

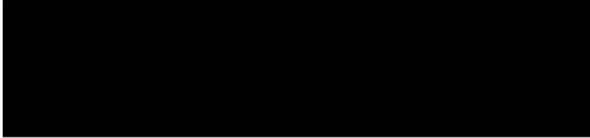
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FILE: Office: LOS ANGELES DISTRICT OFFICE Date: OCT 25 2006

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act (INA), 8 U.S.C. § 1182(i)

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. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the District Director will be withdrawn and the matter will be remanded for further consideration.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(C)(6)(i) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(C)(6)(i), for seeking to procure admission to the United States by fraud or willful misrepresentation. He was also found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for more than 180 days but less than one year and seeking admission within three years of his departure date. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility in order to reside in the United States with his wife and U.S. citizen child.

The record reflects that the applicant entered the United States without inspection in 1996 and departed some time after December 1997, thus accruing unlawful presence. The record further reflects that on January 5, 2000 the applicant attempted to reenter the United States by presenting an altered Form I-512 (Authorization for Parole) that did not belong to him and was therefore found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for seeking to procure admission into the United States by fraud or willful misrepresentation of a material fact and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I), for being an immigrant not in possession of proper entry documents. Consequently the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States without inspection approximately a year later; he married a U.S. citizen on April 26, 2001 and is the beneficiary of an approved Petition for Alien Relative (Form I-130). On April 30, 2001, along with his Application for Adjustment of Status, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). The District Director denied the I-601 on August 18, 2004.

The District Director's decision refers to the applicant's I-601 request for a waiver of inadmissibility, but does not make a determination on eligibility. Instead, the District Director determined that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), applies to this case, rendering the applicant "statutorily ineligible for any type of relief" and, therefore, "the instant application for a waiver of ground of [inadmissibility] must be . . . denied."

On appeal, counsel for the applicant asserts that pursuant to the August 13, 2004 decision, [REDACTED] v. *Ashcroft*, 379 F.3d 783 (9th Cir. 2004), section 241(a)(5) of the Act is not applicable to this case and the applicant is eligible for a waiver of inadmissibility and eligible to file Form I-212, Permission to Reapply for Admission Into the United States After Deportation or Removal. In support of these assertions, counsel submits additional evidence relating to hardship the applicant's U.S. citizen spouse and child would suffer if he were not granted a waiver of inadmissibility, and Form I-212.

The AAO finds that the District Director erred in concluding that the applicant is statutorily ineligible for a waiver pursuant to section 241(a)(5) of the Act.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

In considering whether the reinstatement statute categorically bars an applicant from adjustment of status, the Ninth Circuit Court of Appeals ruled in [REDACTED] that because the applicant had applied for adjustment of status and permission to reapply *before* his prior deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief. In this case, the record of proceedings does not reveal that the applicant's prior removal order had been reinstated at the time he filed his application for adjustment of status and request for a waiver of inadmissibility. Since this case arises in the Ninth Circuit, [REDACTED] is controlling. The applicant is eligible to apply for a waiver of inadmissibility and to have it adjudicated in connection with his application for adjustment of status.

In view of the foregoing, the District Director's decision will be withdrawn and the record will be remanded for adjudication of his request for a waiver of inadmissibility, Form I-601.

ORDER: The decision of the District Director will be withdrawn and the matter will be remanded for further consideration.