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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

714



FILE:

Office: PHOENIX, ARIZONA

Date: OCT 23 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, 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 District Director, Phoenix, Arizona, and is now before the Administrative Appeals Office (AAO) on appeal. The District Director's decision will be withdrawn, the appeal will be dismissed and the application declared moot.

The applicant is a native and citizen of Mexico who entered the United States without a lawful admission or parole on three occasions. He was placed in deportation proceedings all three times and was granted voluntary departure in lieu of deportation. The record reflects that the applicant was admitted into the United States in possession of a valid Border Crossing Card (Form I-586) on or about June 21, 1988, with an authorized period of stay until on or about June 26, 1988. On October 15, 1988, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant. On October 18, 1998, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On October 27, 1988, an immigration judge ordered the applicant deported pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for having remained in the United States longer than permitted. Consequently, on the same date the applicant was deported from the United States. The applicant failed to surrender his Form I-586 and on or about July 1, 1990, he was admitted into the United States without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). On June 21, 2000, the applicant appeared at a CIS office for a scheduled interview regarding an Application to Register Permanent Residence or Adjust Status (Form I-485). The applicant was found removable pursuant to section 237(a)(1)(A) of the Act, as an alien who at the time of entry was within one or more of the classes of aliens inadmissible by the law existing at such time. On July 5, 2000, a Notice to Appear (NTA) for a removal hearing before an immigration judge was issued. On December 13, 2000, the applicant failed to appear for the removal hearing and he was subsequently ordered removed *in absentia* by an immigration judge. On January 11, 2001, a Motion to Reopen proceedings was granted and on February 19, 2002, an immigration judge granted the applicant Lawful Permanent Resident (LPR) status. The District Director determined that the applicant was not eligible to adjust his status to that of an LPR and on March 4, 2005, he issued a Notice of Intent to Rescind (NOIR) the applicant's LPR status. The applicant filed a Form I-212 seeking 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 his U.S. citizen spouse.

The District Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. See *District Director's Decision* dated September 19, 2005.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether a Form I-212 is required. As noted above, the District Director issued a NOIR on March 4, 2005, pursuant to the regulation at 8 C.F.R. § 246.1. The record reflects that on March 29, 2005, counsel responded to the District Director's NOIR and requested a hearing before an immigration judge. The record of proceeding and the electronic database of CIS fail to reveal that a hearing before an immigration judge has been scheduled as required by the regulation at 8 C.F.R. § 246.3

The regulation at 8 C.F.R. § 246.3 states:

Allegations contested or denied; hearing requested.

If, within the prescribed time following service of the notice pursuant to § 246.1, the respondent has filed an answer which contests or denies any allegation in the notice, or a hearing is requested, a hearing pursuant to § 246.5 shall be conducted by an immigration judge, and the requirements contained in §§ 240.3, 240.4, 240.5, 240.6, 240.7, and 240.9 of this chapter shall be followed.

In rescission proceedings, the Government bears the burden of proving ineligibility for adjustment of status by clear, unequivocal, and convincing evidence. *Waziri v.INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Pereira*, 19 I&N Dec. 169 (BIA 1984).

The regulation at 8 C.F.R. § 1001.1(p) states in pertinent part:

The term lawfully admitted for permanent residence means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion, deportation, or removal.

To recapitulate, the applicant in the present case was granted LPR status on February 19, 2002, and until it is rescinded, his status as an LPR has not been terminated. Therefore, the applicant is not required to file a Form I-212. Accordingly, the District Director's decision will be withdrawn, the appeal will be dismissed and the application declared moot.

ORDER: The District Director's decision is withdrawn, the appeal is dismissed and the application is moot.