



U.S. Citizenship  
and Immigration  
Services

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H4

FILE:

Office: CLEVELAND, OH

Date: MAR 30 2007

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) of the Immigration and Nationality Act,  
8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 was denied by the District Director, Cleveland, Ohio. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The application will be denied.

The applicant is a native and citizen of Mexico. The record reflects that on August 3, 1999, the applicant was convicted in the Third District Court, County of Salt Lake, State of Utah, of the offense of Forgery, a 3<sup>rd</sup> Degree Felony, for which the term of imprisonment was up to five years. The applicant was sentenced to a prison term of 9 months. The applicant was subsequently ordered removed from the United States on June 15, 2000, pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony, as defined in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). The applicant was found to be present in the United States without a lawful admission or parole on January 12, 2001. On April 14, 2001, the applicant was convicted in the U.S. District Court, District of Utah, of Illegal Re-entry of a Deported Alien, pursuant to section 276 of the Act, 8 U.S.C. § 1326. As a result the applicant was ordered to serve a term of 77 months in prison. Based on the record, the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii).

The district director found that the applicant was subject to the reinstatement of deportation or removal order provision of section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and that he was thus statutorily ineligible for any benefits or relief under the Act. The district director denied the applicant's Form I-212, Application for Permission to Reapply for Admission Into the United States after Deportation or Removal accordingly without addressing the merits of the application.

The applicant asserts on appeal that: 1) his 1999 Forgery conviction does not qualify as an aggravated felony under section 101(a)(43) of the Act, and that he was wrongfully removed from the United States in June 2000; 2) he has declared his allegiance to the United States and is therefore a U.S. national and not subject to removal from the United States; and 3) his Form I-212 application for permission to reapply for admission into the United States after removal pursuant to section 212(a)(9)(A) of the Act should be approved because he has lived in the U.S. almost his entire life, and knows no other home.

The AAO is unconvinced by the applicant's assertion that he was wrongfully removed from the United States, and the indication that he is therefore not subject to the reinstatement and unlawful reentry after removal provisions contained in the Act. The AAO notes first that it has no jurisdiction to adjudicate the appeal of an Immigration Judge's removal decision. *See* 8 C.F.R. § 103.3(a). Rather, the appeal of an Immigration Judge's removal decision is properly heard by the Board of Immigration Appeals. The regulations provide in pertinent part at 8 C.F.R. § 1003.3(a)(1) that:

[A]n appeal from a decision of an immigration judge shall be taken by filing a Notice of Appeal from a Decision of an Immigration Judge (Form EOIR-26) directly with the Board [of Immigration Appeals], within the time specified in § 1003.38. The appealing parties are only those parties who are covered by the decision of an immigration judge and who are specifically named on the Notice of Appeal. The appeal must reflect proof of service of a

copy of the appeal and all attachments on the opposing party. An appeal is not properly filed unless it is received at the Board, along with all required documents, fees or fee waiver requests, and proof of service, within the time specified . . . .

The regulation provides at 8 C.F.R. § 1003.38 (b) that:

The Notice of Appeal to the Board of Immigration Appeals of Decision of Immigration Judge (Form EOIR-26) shall be filed directly with the Board of Immigration Appeals within 30 calendar days after the stating of an Immigration Judge's oral decision or the mailing of an Immigration Judge's written decision. . . .

It is noted that the record contains no evidence to establish that the applicant filed a timely appeal of his removal proceedings decision with the Board of Immigration Appeals in accordance with the regulations set forth above, and the record does not establish that the applicant's removal order was considered or overturned by the Board of Immigration Appeals. The applicant is therefore subject to the reinstatement and unlawful reentry after removal provisions contained in the Act.

The applicant additionally failed to establish that he is a national of the United States pursuant to section 101(a)(22) of the Act which provides in pertinent part that "[t]he term "national of the United States" means . . . (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." It is noted that:

[T]he acquisition of nationality for a noncitizen national is governed by section 308 of the Act [8 U.S.C. § 1409] rather than by the definitional provision at section 101(a)(22). . . . [W]hether one owes permanent allegiance to the United States, is not simply a matter of individual choice... . Instead, it reflects a legal relationship between an individual and a sovereign. Such allegiance can, for example, arise or be eliminated through the United States' acquisition or relinquishment of territory under terms declared by Congress . . . .

*See In Re Moises Navas-Acosta*, 23 I&N Dec. 586, 587-88 (BIA 2003) (*Citing Matter of Tuitasi*, 15 I&N 102, (BIA 1974) and *Rabang v. Boyd*, 353 U.S. 427 (1957)). (Quotations omitted.)

