

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



H4

FILE:



Office: VERMONT SERVICE CENTER

Date: **AUG 25 2006**

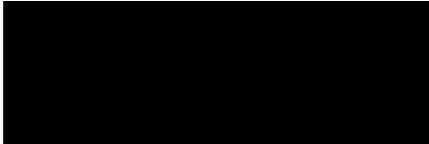
IN RE:

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.

A handwritten signature in black ink that reads "Robert P. Wiemann".

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, Vermont 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 Guatemala who, on April 5, 1997, at the J.F.K. International Airport applied for admission into the United States. The applicant presented a Guatemalan passport with a counterfeit biographical page, containing a valid non-immigrant visa. She was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud, 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, section 212(a)(7)(B)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(B)(i)(I) for being a nonimmigrant not in possession of a valid passport, and section 212(a)(7)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(7)(B)(i)(II) for being a nonimmigrant not in possession of a valid nonimmigrant visa or border crossing identification card at the time of application for admission. Consequently, on April 6, 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 in July 1997 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 her Lawful Permanent Resident (LPR) spouse. The applicant is inadmissible pursuant to 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 her LPR spouse and U.S. citizen children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and the Form I-212 accordingly. *See Director's Decision* dated June 6, 2005.

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 alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

On appeal, counsel submits a brief, a sworn statement from the applicant, a copy of the applicant's driver's license, a copy of a Notice of Action (Form I-797) regarding the approval of a Form I-130 on behalf of the

applicant, a letter from a pediatrician, copies of DMV records, a letter from a psychiatrist, IRS transcripts, bank statements, a police clearance and a duplicate of AR-11, Alien's Change of Address Card. In his brief, counsel states that the applicant never worked in the United States illegally. He further states that she is a housewife and a stay-at-home mother who has never been in trouble with the police, always filed taxes jointly with her spouse and always kept the federal government authorities updated as to her address and whereabouts. In addition, counsel states that the applicant does not have a criminal record, is a person of good moral character, and her actions demonstrate her respect for law and order. Counsel further states that the applicant's presence in the United States is needed because otherwise her spouse may be forced to close his business in order to take care of their three U.S. citizen children. Additionally, counsel states that the applicant's initial attempt to enter the U.S. was in order to join her husband and not to work without authorization nor to engage in any other illicit activity. Furthermore, counsel states that the applicant and her family would suffer extreme hardship if the application were not granted. The letter from the psychiatrist states that the applicant's spouse suffers from major depression, which has grown worse since he received the denial of the applicant's waiver application.

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).

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 removed from the United States on April 6, 1997. She reentered the United States in July 1997 without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after her removal, the applicant is clearly inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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 Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary 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.

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's last departure was at least ten years ago *and* that CIS has consented to the applicant's reapplying for admission. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed.

DECISION: The appeal is dismissed.