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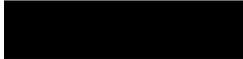
U.S. Citizenship
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FILE:



Office: NEWARK, NEW JERSEY

Date: **NOV 15 2005**

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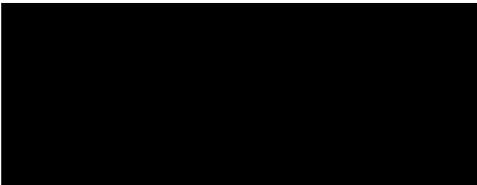
Applicant:



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 District Director, Newark, New Jersey, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Honduras who entered the United States without a lawful admission on or about August 6, 1989. On August 9, 1989, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) issued an Order to Show Cause (OSC) for a hearing before an Immigration Judge. On September 22, 1989, an Immigration Judge ordered the applicant deported from the United States. On September 29, 1989, the applicant was deported from the United States pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering without inspection. The record reflects that the applicant reentered the United States in 1990 without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. He is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 in the United States and reside with his U.S. citizen spouse and children.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and denied the Form I-212 accordingly. See *District Director's Decision* dated January 20, 2004.

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

(A) Certain aliens 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 aliens 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.

On appeal counsel states that the District Director erred in denying the Form I-212 because he used incorrect information and gave improper weight to the negative factors in the case. According to counsel the record of proceeding shows that the favorable factors outweigh the unfavorable factors and therefore the applicant has met his burden under the Act. Counsel refers to section 212(a)(9)(B) of the Act and states that a waiver pursuant to section 212(a)(9)(B)(v) of the Act is available to the applicant and it depends upon a showing that the bar would cause extreme hardship to a qualifying relative. In his brief counsel refers to case law that deals with extreme hardship and he discusses the extreme hardship the applicant's family would suffer if the applicant is removed from the United States. In addition counsel states that the District Director wrongfully concluded that the applicant lacked family structure in the United States. Furthermore counsel states that the District Director erred in stating in his decision that the applicant failed to depart the United States after being ordered deported. Counsel states that the applicant has never been arrested for any crime anywhere in the world, has been married to his U.S. citizen spouse for almost seven years, has two U.S. citizen children and is the sole financial provider of the family. According to counsel, the District Director abused his discretion because he failed to give weight to the applicant's strong family ties and to the extreme hardship the family will suffer if the application is not granted. Counsel finally states that the record clearly shows that the favorable factors in this case outweigh the unfavorable ones and therefore the applicant is statutorily eligible to receive a waiver under section 212(a)(9)(B)(v) of the Act.

Section 212(a)(9)(B) of the Act provides, in pertinent part, that:

(B) Aliens Unlawfully Present.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

. . . .

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver.- The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. . .

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and therefore section 212(a)(9)(B) of the Act is not applicable in this matter. The proceeding in the present case is limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A)(ii) of the Act, to be waived.

The AAO agrees partially with counsel and finds that the applicant has family structure in the United States since he has been married to a U.S. citizen for over seven years and is the father of two U.S. citizen children. In addition, the AAO finds that the District Director erred in his statement that the applicant failed to depart

the United States after being ordered deported. The evidence indicates that the applicant was removed from the United States on September 29, 1989, and reentered illegally in 1990.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

Before the AAO can adjudicate the appeal and weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for any relief under the Act.

Section 241(a) states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. - If the Attorney General [Secretary] 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.

The record of proceedings clearly reflects that the applicant was deported from the United States on September 29, 1989, and illegally reentered in 1990. The applicant's illegal reentry into the United States occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009.

The issue of whether section 241(a)(5) provisions of the Act apply retroactively to illegal reentries made prior to April 1, 1997, has been the subject of conflicting decisions by the Circuit Courts.

The Ninth Circuit has held that Congress did not intend for section 241(a)(5) of the Act to be retroactive. The Sixth Circuit Court of Appeals has also held that section 241(a)(5) does not apply retroactively. The Fourth, Fifth and Eighth Circuit Courts of Appeals, on the other hand, have held that section 241(a)(5) of the Act is not retroactive if an alien can demonstrate that he or she had a reasonable expectation of relief prior to the enactment of the law.

It is noted that the applicant in the present case resides within the jurisdiction of the Third Circuit Court of Appeals. The Third Circuit has not ruled on the issue of section 241(a)(5)'s retroactivity. The applicant will therefore be bound by the AAO's determination regarding whether section 241(a)(5) of the Act applies retroactively to the applicant.

