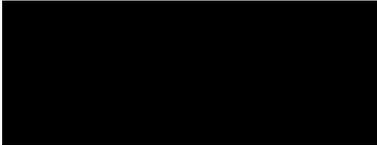


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Office: VERMONT SERVICE CENTER

Date: AUG 09 2005

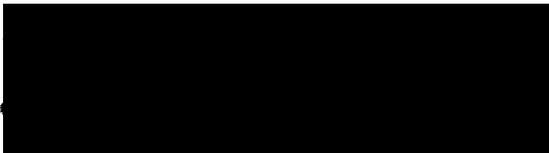
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IN RE:



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

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 application was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant is a native of Algeria and first entered the United States with a tourist visa on February 7, 1992. An Immigration Judge (IJ) granted the applicant voluntary departure on March 29, 1996 with the period for voluntary departure set to expire on June 27, 1996. The applicant failed to depart the United States by June 27, 1996, so the order of voluntary departure became a deportation order. The applicant left the United States on August 23, 1996. On February 10, 1997, a warrant of deportation was issued against the applicant. On March 1, 1997 the applicant entered the United States without inspection. The applicant married a United States citizen on July 5, 1999 and is the beneficiary of an approved I-130 Petition for Alien Relative filed by his wife. The applicant filed an I-485 Application to Register Permanent Residence or Adjust Status on August 28, 2002. On August 5, 2003, United States Immigration and Customs Enforcement (ICE) reinstated the applicant's prior deportation order under section 241(a)(5) of the Immigration and Nationality Act (the Act). The applicant filed an I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal on October 10, 2003. On November 14, 2003, an IJ denied the applicant's motion to reopen his adjustment proceedings. ICE removed the applicant from the United States on June 15, 2004. The applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act because, after having been removed from the United States, he re-entered the United States without being admitted. He now seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act in order to travel to the United States and reside with his U.S. citizen wife and child.

The director concluded that the applicant was not eligible to apply for any relief under the Act and denied the applicant's I-212 accordingly. *Decision of the Acting Director, Vermont Service Center, October 14, 2004.*

On appeal, counsel contends that an application for a waiver of inadmissibility after deportation or removal is not in itself a form of relief, that cases from the United States Ninth Circuit Court of Appeals reject the director's decision that the applicant is precluded from obtaining any form of relief under the Act, and that the applicant is eligible to apply for a waiver under section 212(a)(9)(B)(v) of the Act.¹ In support of the appeal, counsel submitted a brief. The entire record was considered in rendering this decision.

Section 212(a)(9)(C) of the Act provides

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is

¹ The AAO notes that section 212(a)(9)(B)(v) referred to by counsel relates to a waiver of inadmissibility for unlawful presence under section 212(a)(9)(B). It has no relevance in the current proceeding where the applicant is requesting permission to reapply for admission after deportation or removal.

inadmissible.

(ii) EXCEPTION.-Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General has consented to the alien's reapplying for admission.

The applicant is inadmissible under section 212(a)(9)(C)(i)(II), but section 212(a)(9)(C)(ii) provides a basis for permitting the re-admission of an alien who is inadmissible under section 212(a)(9)(C)(i)(II). ICE, however, has reinstated the prior removal order against the applicant under section 241(a)(5) of the Act, which provides:

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

Because the prior removal order has been reinstated, the applicant is not eligible for any form of relief under section 241(a)(5) the Act. In fact, the alien's eligibility for this relief has already been litigated, and he is bound by the adverse judgment in *Lattab v. Ashcroft*, 384 F.3d 8 (1st Cir. 2004). In *Lattab*, the applicant petitioned the United States Court of Appeals for the First Circuit for review of the ICE order reinstating his prior deportation order. In upholding the government's reinstatement of the petitioner's prior deportation order, the court held that the petitioner was ineligible for relief under Act, even if he filed an I-485 before the government reinstated the prior order of deportation. Accordingly, the court denied and dismissed the petition for review.² The AAO's present decision only addresses the applicant's appeal of the I-212 that was filed on October 10, 2003.

The *Lattab* judgment is a sufficient basis, but not the only basis, for denying the application. Even assuming that section 241(a)(5) did not foreclose the approval of the application, an alien is not eligible to apply under section 212(a)(9)(C)(ii) unless the alien seeks to return "more than 10 years after the date of the alien's last departure." The record indicates that the applicant last left the United States on June 15, 2004. The earliest date on which he could apply under section 212(a)(9)(C)(ii) (assuming no later departures) is June 16, 2014.

Approval of an I-212, moreover, is a matter entrusted to USCIS discretion. The AAO acknowledges that the applicant has significant equities in the United States. He has been married to a United States citizen for six years, and they have a son born in the United States. These equities must be weighed, however, against his long history of violating United States immigration laws. For most of the past 13 years, the applicant has been present in the United States unlawfully. Returning to the United States unlawfully after having been

² The court also held that permission to reenter is relief under the Act and rejected counsel's attempt to apply *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) to the petitioner's case.

removed is a serious offense that only increases the adverse impact of his long-term unlawful presence. In fact, section 276(a) of the Act would authorize the applicant's criminal prosecution, on a felony charge, for returning to the United States after removal without prior consent. Even if the applicant were eligible to apply for relief under section 212(a)(9)(C)(ii) of the Act, therefore, the denial of his I-212 would be justified as a matter of discretion.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that he is eligible for any form of relief under the Act. The director's decision is therefore affirmed both on the basis of statutory ineligibility and as a matter of discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.