



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

FEB 27 2001

FILE [Redacted] Office: San Francisco

Date:

IN RE: Applicant:

[Redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The Form I-212 application was denied by the Acting District Director, San Francisco, California, and a subsequent appeal was dismissed by the Associate Commissioner for Examinations on appeal. The matter is before the Associate Commissioner on a motion to reopen. The motion will be dismissed.

The applicant is a native and citizen of Mexico who attempted to procure admission into the United States on August 10, 1995 by fraud or willful misrepresentation by presenting a Temporary Resident Card (Form I-688) of Maria Guadalupe Gamboa de Casas. Therefore, she is inadmissible under § 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant was excluded and deported on August 15, 1995. Therefore, she is inadmissible under § 212(a)(9)(A)(ii)(I) of the Act, 8 U.S.C. 1182(a)(9)(A)(ii)(I), for having been previously removed from the United States and failing to remain abroad for at least one year. Prior to her removal, she was informed of the consequences of re-entering the United States within one year and/or without permission to reapply for admission. The applicant was present in the United States without a lawful admission or parole in September 1995 and without permission to reapply for admission in violation of § 276 of the Act, 8 U.S.C. 1326 (a felony).

The applicant married a lawful permanent resident in Mexico in December 1988. Her husband became a naturalized U.S. citizen in September 1996. She is the beneficiary of an approved petition for alien relative. The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to remain with her husband and three children in the United States.

The acting district director determined that § 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5) applies in this matter and the applicant is not eligible and may not apply for any relief. The acting district director then denied the application accordingly.

On appeal, counsel states that statutory construction of § 241(a)(5) of the Act does not cover excluded aliens. "Removal" is a term that emerged with the enactment of IIRIRA, long after the applicant's exclusion and last entry. Counsel requests that the applications be evaluated on their merits. Counsel then argues that the amended statute cannot be applied retroactively to an individual's past conduct and states that the Service's holding in Matter of Soriano, 21 I&N Dec. 516 (BIA, A.G. 1996), is erroneous.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] initiated upon the

alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under § 240 [1229a] or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

Section 241.(a) DETENTION, RELEASE, AND REMOVAL OF ALIENS ORDERED REMOVED.-

(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 [chapter], and the alien shall be removed under the prior order at any time after reentry.

Several sections of the Act were added and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). According to the reasoning in Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of

George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Notwithstanding the arguments on appeal, § 241(a)(5) of the Act is very specific and applicable. The applicant is ineligible and may not apply for any relief. However, once the alien departs from the United States, the § 241(a)(5) bar would no longer apply and the applicant could seek relief from abroad. The appeal will be dismissed.

The record contains both a Form I-212 application and a Form I-601 (Application for Waiver of Grounds of Inadmissibility). Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Form I-601 application should be rejected, and the fee refunded.

ORDER: The appeal is dismissed.