



U.S. Citizenship
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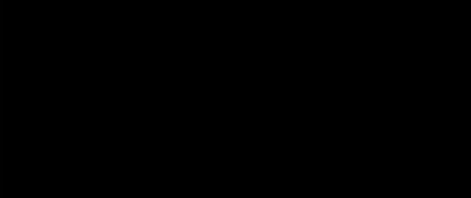


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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **NOV 15 2005**

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:


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 a citizen of El Salvador who entered the United States without a lawful admission or parole on or about September 7, 1992. On September 22, 1992, he applied for asylum with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On November 28, 1995 the applicant was interviewed for asylum status. His application was denied and an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued on November 28, 1995. On July 1, 1996 the applicant failed to appear for a deportation hearing and was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). The applicant failed to surrender for removal or depart from the United States and a Warrant of Deportation (Form I-205) was issued on August 15, 1996. Consequently, on February 12, 1998 the applicant was removed from the United States. The record reflects that the applicant reentered the United States in August 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 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 in the United States and reside with his U.S. citizen spouse.

The Director determined that the applicant was inadmissible under section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of one year or more. In addition 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 for any relief or benefit from his application. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated October 19, 2004.

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 the AAO will not discuss the applicant's potential grounds of inadmissibility under section 212(a)(9)(B) of the Act. If the applicant is found inadmissible under section 212(a)(9)(B)(i)(II) of the Act, he would be eligible to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v) based on his marriage to a U.S. citizen. 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.

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 . . . [and who 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 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.

On appeal counsel submits a brief in which he states that the applicant's spouse would suffer extreme hardship if the applicant is not granted and she is separated from the applicant. In addition counsel states that the Director did not take into consideration a memorandum from the former INS Commissioner regarding exercising prosecutorial discretion. Counsel states that the memo notes; ". . . is the authority of an agency charged with enforcing a law to decide whether to enforce, or not to enforce, the law against someone."

Counsel's statement is unpersuasive. In her November 17, 2000 memorandum regarding prosecutorial discretion the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) Commissioner states in pertinent part:

". . . Prosecutorial discretion does not apply to affirmative acts of approval, or grants of benefits, under a statute or other applicable law that provides requirements for determining when the approval should be given. For example, the INS has prosecutorial discretion not to place a removable alien in proceedings, but it does not have prosecutorial discretion to approve a naturalization application by an alien who is ineligible for that benefit under the INA."

Prosecutorial discretion is not relevant in the present case. The applicant was placed in proceedings and was ordered removed from the United States by an Immigration Judge. He has filed a Form I-212 that involves various statutory requirements before it can be approved.

Before the AAO can weigh the favorable and unfavorable factors in this case and decide if a favorable exercise of the Secretary's discretion is warranted it must first determine if the applicant is eligible to apply for any relief under the Act.

As noted above, on February 12, 1998, the applicant was removed from the United States. The record reveals that the applicant reentered the United States after his removal without a lawful admission or parole and without permission to reapply for admission; therefore the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and he is subject to the provisions of section 241(a) (5) of the Act, 8 U.S.C. § 1231(a)(5).

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

(C) Aliens unlawfully present after previous immigration violations. -

(i) In general.- Any alien who-

(I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The applicant does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. He is not eligible to apply for any relief under this Act for 10 years following the date of his last departure from the United States and then only if the Secretary consents to his reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on February 12, 1998, less than ten years ago.

Section 241(a)(5) of the Act states:

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.

Sections 212(a)(9)(C) and 241(a)(5) of the Act are very specific and applicable. 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.