursuant to the former 8 C.F.R. § 243.5, now 8 C.F.R. § 241.7. That regulation states that any alien who departed the United States while an order of deportation was outstanding is considered to

have been deported in pursuance of law, except that an alien who departed before the expiration of the voluntary departure time granted in connection with an alternate order of deportation is not considered to have been deported.

Counsel points out that date of deportation on the Warrant of Deportation was entered months after the fact, and that the warrant does not show that any officer witnessed the departure. While the applicant's departure was not actually witnessed, he personally appeared at the INS office in Guadalajara, and demonstrated that he had departed the previous day. In such a case it is not necessary for the departure to have been witnessed by an officer.

Counsel maintains that the fact that the applicant obtained Form I-392 "argues persuasively that he proceeded to voluntary departure." The information on the form was used to assist in the verification of departure and cancellation of a bond. The fact that the form was issued to him does not indicate or imply that he departed the United States voluntarily within the period permitted.

A transcript of the deportation hearing is not in the record, and counsel states that his inability to review such document renders him unable to determine that the hearing was conducted in a fair manner. On December 30, 2004, the Executive Office for Immigration Review informed counsel that it has no records relating to the applicant. There is no reason to believe that either Citizenship and Immigration Services (CIS) or EOIR has any other records to release to counsel that relate to the applicant.

Implicit in counsel's desire to review the transcript of the deportation hearing is the premise that the immigration judge may have somehow erred, and that CIS, in this current proceeding, has the authority to review and overrule the actions of the judge. However, it is not within the authority of CIS to pass judgment on judicial proceedings. The assertion that the order of deportation itself may now be reviewed or essentially appealed in this proceeding cannot be accepted. The deportation order of the immigration judge was subject to appeal, at the time, to the Board of Immigration Appeals. The applicant did not appeal.

While counsel contends that the various forms do not prove that the applicant departed on January 31, 1984, he has not provided evidence of an earlier departure, or even put forth an earlier claimed date of departure. It is further noted that neither the applicant nor counsel claimed or even speculated that the applicant departed timely until counsel's rebuttal filed on February 16, 2005, 21 years after the fact. No claim of a timely departure was made when the applicant appealed the original denial of temporary residence on June 4, 1990.

It is concluded that the applicant did not depart voluntarily within the period granted and, because of that, his departure on January 31, 1984 constituted a deportation. As the applicant was deported, he did not reside continuously in the United States for the requisite period. Therefore, he is statutorily ineligible for temporary residence.

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 explains 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. Nonetheless, in *Proyecto San Pablo v. INS*, 189 F.3d 1130 (9th 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 change its interpretation of the statute.

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.