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U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **AUG 15 2006**

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, Chief
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 March 20, 1997, at the San Ysidro, California, Port of Entry, represented himself to be a citizen of the United States in order to gain admission into the United States. The applicant was found to be inadmissible pursuant to 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 April 1, 1997, an immigration judge ordered the applicant excluded and deported from the United States, and the applicant was removed to Mexico. The record reflects that the applicant reentered the United States on an unknown date, 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 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 children.

The Director determined that the applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II) for being unlawfully present in the United States after a previous immigration violation. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated May 25, 2005.

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.

On appeal, counsel states that the applicant was never "removed and deported" as stated in the decision but rather he was excluded for failure to have a proper immigration document. In addition, counsel states that it is not clear from the order of exclusion if the applicant waived his right to appeal the decision, and that it does not appear that the applicant was made aware of the possibility of withdrawing his application for entry, the equivalent of a voluntary departure. Counsel further states that the applicant was not subject to "summary removal" pursuant to section 212(a)(9)(A)(i) of the Act, and was not given an order of removal indicating the time period during which he was not allowed to re-enter the United States. According to counsel this fact makes it clear that the Director erroneously concluded that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act. Additionally, counsel states that the decision did not take into consideration the extreme hardship and the impact the separation from the applicant would have on his spouse and children. Furthermore, counsel states that the decision fails to weigh the applicant's positive factors, such as his good moral character, as evidenced by the letters of recommendation, and his contributions to his church and community. Moreover, counsel states that the adjudication of the Form I-212 was delayed for over two years, and it was not until she requested intervention from the AILA liaison that a decision was made. Finally counsel states that the government acted arbitrarily, without due consideration to all factions, thus constituting a denial of due process of law.

Section 101(g) of the Act states in pertinent part:

For the purposes of this Act any alien ordered deported or removed (whether before or after the enactment of this Act) who has left the United States, shall be considered to have been deported or removed in pursuance of law . . .

The AAO does not have jurisdiction over the circumstances surrounding the applicant's exclusion and deportation from the United States. The fact remains that the applicant was ordered excluded and deported from the United States, and was removed on April 1, 1997. Therefore, he is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, and must receive permission to reapply for admission. In addition, the record of proceedings reflects that the applicant waived his right to appeal the immigration judge's order. The proceeding in the present case relates to the denial of the Form I-212 and the AAO will not address the backlog or the processing time it took the Service Center to adjudicate the application.

Although counsel states that the applicant was denied due process of law, she has not shown that any violation of the regulations resulted in "substantial prejudice" to the applicant. *See De Zavala v. Ashcroft*, 385

F.3d 879, 883 (5th Cir. 2004) (holding that an alien "must make an initial showing of substantial prejudice" to prevail on a due process challenge). A review of the record and the adverse decision indicates that the Director properly applied the statute and regulations to the applicant's case. Accordingly, counsel's claim is without merit.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. To recapitulate, the applicant was excluded and deported from the United States on April 1, 1997. He reentered the United States without a lawful admission or parole, and without permission to reapply for admission. Because the applicant illegally reentered the United States after his removal he is clearly inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i)(II) of the Act may not apply for consent to reapply unless more than ten years have elapsed since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, it must be the case that the applicant has remained outside the United States for at least ten years since his last departure *and* that CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant did not remain outside the United States for at least ten years since his departure on April 1, 1997. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

In addition, the AAO notes that on March 20, 1997, the applicant represented himself to be a citizen of the United States in order to gain admission into the United States and, therefore, he is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii).

A March 31, 1997, memorandum by Joseph R. Greene, Acting Associate Commissioner, Office of Programs, addresses section 212(a)(6)(C)(ii) of the Act, as amended by section 344(a) of IIRIRA and states in pertinent part:

"Pursuant to section 344(c) of IIRIRA, section 212(a)(6)(C)(ii) of the Act became effective on September 30, 1996. It applies only to false claims to U.S. citizenship made on or after September 30, 1996." (Emphasis added).

Section 212(a)(6)(C) of the Act states in pertinent part:

(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.

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.

The applicant is subject to the provisions of section 212(a)(6)(C)(ii) of the Act, which are very specific and applicable. No waiver is available to an alien who has made a false claim to United States citizenship. Therefore, 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. Accordingly, as the applicant is statutorily inadmissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.