Section 308 of the Act describes the terms under which a person born in a U.S. outlying possession, or to parents who are U.S. outlying possession nationals, becomes a national of the United States. The record reflects that the applicant was born in Mexico, not a U.S. outlying possession, and the record contains no evidence to establish that the applicant's parents were U.S. outlying possession nationals at the time of the applicant's birth. As stated in *In Re Moises Navas-Acosta*, *supra* at 588:

The respondent [applicant] can point to no provision that would confer nationality upon him. He did not acquire nationality at birth under section 308 of the Act; he did not acquire it through the terms of a territorial transfer; and he did not acquire it through naturalization after

birth. The [section 101(a)(22) of the Act] definitional provision the respondent [applicant] relies on does not set forth the terms and conditions for acquisition of nationality.

As previously noted, the record reflects that the applicant was ordered removed from the United States on June 15, 2000, pursuant to section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony as defined in section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43). By his own admission, the applicant unlawfully reentered the United States two hours after his removal. Moreover, the applicant was found to be present in the United States without a lawful admission or parole on January 12, 2001, and on April 14, 2001, the applicant was convicted in the U.S. District Court, District of Utah, of Illegal Re-entry of a Deported Alien, pursuant to section 276 of the Act, 8 U.S.C. § 1326. The district director erred, however, in finding that the applicant was statutorily ineligible for any benefits or relief under the Act pursuant to section 241(a)(5) of the Act.

Section 241(a)(5) of the Act provides in pertinent part:

If the Attorney General 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.

The regulation at 8 C.F.R. § 241.8 states that:

(a) [A]n alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. . . . (2) The identity of the alien. . . . (3) Whether the alien unlawfully reentered the United States . . . .

(b) [I]f an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

A thorough review of the record reflects that the applicant in the present matter was not given a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) as required by 8 C.F.R. § 241.8(b). Consequently, the applicant's prior removal order was not reinstated. The applicant is thus eligible to file a Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal. The AAO will therefore adjudicate the merits of the Form I-212 application.

Approval of a Form I-212 Application for Permission to Apply for Admission after Deportation or Removal requires that the favorable aspects of the applicant's case outweigh the unfavorable aspects. 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:

[T]he 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.

The *Tin* decision found that an alien's unlawful presence in the United States was evidence of disrespect for the law. *Id.* at 373. The Regional Commissioner noted that the alien in *Tin* had gained his claimed equity while being unlawfully present in the United States. The Regional Commissioner noted further that through his illegal actions, the alien had obtained an advantage over aliens who properly sought visa issuance abroad or who abided by the terms of their admission while in this country. The Regional Commissioner concluded that approval of Form I-212 application would condone the alien's acts, which could encourage others to enter the United States unlawfully, and the alien's application was denied. In *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978), the Commissioner clarified further that:

[R]esidence in the United States could be considered a positive factor only where that residence is pursuant to a legal admission or adjustment of status as a permanent resident. To reward a person for remaining in the United States in violation of law would seriously threaten the structure of all laws pertaining to immigration.

The favorable factors contained in the record include the fact that his mother is a naturalized United States citizen. Although the applicant asserts that his residence in the U.S. since childhood is a favorable factor in his case, the legal discussion above makes clear that the applicant's unlawful residence in the U.S. since childhood may not be considered as a positive factor for present proceeding purposes.

The unfavorable factors in the applicant's case include: 1) the applicant's unlawful presence in the United States; 2) the applicant's August 3, 1999, conviction in the Third District Court, County of Salt Lake, Utah, of Forgery, a 3<sup>rd</sup> Degree Felony for which the applicant was sentenced to serve 9 months in prison; 3) the

applicant's removal from the United States pursuant to a June 15, 2000 removal order; 4) the applicant's unlawful reentry into the United States in violation of section 276 of the Act; 5) the applicant's April 14, 2001, conviction in the U.S. District Court, District of Utah, of Illegal Re-entry of a Deported Alien, under section 276 of the Act, for which he was sentenced to serve 77 months in prison.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Upon review of the record, the AAO finds that the unfavorable factors outweigh the favorable factors in the present case. The evidence in the record reflects a serious disregard on the applicant's part toward violating U.S. criminal and immigration laws. Moreover, the applicant asserts no hardship to his mother, and the record contains no evidence of other favorable factors. Accordingly, the AAO finds that the applicant has failed to establish that he warrants a favorable exercise of discretion. The present appeal will therefore be dismissed, and the Form I-212 application will be denied.

**ORDER:** The appeal is dismissed. The application is denied.