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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H4



FILE:



Office: TAMPA, FLORIDA

Date: SEP 27 2011

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 Acting District Director, Miami, Florida. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the AAO order dismissing the appeal will be affirmed.

The applicant is a native and a citizen of Mexico who entered the United States without inspection in 1991. The applicant departed the United States in January 1999 to return to Mexico. The applicant applied for a nonimmigrant visitor's visa that was issued on January 28, 1999, and valid for one entry into the United States. The applicant was admitted into the United States on February 4, 1999. The applicant again departed from the United States in May 1999. She attempted to reenter the United States on May 18, 1999, using the same one entry visitor's visa obtained in January of that year. 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. The applicant was ordered removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1), and departed for Mexico on May 19, 1999. The applicant subsequently reentered the United States illegally. 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 spouse, children and grandchildren.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated March 13, 2003. On appeal the AAO found 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. *See AAO Decision*, dated December 12, 2003.

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 [chapter], and the alien shall be removed under the prior order at any time after reentry.

On motion, counsel submits a brief in which he states that the AAO did not review the merits of the Form I-212 because it erroneously focused its decision on section 241(a)(5) of the Act. According to counsel this provision of the Act is not at issue because the Tampa, Florida, Citizenship and Immigration Services (CIS) office has not reinstated the administrative removal order. In addition counsel states that the AAO must consider the adjustment and Form I-212 applications prior to any efforts to reinstate an administrative removal order. Counsel refers to case law issued by the 10th Circuit Court of Appeal and the United States District Court, W.D. Washington at Seattle. Furthermore counsel states that the *Matter of Martinez-Torres*,

10 I&N Dec. 776 (reg. Comm. 1964) cited by the AAO in its decision is not relevant nor applicable because it dealt with an individual for whom no waiver was available due to a drug trafficking violation.

This office agrees partially with counsel. *Matter of Martinez-Torres, supra*, does not apply in the present case. If the Form I-212 is granted the applicant may be eligible to file a Waiver of Grounds of Inadmissibility (Form I-601) under section 212(i) of the Act. The case-law counsel refers to, does not apply in the applicant's case. It is noted that the applicant in the present matter resides within the jurisdiction of the Eleventh Circuit Court of Appeals. The Eleventh Circuit has ruled that only individuals who applied for discretionary relief before April 1, 1997, are judicially exempt from reinstatement of removal under section 241(a)(5) of the Act. See *Sarmiento-Cisnero v. Ashcroft*, 381 F.3d 1277 (11th Cir. 2004).

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).

To recapitulate, the applicant was expeditiously removed from the United States on May 19, 1999. The record of proceeding reflects that she reentered the United States on May 30, 1999. She has never been granted permission to reapply for admission; therefore she is subject to the provisions of section 241(a)(5) of the Act.

In addition because the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission after her May 19, 1999 removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act.

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

(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.

Notwithstanding the arguments on appeal, the applicant is subject to sections 241(a)(5) and 212(a)(9)(C) Act. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. The applicant is not eligible to apply for any relief under this Act unless 10 years pass after the date of her last departure from the United States and the Secretary has consented to the alien's reapplying for admission. Accordingly, the motion will be granted and the prior AAO decision dismissing the appeal will be affirmed.

ORDER: The motion to reconsider is granted and the prior AAO decision is affirmed.