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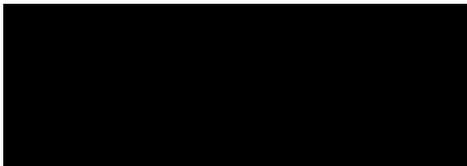
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FILE:  Office: CALIFORNIA SERVICE CENTER Date: DEC 16 2005

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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) 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 The Director's decision will be withdrawn, and the matter will be remanded to him for further action.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 a citizen of Nicaragua who entered the United States without a lawful admission or parole on or about May 21, 1989. On August 28, 1995, the applicant applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On October 3, 1995, the applicant was interviewed for asylum status. His application was referred to the immigration court and an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued on October 17, 1995. On March 27, 1996, an Immigration Judge found the applicant deportable and granted him voluntary departure until September 27, 1996, in lieu of deportation. On September 25, 1996, the applicant filed a motion to reopen and a motion of stay of deportation that were denied on November 27, 1996. On December 24, 1996, the applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on May 28, 1997. On June 26, 1997, the applicant filed a petition for review of deportation order with the United States Court of Appeal for the Ninth Circuit that was denied on September 3, 1997. On October 8, 1997, the applicant was removed from the United States. The record reflects that the applicant reentered the United States in February 1998 without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326. On February 22, 1999, the applicant applied for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA). The applicant is inadmissible pursuant to 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 remain and reside in the United States.

The Director determined that section 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 Director denied the Form I-212 accordingly. *See Director's Decision* dated November 1, 2004.

On appeal, counsel states that since the applicant is filing a Form I-485 under NACARA he is only required to submit an Application for Stay of Deportation or Removal (Form I-246). Counsel states that the Director abused his discretion by denying the Form I-212. According to counsel, the applicant was eligible for NACARA adjustment and, as such is eligible to be paroled into the United States. In addition, counsel states that the applicant acted on the advice of his previous attorney and reentered the United States illegally in order to timely apply for NACARA. She further states that had the applicant avoided his physical deportation he would not have been required to file a Form I-212. Furthermore, counsel states that the applicant is a person of good moral character who was not outside the United States for more than 180 days from December 1, 1995 to present. Finally, counsel states that the applicant has resided in the United States for over 15 years and will suffer extreme hardship if his application is denied and he is forced to return to Nicaragua.

The record of proceedings indicates that the issue of whether the applicant was eligible to be paroled into the United States in order to file for NACARA, was previously discussed and it was decided that he was not eligible to be paroled into the United States. However, the AAO finds the Director erred in stating that section 241(a)(5) of the Act applies in this case and that the applicant is not eligible for any exception or waiver under the Act. The applicant in the present case filed a Form I-485 under NACARA.

The Nicaraguan Adjustment and Central American Relief Act, Public Law 105-100, as amended by Pub. L. No. 105-139, Pub. L. No. 106-389 and Pub. L. No. 106-554, section 202 states in pertinent part:

(a) Adjustment of status

(2) Rules in applying certain provisions. – In the case of an alien described in subsection (b) or (d) who is applying for adjustment of status under this section –

(A) the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply; and

(B) the Attorney General may grant the alien a waiver of the grounds of inadmissibility under subparagraphs (A) and (C) of section 212(a)(9) of such Act. In granting waiver under subparagraph (B), the Attorney General shall use standards used in granting consent under subparagraphs (A)(iii) and (C)(ii) of such section 212(a)(9).

Although the applicant is not subject to section 241(a)(5) of the Act, he is inadmissible under sections 212(a)(9)(A) and 212(a)(9)(C) of the Act, 8 U.S.C § 1182(a)(9)(C).

The regulation at 8 C.F.R. § 245.13(c) states in pertinent part:

(2) Special rule for waiver of inadmissibility grounds for NACARA applicants under section 212(a)(9)(A) and 212(a)(9)(C) of the Act. An applicant for adjustment of status under section 202 of Public Law 105-100 who is inadmissible under section 212(a)(9)(A) or 212(a)(9)(C) of the Act, may apply for a waiver of these grounds of inadmissibility while present in the United States. Such an alien must file a Form I-601, Application for Waiver of Grounds of Excludability, with the director of the Texas Service Center if the application for adjustment is pending at that office, with the district director having jurisdiction over the application if the application for adjustment is pending at a district office, with the Immigration Judge having jurisdiction if the application for adjustment is pending before the Immigration Court, or with the Board of Immigration Appeals if the appeal is pending before the Board.

Based on the above facts, the filing of the I-212 was inappropriate. The Form I-485 is pending with the Los Angeles, California, District Office, and therefore, the applicant is entitled to file a Form I-601 with that office, pursuant to 8 C.F.R. § 245.13(c).

In view of the foregoing, the Director's decision will be withdrawn and the record will be remanded to him in order to transfer the record of proceedings to the Los Angeles District Office. The applicant will be allowed to file a Form I-601 with the Los Angeles District Office and the District Director will adjudicate the Form I-601 pursuant to the regulation at 8 C.F.R. § 245.13(c)(2).

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