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U.S. Citizenship
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NOV 30 2004

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

WAC-02-040-52213

IN RE:

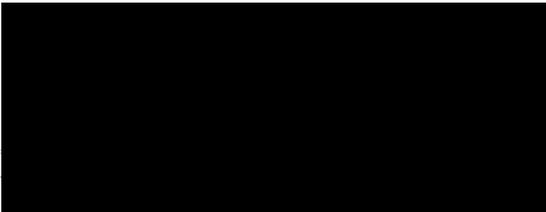
Applicant:



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:



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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn, and the matter will be remanded to him for further action.

The applicant is a native and citizen of the Philippines who was admitted into the United States on September 2, 1991, in possession of a valid C-1 non-immigrant visa, authorized to remain in the United States for a period not to exceed 29 days. The applicant remained longer than authorized and on August 12, 1992, he was served an Order to Show Cause for a hearing before an Immigration Judge. On November 7, 1995, the applicant was ordered deported by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on March 26, 1997. He was granted voluntary departure until April 26, 1997. He filed an appeal with the United States Court of Appeals for the Ninth Circuit, which was dismissed on August 1, 1997. On June 23, 1998, the applicant appeared at the Immigration and Naturalization Service office (now, Citizenship and Immigration Services, (CIS)) in Manila, Philippines to verify his departure from the United States. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks 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 travel to the United States to reside with his U.S. citizen spouse.

The Director determined that the applicant was inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. He further determined that the applicant was not eligible for a waiver under this section of the Act and denied the applicant's Application for Permission to Reapply for Admission After Removal (Form I-212). See *Director's Decision* dated April 20, 2004.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain alien previously removed.-

(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 alien 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 continuous territory, the Attorney General has consented to the alien's reapplying for admission.

On appeal, counsel states that the Director erroneously treated the Form I-212 as an Application for Waiver of Grounds of Inadmissibility (Form I-601) and did not weigh the favorable factors against the unfavorable factors as should be done in adjudicating an application for permission to reapply for admission. Counsel further states that the Director's statement that the applicant is not eligible for any exceptions or waivers due to his inadmissibility under section 212(a)(9)(B) of Act is incorrect as a matter of law. Furthermore, counsel states that the applicant has not filed a Form I-601 application and, even if he had, the Director would not have jurisdiction to adjudicate the Form I-601 application since the applicant is presently overseas.

The AAO concurs with counsel and finds that the Director erred in his decision stating that the applicant is inadmissible without exceptions or waivers pursuant to section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section 212(a)(9)(B) of the Act, he would be eligible to file an application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on his marriage to a U.S. citizen.

The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal. The Director did not properly adjudicate the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act. In view of the foregoing, the Director's decision will be withdrawn and the record will be remanded to him in order to properly adjudicate the Form I-212 under section 212(a)(9)(A)(iii) of the Act.

ORDER: The Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.