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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Room A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: FEB 04 2005

IN RE:

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

The applicant is a twenty-seven-year-old native and citizen of El Salvador. The record reflects a complex immigration history that the AAO will briefly summarize due to its relevance to the instant proceedings. The applicant first entered the United States near Naco, Arizona on August 19, 1988. At the time, he was eleven years old and was accompanied by his mother, [REDACTED] (The applicant's assigned A number was [REDACTED] hereinafter, "court file.") They were apprehended by U.S. Border Patrol agents and placed into deportation proceedings through an Order to Show Cause (Form I-221S) dated August 21, 1988, filed with the immigration court in Los Angeles, California, apparently in late 1988. At some point, the applicant's father joined them in those proceedings because it appears that all three family members were before the immigration court seeking asylum/withholding of deportation.¹ A hearing on the application was held on August 4, 1989, at which time the immigration judge denied the asylum and withholding applications but in the alternative granted the family voluntary departure through November 4, 1989. The copy of the immigration judge's order in the file reflects that the respondents reserved appeal.

It appears that the applicant has more than one immigration file. This is a result of the fact that parallel to the immigration court proceedings, both the applicant's mother and father had filed separate affirmative asylum applications with the Los Angeles Asylum Office. (The second number assigned to the applicant, apparently in the course of those proceedings, is [REDACTED] hereinafter, "affirmative asylum file.") It appears that the district director denied the application for lack of prosecution on or about June 21, 1990. The result of the father's affirmative asylum application is unknown, but presumably it was denied as the father's immigration court case was consolidated with that of the applicant and his mother.

Several years after the immigration court order, the applicant married a United States citizen. A Petition for Alien Relative (Form I-130) filed by the applicant's wife was approved, and the applicant subsequently filed an Application for Adjustment of Status (Form I-485) with the district director. The court file contains a copy of the I-485 bearing a fee receipt dated September 25, 1997. The only A number listed by the applicant was the affirmative asylum A file number and not the court file A file number associated with the deportation proceedings. It appears from a review of the record, including documents submitted by the applicant's counsel on appeal, that the district office took two different courses of action with respect to the I-485. First, the district took steps to reject the I-485, as the court file contains a copy of the application bearing a rejection stamp noting that the Executive Office for Immigration Review (EOIR) had jurisdiction over the application. It appears that this action was taken on October 3, 1997, as the bottom of the I-485 copy contains that date next to initials. It is not clear in what form, if any, the rejection of the application was conveyed to the applicant or his counsel.

Although the copy of the I-485 indicates it was rejected, the file contains additional documents, submitted by counsel in support of the appeal. Those documents reflect that the district director denied the application for lack of prosecution after the applicant failed to appear for two scheduled interviews. *See Decision of the District Director*, dated March 20, 2000. It is unclear from the court file why, after rejecting the application noting that jurisdiction lay with EOIR, the application was subsequently adjudicated.

¹ The applicant's father is [REDACTED]

In addition to the incomplete material relating to the I-485, the file contains an original I-212 filed by the applicant in Los Angeles under file number 046, on June 19, 2000, seeking permission to reapply following a deportation or removal to El Salvador. However, the AAO notes that the date specified by the applicant for his deportation or removal, is August 4, 1989, which is the date that he and his parents were granted voluntary departure from the United States. No other records in the file confirm that the order of removal was executed. The director issued a decision on the I-212 on November 22, 2002, finding that the applicant had not established eligibility for the benefit sought. The director found that the applicant's I-485 had been rejected for lack of jurisdiction.² The director's decision noted that the applicant could file a motion to reopen with EOIR, which, if granted, would allow him to file an adjustment application. Furthermore, the director found that if the motion were granted, the applicant would not need to file the I-212, because the removal order had not been executed.³

The applicant's counsel filed an appeal from the director's decision on December 23, 2002. In the appeal brief, counsel makes various assertions regarding both the district director's decision denying the I-485, and the director's decision regarding the I-212. Because the decision on appeal is the director's decision denying the I-212, this decision will focus on that issue alone.⁴

