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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: SEP 12 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 The Director's decision will be withdrawn and the matter remanded to him for further consideration and action.

The applicant is a native and citizen of Mexico. In his decision the Director states that on September 18, 1995, the applicant was ordered removed and deported from the United States pursuant to section 241(a) of the Immigration and Nationality Act (the Act). He further states that evidence shows that the applicant tried to reenter the United States fraudulently through the San Diego Port of Entry. In addition he states that U.S. officials cancelled the applicant's visa under section 212(a)(4) of the Act, as an alien who is a public charge to the United States and she was found inadmissible under sections 212(a)(6)(C), (misrepresentation/fraud) and 212(a)(7)(A)(i)(I) of the Act for being an immigrant not in possession of a valid visa. According to the Director the applicant was removed from the United States and reentered on an unknown date. The Director found that the applicant is inadmissible to the United States because she falls within the purview of 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 her Lawful Permanent Resident (LPR) spouse and her U.S. citizen children.

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 her application. The Director denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated October 20, 2004.

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, she is 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 her marriage to a LPR. 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 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 record of proceedings does not include any documentation to show that the applicant was removed or deported on September 18, 1995. If in fact the applicant was removed on September 18, 1995, she reentered without a lawful admission or parole prior to December 27, 1995, the date she gave birth to her U.S. citizen child.

The applicant reentered the United States 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 District Director erred in his decision finding that section 241(a)(5) of the Act is applicable in this case.

The record of proceedings only reveals that the applicant's visa was cancelled pursuant to sections 212(a)(4), 212(a)(6)(C) and 212(a)(7)(A)(i)(I) of the Act.

A thorough review of the record of proceeding and a search of the electronic database of Citizenship and Immigration Services (CIS) finds no evidence that the applicant was removed on September 18, 1995. In addition, the CIS database does not reveal any additional Service files related to the applicant. Absent supporting documentation, the AAO is unable to confirm the Director's conclusion that that the applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act.

The CIS Operation Instructions at 103.3(C) provide, in part, that the record of proceeding must contain all evidence used in making the decision. Without the complete record of proceeding and documentary evidence that the applicant was removed from the United States the AAO cannot make a decision on the appeal.

In view of the foregoing, the application will be remanded to the Director for further action. After preparing a proper record of proceedings the documentation should be resubmitted to the AAO for review.

ORDER: The matter is remanded to the Director for further action consisted with the foregoing discussion.