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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

Hu

FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

SEP 29 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 citizen of Mexico who on October 19, 1997, at the San Ysidro, California Port of Entry applied for admission into the United States. The applicant presented a valid U.S. birth certificate that did not belong to him in an attempt to gain admission into the United States. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who falsely represents himself to be a citizen of the United States for any purpose or benefit under this Act and section 212(a)(7)(A)(i)(I) of 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. Consequently, on October 20, 1997, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on an unknown date after his removal, but prior to March 3, 2001, the date of his marriage to a U.S. citizen, 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. He is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) and 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 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 for any relief or benefit from his application. In addition the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director denied the Form I-212 accordingly. *See Director's Decision* dated November 1, 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 AAO finds that the Director erred in finding that section 241(a)(5) of the Act applies in this case. In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004), the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated might nonetheless obtain adjustment of status if his Form I-212 was granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief." The Court further stated: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The applicant is eligible to file a Form I-212 and the applicant is not subject to section 241(a)(5) of the Act.

This office finds that although the applicant is not subject to section 241(a)(5) of the Act, he 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 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 submits a brief in which he states that the Form I-212 should be granted based on humanitarian reasons and because the applicant's denial of admission would result in extreme hardship to his U.S. citizen spouse and child. Counsel refers to *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) which provides a list of factors the Board of Immigration Appeals (BIA) deemed relevant in determining whether an alien has established extreme hardship pursuant to section 212(g), (h) or (i) of the Act. Counsel states that the applicant's spouse would suffer extreme financial hardship if the applicant were not permitted to remain in the United States. The applicant's spouse would either have to relocate to Mexico where she does not have family, and her chances for employment are limited due to her limited ability in reading and writing in the Spanish language. If she does not relocate to Mexico with the applicant, she will have to take care of the couple's financial responsibilities by herself while raising her child as a single mother. Furthermore, counsel states that the applicant's child would be deprived of her rights as a U.S. citizen. Finally, counsel submits documentation to prove that the marriage is bona fide.

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. The AAO notes that in his decision the Director states that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. In addition, on the Notice and Order of Expedited Removal (Form I-860) the same section of law is marked. Section 212(a)(6)(C)(i) refers to an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure admission into the United States.

The record of proceedings reveals that a Record of Deportable/Inadmissible Alien (Form I-213) was issued on October 20, 1997, finding the applicant inadmissible pursuant to sections 212(a)(7)(A)(i)(I) and 212(a)(6)(C)(ii) of the Act. On the Form I-860, although 212(a)(6)(C)(i) is marked, it is stated that the applicant is subject to removal because he presented a State of California birth certificate that did not belong to him. As noted above the record reflects that on October 19, 1997, the applicant presented a U.S. birth certificate that did not belong to him in an attempt to gain admission into the United States. By submitting a U.S. birth certificate to an Immigration Inspector when applying for admission to the United States, the applicant falsely represented himself as a U.S. citizen.

Based on the above the AAO finds that the Form I-860 contains a typographical error. In the present case the applicant attempted to use a U.S. birth certificate in order to gain admission into the United States as a U.S. citizen. Therefore the applicant is clearly inadmissible under section 212(a)(6)(C)(ii) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

(ii) Falsely claiming citizenship -

(I) In general- Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.

(II) Exception- In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

The applicant in the instant case does not qualify for the exception under section 212(a)(6)(C)(ii)(II) of the Act, and there is no waiver available under section 212(a)(6)(C)(ii) of the Act.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

Notwithstanding the arguments on appeal, the applicant is subject to the provision of section 212(a)(6)(C)(ii) of the Act, which is very specific and applicable. No waiver of the ground of inadmissibility under section 212(a)(6)(C)(ii) of the Act is available to an alien who made a false claim to United States citizenship.

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 and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.