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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

Handwritten initials: MM

[Redacted]

JUN 7 2004

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER, NE

Date:

IN RE:

Applicant:

[Redacted]

APPLICATION:

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

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. Any further inquiry must be made to that office.

Handwritten signature: Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the appeal will be sustained.

The applicant is a native and citizen of Mexico who on May 3, 1994, attempted to gain entry into the United States by presenting an Alien Registration Card (Form I-551) that did not belong to her. On May 4, 1994, the applicant was convicted of attempting to enter the United States by a willful false or misleading representation or willful concealment of a material fact, in violation of 8 U.S.C. § 1325(a)(3). On July 21, 1994, an immigration judge ordered that the applicant's application for admission to be considered as having been withdrawn after the applicant failed to attend an immigration court hearing in connection with her application for admission into the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on her behalf by her Lawful Permanent Resident (LPR) spouse. The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) and she filed an application for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii) in order to remain in the United States with her spouse and children.

The director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. In addition the director found the applicant inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) for alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude or an attempt or conspiracy to commit such a crime. The director denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director's Decision* dated September 19, 2003.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five 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 section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and 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 aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

On appeal counsel asserts that the director erred in determining that the applicant is inadmissible under section 212(a)(9)(A) of the Act since she was never ordered removed by an immigration judge and therefore an application under section 212(a)(9)(iii) of the Act is not necessary.

The AAO notes that the applicant may be inadmissible under section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for having attempted to procure admission into the United States by fraud and willful misrepresentation of a material fact and section 212(a)(2)(A)(i)(I) of the Act for committing an act which constitute the essential elements of a crime involving moral turpitude. The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's possible inadmissibility under sections 212(a)(6)(C) and 212(a)(2)(A)(i)(I) of the Act.

The AAO finds the director erred in finding that section 212(a)(9)(A) of the Act applies in this case. A thorough review of the documentation in the record of proceeding reveals that an immigration judge considered the applicant's application for admission as having been withdrawn. A final order of removal has never been issued to the applicant. She is thus not inadmissible pursuant to section 212(a)(9)(A) of the Act and a Form I-212 application is not necessary. Accordingly, the application for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act is moot as the applicant is not inadmissible pursuant to section 212(a)(9)(A) of the Act.

ORDER: The director's decision is withdrawn, as it has not been established that the applicant is inadmissible under section 212(a)(9)(A) of the Act. The appeal is sustained.