



U.S. Citizenship
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Services

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: JUN 19 2006

IN RE:

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 Director, Nebraska Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 21, 1998, was apprehended by immigration officers after he had been smuggled across the border. On January 28, 1998, an immigration judge ordered the applicant removed from the United States. Consequently, on February 3, 1998, the applicant was removed from the United States via the El Paso, Texas, Port of Entry. The record reflects that the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to November 23, 2002, the date on which he married his U.S. citizen spouse in Joliet, Illinois. On December 9, 2002, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 17, 2003, the applicant appeared at the Citizenship and Immigration Services' (CIS) Chicago District Office where he was apprehended by immigration officers. On June 19, 2003, a warrant of removal and a Notice of Intent/Decision to Reinstate Prior Order was issued. Consequently, on June 27, 2003, the applicant was removed from the United States pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). On January 16, 2004, the applicant filed the Form I-212. On June 17, 2004, the applicant was apprehended by immigration officers after he had entered the United States without a lawful admission or parole and without permission to reapply for admission. On the same day a warrant of removal and a second Notice of Intent/Decision to Reinstate Prior Order was issued. Consequently, on June 17, 2004, the applicant was removed from the United States pursuant to section 241(a)(5) of the Act. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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 re-enter the United States and reside with his U.S. citizen spouse.

The director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, for being an alien who entered the United States within 20 years after having entered the United States illegally and had a prior order reinstated under section 241(a)(5) of the Act. In addition, the director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The director then denied the Form I-212 accordingly. *See Director's Decision* dated April 26, 2005.

On appeal, counsel contends that the director failed to correctly apply criteria set forth in case law in the weighing of the applicant's favorable and unfavorable factors. *Form I-290B*, dated May 19, 2005.

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. As noted previously, the applicant was removed from the United States on February 3, 1998. The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant's prior order of removal was reinstated and he was removed on June 27, 2003. The applicant reentered the United States after this second removal without a lawful admission or parole and without permission to reapply for admission. The applicant's prior order of removal was again reinstated and he was removed on June 17, 2004.

The AAO finds that the applicant is inadmissible under sections 212(a)(9)(A)(ii) and 212(a)(9)(C)(i) of the Act and, therefore, must receive permission to reapply for admission.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (ii) Other aliens.-Any alien not described in clause (i) who-
 - (I) has been ordered removed under section 240 or any other provision of law, or
 - (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a 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.

(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.

Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, as an alien who reentered the United States without being admitted after having been removed from the United States. The AAO notes that an exception to this ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than 10 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) 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 June 17, 2004, less than ten years ago. He 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.

ORDER: The appeal is dismissed.