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U.S. Citizenship
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FILE:

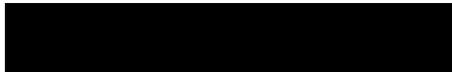


Office: CALIFORNIA SERVICE CENTER

Date: JAN 13 2006

IN RE:

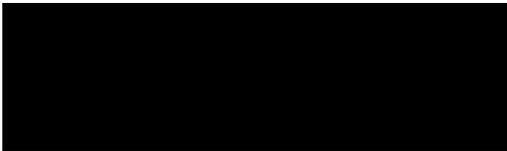
Applicant:



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, 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 January 6, 1999, at the San Ysidro, California Port of Entry, attempted to procure admission into the United States by fraud and willful misrepresentation of a material fact. The applicant presented a Border Crossing Card (Form I-586) that did not belong to her. 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 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, 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 reveals that the applicant reentered the United States in February 1999 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 U.S. citizen 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 U.S. citizen spouse and children.

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 the Act and denied the Form I-212 accordingly. *See Director's Decision* dated November 11, 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 [now Secretary, Homeland Security, "Secretary"] 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.

On appeal, counsel submits a brief in which he states that pursuant to the decision by the Ninth Circuit Court of Appeals in *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) that the reinstatement procedures established by the Attorney General at 8 C.F.R. section 241.8 violates the Act. Counsel states that if the applicant is found inadmissible pursuant to section 212(a)(6)(C)(i) of the Act she will file an Application for Waiver of Grounds of Inadmissibility (Form I-601) under section 212(i) of the Act, based on her marriage to a U.S. citizen. In addition, counsel states that the applicant has been diagnosed with Hodgkins lymphoma and is undergoing chemotherapy and may require radiation therapy. Counsel submits a medical report regarding the applicant's medical condition and a letter from her doctor in which he states: ". . . she should not leave the United States as she requires close medical observation." Furthermore, counsel states that the applicant is married to a U.S. citizen, has two U.S. citizen children, her medical expenses are paid by her spouse's insurance provider and her spouse is able to care for and provide the required support following chemotherapy treatment.

Pursuant to *Morales-Izquierdo v. Ashcroft, supra*, only an immigration judge can determine whether an individual is removable under section 241(a)(5) of the Act for cases in the Ninth Circuit. It further states that the Director does not have jurisdiction over the issue of reinstatement. Although in his decision the Director states that a Warrant of Deportation was reinstated, the record of proceedings does not reveal that the Director initiated a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) and therefore the order of removal has never been reinstated.

Since this case arises in the Ninth Circuit, *Morales-Izquierdo* is controlling. The AAO agrees with counsel and finds that the Director erred in denying the Form I-212 based on the fact that section 241(a)(5) of the Act is applicable in this case. The applicant is not subject to section 241(a)(5) of the Act and she is eligible to file a Form I-212.

The AAO conducts the final administrative review and enters the ultimate decision for Citizenship and Immigration Services (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 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 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. To recapitulate, the applicant was expeditiously removed from the United States on January 6, 1999. The applicant reentered the United States shortly after her removal without a lawful admission or parole and without permission to reapply for admission.

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under sections 212(a)(9)(A) and 212(a)(9)(C)(i) 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 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.

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) of the Act may not apply for consent to reapply unless the alien is "seeking admission more than ten years after the date of the alien's last departure." *See* Section 212(a)(9)(C)(ii) of the Act. Thus, to avoid inadmissibility under section 212(a)(9)(C) 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. In the present matter, the applicant's last departure from the United States occurred on January 6, 1999, less than ten years ago.

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.