



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: MAY 23 2006

IN RE:

Applicant:

[Redacted]

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:

[Redacted]

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 sustained and the application approved.

The applicant is a native and citizen of Mexico who, on September 2, 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 an Alien Registration Card (Form I-551) that did not belong to her. She 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, on September 3, 1999, 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 on September 7, 1999, at the San Ysidro, California, Port of Entry the applicant was paroled into the United States pursuant to section 212(d)(5)(A) of the Act. The record further reflects that the applicant filed two Applications for Family Unity Benefits (Form I-817). Her applications were approved and the applicant was granted voluntary departure under the Family Unity Program until August 22, 2003. 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 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 her LPR spouse and children, and her U.S. citizen children.

The Director determined that based upon the applicant's reentry without inspection or permission from the Attorney General, the Warrant of Deportation was reinstated, and the applicant was not eligible for any relief or benefit from her Form I-212. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated February 15, 2005.

On appeal, counsel submits a brief in which she states that the Director erroneously denied the Form I-212 based on the applicant having reentered the United States without inspection or permission from the Attorney General, and reinstating the warrant of deportation based on the decision in *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003). In addition, counsel states that the reinstatement provision, pursuant to section 241(a)(5) of the Act, applies only to aliens who reentered the United States illegally after having been removed. Furthermore, counsel states that even if the applicant was subject to section 241(a)(5) of the Act, based on recent decisions by the Ninth Circuit Court of Appeals, the Director does not have the authority to reinstate a prior removal order and the applicant is eligible to file a Form I-212. Counsel refers to *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) in which the Ninth Circuit Court of Appeals decided that the Service does not have jurisdiction to reinstate deportation orders and only an immigration judge can reinstate a removal order. In addition, counsel states that based on the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) the applicant is eligible to file a Form I-212 which must be adjudicated before a deportation or removal order can be reinstated. Finally, counsel requests that the Form I-212 be granted based on the applicant's nearly 18 years of residence in the United States, her 23 year marriage to an LPR, her five U.S. citizen and LPR children, and the hardship that she and her family will suffer if the Form I-212 is not granted.

The AAO agrees with counsel and finds that the Director erred in stating that the applicant illegally reentered the United States on September 7, 1999. The record of proceedings clearly reveals that on September 7, 1999, the applicant was paroled into the United States pursuant to section 212(d)(5)(A) of the Act.

Section 241(a) of the Act states in pertinent part:

(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 . . .

Since the applicant did not reenter illegally, she is not subject to reinstatement of a prior removal order.

In *Morales-Izquierdo v. Gonzales*, 423 F.3d 1118 (9th Cir. 2005) the U.S. Court of Appeals for the Ninth Circuit granted *en banc* rehearing of *Morales-Izquierdo v. Ashcroft*. In granting rehearing, the court also vacated the previous decision in the case, pending further order by the court. Therefore, *Morales-Izquierdo* will not be discussed.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft, supra*, the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief."

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.

The AAO finds that although the applicant is not subject to a reinstatement order, she is clearly inadmissible under section 212(a)(9)(A) 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.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work unlawfully. *Id.*

Matter of Lee, 17 I&N Dec. 275 (Comm. 1978) further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that:

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The AAO finds that the favorable factors in this case are the applicant's family ties in the United States, her LPR spouse and children, and her U.S. citizen children, the approval of a Form I-130, the absence of any criminal record, the prospect of general hardship to her family and the fact that she did not reenter or attempt to reenter illegally.

The AAO finds that the unfavorable factors in this case include the applicant's initial illegal entry into the United States in 1987 and her attempt to gain entry into the United States by using a Form I-551 that did not belong to her.

While the applicant's immigration violations are serious matters that cannot be condoned, the AAO finds that given all of the circumstances in the present case, the applicant has established that the favorable factors outweigh the unfavorable factors, and that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained and the application approved.

ORDER: The appeal is sustained and the application approved.