The thrust of counsel's argument in support of appeal is that the immigration authorities erred in denying adjustment of status and the I-212 on the merits because the Service lacked jurisdiction over such applications since the applicant was in proceedings before EOIR.⁵ Counsel supports his argument by citing 8 C.F.R. § 212.2(e) which provides as follows:

(e) Applicant for adjustment of status

An applicant for adjustment of status under section 245 of the Act and Part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

Counsel argues that since the applicant had filed an I-485 with the district director, the provisions of 8 C.F.R. § 212.2(e) were in effect and the district director was required to forward the request for permission to reapply to EOIR, specifically, the BIA because an appeal was pending with that body. In the alternative, counsel argues that if the appeal is denied, the appellant will file a motion to reopen or remand with EOIR.

² It appears likely that the Service Center was unaware of the fact that the I-485 had been rejected for lack of prosecution in March of 2000. However, it is possible that the applicant's affirmative asylum file may contain additional documentation addressing this issue.

³ The director further noted that if EOIR denied the motion, the applicant's remedy would be to depart the United States, and thus having executed the removal order, he could file the Form I-212 from abroad.

⁴ The AAO will briefly touch on one issue raised by counsel that also relates to the I-212. It is counsel's argument that the applicant did not depart the United States following the immigration judge's order of voluntary departure as he had appealed the immigration judge's decision to the Board of Immigration Appeals (BIA). The AAO will return to this issue shortly.

⁵ Counsel's argument does not differ in its premise from the director's decision. The difference lies in counsel's understanding of the director's obligations once the director determined that he lacked jurisdiction.

The AAO believes that counsel's argument, which adopts a strict reading of the regulation, mistakes the overall intent of the regulation. The regulation does contemplate that a request for permission to reapply, while filed with district director in the first instance, will be referred to EOIR in those situations where the application for adjustment of status is before EOIR. The intention of the referral requirement appears to be to have the same adjudicator consider the adjustment application in conjunction with the request for permission to reapply. The regulatory provision appears designed to address those situations where, an applicant for adjustment ends up having the adjustment application considered in the context of immigration court proceedings due to the operation of 8 C.F.R. § 245.2(a)(1) which requires that once proceedings have been initiated, jurisdiction over the adjustment of status application lies exclusively with the immigration court. The referral provision of 8 C.F.R. § 212.2(e) requires the referral in order facilitate the consideration of the applications together. However, the purpose underlying the regulatory language would not be furthered in this instance where, although proceedings were initiated and are technically still pending, those proceedings occurred at a time where an adjustment of status application was not contemplated, let alone filed. As the director noted, however, the applicant is not without a remedy.

It is worth noting that the inconsistent course of events relating to the treatment of the applications stems from the fact that the applicant did not disclose the existence of his previous immigration court proceedings. The applicant, rather than seeking to apply for adjustment of status and permission to reapply from the district director, should have sought a reopening of his immigration proceedings before EOIR in order to pursue those applications in the appropriate forum. Although a strict reading of the regulation does not distinguish between a referral where an applicant has submitted or may still submit an adjustment application in the course of the immigration court proceedings, as opposed to a current situation where the opportunity to submit the application arises only after the conclusion of those proceedings, it is reasonable to construe the regulation to require that an applicant pursue a motion to reopen to seek adjustment of status in the latter situation. Consequently, the AAO does not agree with counsel that CIS was obligated to refer the I-212 to EOIR.

Counsel's brief statement on the Notice of Appeal (Form I-290B), raises a matter that adds additional confusion to the case. Counsel states that a timely appeal of the immigration judge's decision had been filed and remains pending before the BIA. Other than counsel's assertions, and the copy of the Notice of Appeal (Form I-290A) submitted by counsel, no other information in the file confirms that an appeal from the immigration judge's order is pending. Nevertheless, whether an appeal is pending before the BIA, or whether the order has simply not been executed, it is possible, as noted by the director, that the applicant does not require permission to reapply in conjunction with the adjustment application. However, these are matters that counsel may wish to address in the context of any motion to reopen those proceedings. The AAO expresses no view on the reopening or that specific issue, but reserves the right of a representative of the Department of Homeland Security, to take a position, at the appropriate time, on the motion and the applicant's eligibility for any related applications.

ORDER: The appeal is dismissed.