In *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002), the Eighth Circuit Court of Appeals discussed the varying conclusions reached by the Ninth, Sixth and Fourth Circuit Courts of Appeals regarding the

retroactivity of section 241(a)(5) of the Act. The Eighth Circuit stated that it agreed with the Fourth Circuit, “that Congress by its silence has not unambiguously indicated either that § 241(a)(5) applies to all aliens or that it applies only to aliens that reentered the country after the statute’s effective date.” *Alvarez-Portillo* at 864.

The Court disagreed however, with the Fourth Circuit’s determination that an alien who would have been eligible to adjust his status prior to the enactment of section 241(a)(5), had failed to establish that he had a reasonable expectation of relief from deportation.

The Eighth Circuit stated that:

A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.

Alvarez-Portillo at 865

The Court held that, in general, “[n]o illegally reentering alien has a reasonable expectation that his prior deportation order will not be reinstated for purposes of effecting a second removal” and that “[i]llegally reentering aliens have no reasonable expectation that they will be entitled to collaterally attack their prior, final deportation orders in a subsequent removal proceeding.” The Eighth Circuit additionally held that:

In IIRIRA, Congress intended to reduce the delays incident to removing aliens who have illegally reentered. Illegal reentrants have no entitlement to such delays and no reasonable expectation that prior inefficiencies in the administration of our immigration laws would continue indefinitely. Thus, there is no impermissible retroactive effect when INS conducts reinstatement proceedings commenced after IIRIRA’s enactment using the procedures adopted to implement § 241(a)(5). . . .

Id. at 865-866.

The Eighth Circuit found, however, that the petitioner in that case had married a United States citizen prior to the enactment of section 241(a)(5) of the Act, and that pursuant to a long-standing Service practice, “if the INS had commenced a deportation proceeding under [the] prior statutory regime for illegal reentry, his marriage would have made him a likely candidate for adjustment of status to [a] lawful permanent resident”. *Id.* at 862. The Court stated that, as a result:

[U]nder prior law, [redacted] had a reasonable expectation he could either file for a discretionary adjustment of status, or wait and seek the adjustment as a defense to a later deportation proceeding. He chose to wait, and § 241(a)(5) as applied by the INS has now deprived him of that defense. To this extent, we conclude the statute has an impermissible retroactive effect on his reinstatement and removal proceeding. *Id.* at 867.

In *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292 (5th Cir. 2002), the Fifth Circuit Court of Appeals held that “Congress did not clearly indicate whether it intended to apply § 241(a)(5) retroactively” and that section

241(a)(5) of the Act did not have an impermissible retroactive effect as applied to the petitioner in that case. *See Ojeda-Terrazas* at 299.

Using reasoning similar to that set forth in the Eighth Circuit case, *Alvarez-Portillo, supra*, the Fifth Circuit stated that in most cases an illegal reentrant has “no reasonable expectation of having a hearing before an immigration judge rather than an INS official when he illegally reentered the United States (prior to the enactment of section 241(a)(5)), and that in general, section 241(a)(5) “does not deal with any vested rights or settled expectations arising out of the alien’s wrongdoing. *See Ojeda-Terrazas* at 301-302 (citations omitted).

Based on a reading of the above cases, the AAO finds that as a general matter, illegal reentrants have no reasonable expectation of deportation relief. The AAO also finds, however, that section 241(a)(5) will not apply retroactively to an alien who illegally reentered the United States prior to the April 1, 1997, enactment of section 241(a)(5) of the Act, **if** the alien establishes that he or she had a reasonable expectation of relief from deportation prior to the enactment of section 241(a)(5) of the Act. Absent a reasonable expectation of relief, section 241(a)(5) of the Act will be applied retroactively to an alien.

The applicant in this case has failed to establish that he had a reasonable expectation of relief from deportation at the time of his illegal reentry into the United States on or prior to April 1, 1997. At the time of his 1990 reentry the applicant had no reasonable expectation that he would be able to collaterally attack his prior final deportation order or that he was entitled to the prior procedural inefficiencies in the administration of immigration laws. *See Alvarez-Portillo* at 865-66. The applicant therefore had no reasonable expectation of adjustment of status relief under pre-IIRIRA laws. *See id.* at 867. Thus, as applied to the applicant, section 241(a)(5) of the Act does not impose any new duties or new liabilities. Section 241(a)(5) of the Act will therefore be applied to him retroactively.

The applicant is subject to the provision of section 241(a)(5) of the Act, and he is not eligible for any relief under this Act. No purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. The applicant is not eligible for any relief under the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.