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U.S. Citizenship
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: JUN 17 2005

IN RE:

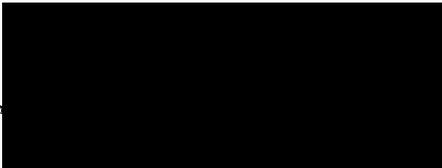
Applicant:



APPLICATION:

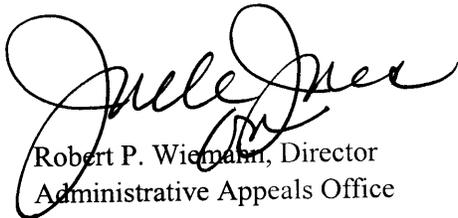
Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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. Wieman, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who attempted to procure admission into the United States on January 12, 2000, by fraud and willful misrepresentation of a material fact. The applicant presented an Alien Registration Card (Form I-551) that did not belong to him. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently, on January 13, 2000, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on an unknown date but prior to January 8, 2001, the date of his marriage to a U.S. citizen, 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 (a felony). On August 17, 2001, the applicant appeared at a Citizenship and Immigration Services (CIS) office for a scheduled interview regarding his application for adjustment of status. His prior removal order was reinstated pursuant to section 241(a)(5) of the Act and the applicant was removed to Mexico on August 24, 2001. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) and 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 and child.

The Director determined that the applicant was not eligible for any exception or waiver under section 212(a)(9)(A)(i) of the Act due to his reentry without permission or inspection and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. *See Director Decision* dated August 26, 2004.

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

(A) Certain aliens 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.

. . . .

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

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress

has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal counsel states that the Director erred in concluding that the applicant is inadmissible and that he was not eligible for any relief or benefits including 245(i) relief. Counsel states that the Director wrongly denied adjustment of status because section 245(i) does not bar aliens from this benefit if they have been previously deported. In addition counsel asserts that the Service failed to consider the recent Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).

The AAO does not have jurisdiction over the applicant's possible eligibility for benefits under section 245(i) of the Act. The fact remains that the applicant was removed from the United States twice, on January 13, 2000, and on August 24, 2001, and he is therefore inadmissible under section 212(a)(9)(A)(i) of the Act. The proceeding in the present case relates to the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss whether the applicant is eligible for adjustment of status under section 245(i) of the Act. This proceeding is limited to the issue of whether or not the applicant's inadmissibility under section 212(a)(9)(A)(i) of the Act, may be waived.

In *Perez-Gonzalez*, the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief."

The record of proceedings reveals that the applicant's prior removal order was reinstated at the time he filed the Form I-212 and therefore *Perez-Gonzalez* does not apply in this case.

The AAO agrees with counsel and finds that the Director erred in finding that the applicant is not eligible for any exception or waiver due to his reentry without permission or inspection pursuant to section 212(a)(9)(A)(i) of the Act. The record of proceedings does not reflect that the applicant re-entered the United States after his removal of August 24, 2001. Counsel and the applicant's spouse state that he resides in Mexico and there is no documentary evidence to show otherwise. The applicant is eligible to apply for a waiver pursuant to section 212(a)(9)(A)(iii) of the Act.

On appeal, counsel submits a statement from the applicant's spouse in which she states that it is very hard for her to support herself and the applicant since he does not make enough to support himself. She knows that her husband made a mistake but states that he is a good hard working man who spent time with his family. In addition she states that she cannot relocate to Mexico with the applicant because her son will miss out on the opportunities this country has to offer him. She further states that they are going through really hard times both emotionally and financially.

Unlike sections 212(g), (h), and (i) of the Act (which relate to waivers of inadmissibility for prospective immigrants), section 212(a)(9)(A)(iii) of the Act does not specify hardship threshold requirements which must

be met. An applicant seeking permission to reapply for admission into the United States after deportation or removal need not establish that a particular level of hardship would result to a qualifying family member if the application were denied.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who had abided by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The court held in *Garcia-Lopes v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. It is also noted that the Ninth Circuit Court of Appeals, in *Carnalla-Nunoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity, referred to as an after-acquired family tie in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. Moreover, in *Ghassan v. INS*, 972 F.2d 631, 634-35 (5th Cir. 1992), the Fifth Circuit Court of Appeals held that giving diminished weight to hardship faced by a spouse who entered into a marriage with knowledge of the alien's possible deportation was proper.

The applicant in the present matter was expeditiously removed from the United States on January 13, 2000, reentered illegally shortly thereafter and married his U.S. citizen spouse on January 8, 2001, almost one year after his removal. He now seeks relief based on that after-acquired equity.

The AAO finds that the favorable factors in this case include the applicant's family ties to U.S. citizens, his spouse and child, the approval of a relative petition and the absence of any criminal record.

The unfavorable factors in this matter include the applicant's entry into the United States without inspection or parole in 1996, his attempt to gain entry into the United States by fraud, his illegal re-entry subsequent to his January 13, 2000, removal, his second removal on August 24, 2001, his employment without authorization and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The applicant's actions in this matter cannot be condoned. His equity, marriage to a U.S. citizen gained after his removal from the United States, can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.