



U.S. Citizenship
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FILE: Office: DENVER Date: APR 12 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)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C).

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 after removal was denied by the District Director, Denver, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The applicant is a native and a citizen of Mexico who entered the United States without inspection in approximately 1992. The applicant was apprehended on January 9, 1999, while attempting to again enter the United States from Mexico, this time falsely representing himself to be a United States citizen. He was arrested and removed from the United States under the assumed identity of [REDACTED] pursuant to an order of expedited removal under section 235(b)(1)(B)(iii)(I); 8 U.S.C. § 1225(b)(1)(B)(iii)(I). The record reflects that the applicant reentered the United States without inspection on or about January 28, 1999. On October 14, 2000, the applicant married [REDACTED], a United States citizen, who subsequently filed a Petition for Alien Relative (Form I-130) on the applicant's behalf. The petition was approved on October 9, 2001, and the applicant subsequently sought to file an Application for Permission to Reapply for Admission Into the United States After Deportation or Removal (Form I-212), in anticipation of filing an Adjustment of Status application (Form I-485). Although the district office questioned the applicant's eligibility, the application was accepted for filing on December 12, 2002. On the same date, the applicant was taken into custody based upon the district office's determination that the applicant, by virtue of his unlawful reentry to the United States following his removal, was subject to reinstatement of the previously entered order of removal pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5).

The district director subsequently issued a decision denying the I-212 application on April 29, 2003. The district director found that the applicant had reentered the United States illegally after having been removed under an order of removal, and as such determined that the previous order of removal should be reinstated and that the applicant was ineligible to be granted or to apply for any relief under the Act. *See Decision of the District Director*, dated April 29, 2003. The applicant was subsequently removed pursuant to the reinstated order on May 6, 2003. Following the applicant's arrest, counsel initiated a habeas corpus action in federal district court challenging his detention. As will be discussed, the results of that litigation have resolved the issues raised by this appeal, making the applicant's appeal moot.

As noted, the applicant was deported on May 6, 2003. At the time of the applicant's filing of the I-485 and I-212 applications, he was inadmissible under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii). The district director denied the applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) finding that because it was determined that he was subject to reinstatement of the 1999 order, he was ineligible to seek or be granted a waiver. *Id.*

Section 212(a)(9). Aliens previously removed.--

(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.

(iii) 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 has consented to the alien's reapplying for admission.

Counsel's brief in support of the appeal sets out various reasons why counsel believes the district director erred in finding the applicant ineligible for permission to reapply after removal. The arguments principally fall into three categories. 1) reinstatement of the prior deportation order before adjudicating the I-212 waiver on the merits was contrary to regulations, and was reversible error and a violation of due process; 2) the original deportation order was based on a constitutionally deficient adjudication as the applicant was found to have made a false claim to U.S. citizenship in a situation where no interpreter was provided; and 3) the denial of admission to the applicant would create extreme hardship for his United States citizen spouse, and his United States citizen daughter. *See Notice of Appeal (Form I-290B)*, dated May 28, 2003. However, it has become apparent that during the pendency of the appeal, counsel's arguments regarding the reasons why the applicant was not subject to reinstatement and should be permitted to pursue the application for permission to reapply for admission, were considered and soundly rejected in a published decision on the applicant's own case by the Tenth Circuit Court of Appeals. That decision, in the course of upholding the reinstatement of the applicant's previous removal order, found that he had no statutory or due process rights to the relief sought. *See Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004).

The Court of Appeals found that the reinstatement provision of the statute did in fact, bar the applicant from obtaining permission to reapply for entry and adjustment of status. *Id.* at p. 1163. It rejected the claim that the applicant was entitled to have his adjustment and I-212 applications considered on the merits because they were filed prior to the INS' reinstatement decision, finding that "Section 1231(a)(5) states not only that an illegal reentrant 'may not apply' for relief, but also that he is 'not eligible' for relief." *Id.* The court additionally rejected the applicants' claim that the failure to adjudicate his application violated his due process rights under the Fifth Amendment, finding that an approval of the I-212 would not have allowed him to escape reinstatement. The court further held that the applicant's illegal reentry into the United States made him "ineligible for any I-212 waiver, quite apart from the effects of § 1231(a)(5)." *Id.* at 1165-1166. The court noted that aliens who illegally reentered the United States after being formally ordered removed, were ineligible to apply for an I-212 waiver from within the United States. The court further stated:

Illegal reentrants to the United States are covered by 8 U.S.C. § 1182(a)(9)(C). Under the plain language of subsection (a)(9)(C)(ii), aliens who illegally reenter the country after having been removed or deported generally face a permanent ban on applying for admission. A waiver of this life-time inadmissibility is available, but aliens covered by this section of the statute must first exit the United States and wait ten years before applying for an I-212 waiver.

Id. at 1166.

Consequently, the AAO finds that in light of the fact that the Tenth Circuit Court of Appeals has resolved the issues regarding the applicant's eligibility for permission to reapply, and his eligibility for adjustment of status, the applicant's appeal to the AAO has been rendered moot.

ORDER: The appeal is dismissed as moot.