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U.S. Citizenship
and Immigration
Services



H14

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **NOV 15 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:

SELF-REPRESENTED

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 appeal will be dismissed.

The applicant is a native and citizen of Mexico who attempted to procure admission into the United States on November 17, 1996, at the San Ysidro, California port of entry by presenting an Alien Registration Card (Form I-551) that did not belong to her. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (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. The applicant was placed in exclusion proceedings and on November 21, 1996, an Immigration Judge ordered the applicant excluded and deported from the United States. Consequently, on the same day the applicant was removed from the United States. The applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by her Lawful Permanent Resident (LPR) spouse. On November 8, 2002, the applicant appeared at a Citizenship and Immigration Services (CIS) office for a scheduled interview regarding her application for adjustment of status. The applicant admitted under oath that she first entered the United States without inspection in 1990, left in 1995 and reentered the United States in December 1996, after her November 21, 1996 removal, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of Act, 8 U.S.C. § 1326 (a felony). The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her LPR spouse and U.S. citizen child.

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 under the Act and denied the Form I-212 accordingly. See *Director's Decision* dated November 3, 2004.

Section 241(a) detention, release, and removal or 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.

The applicant reentered the United States in December 1996, 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 Ninth Circuit Court of Appeals held in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) that section 241(a)(5) of the Act was not retroactive and did not apply to illegal reentries that occurred prior to its April 1, 1997, enactment. Since this case arises in the Ninth Circuit, *Castro-Cortez* is controlling and section 241(a)(5) of the Act is not applicable in this case. For this reason, the AAO finds that the Director erred in his decision finding that section 241(a)(5) of the Act is applicable in this case.

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A) of the Act and therefore must receive permission to reapply for admission.

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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's 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 the applicant's spouse states that he is submitting the appeal because he filed a Form I-130 on the applicant's behalf, which was approved, and that they have a U.S. citizen child. The applicant's spouse submits a copy of a Notice of Action (Form I-797), indicating that a Form I-130 has been approved on behalf of the applicant, a copy of the applicant's child's birth certificate and a copy of his own Form I-551.

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 abide 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 in the United States 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 AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her LPR spouse and her U.S. citizen child, the approval of a Form I-130, the lack of a any criminal record and the prospect of general hardship to her family.

The unfavorable factors in this matter include the applicant's illegal entry into the United States in 1990, her attempt to gain admission into the United States by fraud, her illegal re-entry subsequent to her November 21, 1996 removal and her 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. 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.