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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 13 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, 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 October 4, 2000, at the San Ysidro, California Port of Entry applied for admission into the United States. The applicant orally represented himself to be a citizen of the United States. The applicant was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(ii), as an alien who falsely represents himself to be a citizen of the United States for any purpose or benefit under this Act, 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 October 5, 2002, 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 applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by his U.S. citizen mother. 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 his parents.

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 and may not apply for any relief or benefit from the Act. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors and since there is no waiver available for his inadmissibility no purpose would be served in granting permission to reapply. The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 14, 2004.

On appeal, counsel submits a brief in which he states that the Service lacks authority to reinstate the applicant's removal at this time and that the Service is required to consider the applicant's Form I-212.

Section 241(a) detention, release, and removal or aliens ordered removed states in pertinent part:

> (5) reinstatement of removal orders against aliens illegally reentering.- 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 AAO agrees with counsel and finds that the Director erred in stating that the applicant is subject to section 241(a)(5) of the Act and not eligible for any relief or benefit from his application. In its August 14, 2004 decision, *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), 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." The Court further states: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in

which the petitioner receives permission to reapply for admission after he or she has already reentered the country."

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, *Perez-Gonzalez* is controlling. The applicant is eligible to file a Form I-212 and the applicant is not subject to section 241(a)(5) of the Act.

On appeal, counsel states that the applicant is eligible for a waiver of inadmissibility because his final order of removal charged him with misrepresentation under section 212(a)(6)(C)(i) of the Act, and not a false claim to U.S. citizenship under section 212(a)(6)(C)(ii) of the Act. Counsel states that in his decision the Director notes that the applicant "was inadmissible to the United States under section 212(a)(6)(C)(i). . ." and his final order of expedited removal indicates that the applicant was removed pursuant to section 212(a)(6)(C)(i) of the Act. Counsel further states that the applicant's removal order was signed by an Immigration Inspector, a Supervisory Immigration Inspector and an Assistant Area Port Director who all agreed that section 212(a)(6)(C)(i) of the Act was the proper ground of inadmissibility. In addition, counsel refers to a memorandum issued on April 6, 1998, by legacy Immigration and Naturalization Service (INS) relating to false claims to U.S. citizenship. Counsel points to the section of the memorandum that states: "When both grounds of inadmissibility under section 212(a)(6)(C)(i) and (ii) apply, the aliens should be charged with both grounds and advised of the availability of a waiver (or lack thereof), as appropriate." Additionally, counsel asserts that the inspection officer may have deemed the applicant eligible for an exception to a false claim to U.S. citizenship under section 212(a)(6)(C)(ii)(II) of the Act. Also, counsel states that had the officer inspecting the applicant at the port of entry concluded that he was subject to a false claim to U.S. citizenship, he would have charged him accordingly in the final order of removal as required by Service policy. Furthermore, counsel states that the service improperly applied the standard of hardship and failed to recognize all relevant factors presented with the applicant's Form I-212.

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. As noted by counsel the Director stated that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. In addition, on the Notice and Order of Expedited Removal (Form I-860), the same section of law is marked. Section 212(a)(6)(C)(i) refers to an alien who, by fraud or willfully misrepresenting a material fact, seeks to procure admission into the United States. However, the Director also noted that the applicant verbally declared himself to be a U.S. citizen and that there was no waiver available. The AAO finds that the Director found the applicant inadmissible under section 212(a)(6)(C)(ii) of the Act, and that the reference to section 212(a)(6)(C)(i) was a harmless error.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.
>
> (ii) Falsely claiming citizenship -

> (I) In general- Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act (including section 274A) or any other Federal or State law is inadmissible.
>
> (II) Exception- In the case of an alien making a representation described in subclause (I), if each natural parent of the alien (or, in the case of an adopted alien, each adoptive parent of the alien) is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

Counsel's statements are not persuasive. The memorandum issued by legacy INS provides guidance for the implementation of the new provisions under section 212(a)(6)(C) of the Act and explains the differences between sections 212(a)(6)(C)(ii) and 212(A)(6)(C)(i) of the Act. It clearly states that any false claim to U.S. citizenship, after September 30, 1996, renders the individual inadmissible under section 212(a)(6)(C)(ii). The memorandum clarifies that it is possible for an individual who made a false claim to U.S. citizenship, on or after September 30, 1996, to also be charged with inadmissibility under both sections 212(a)(6)(C)(i) and (ii). As an example the memorandum states: ". . . an alien who made a false claim to U.S. citizenship on or after September 30 to gain admission at a Port-of-Entry would be inadmissible under section 212(a)(6)(C)(i) of the Act for having willfully misrepresented a material fact, and under section 212(a)(6)(C)(ii) of the Act for having made a false claim to U.S. citizenship to obtain a benefit under the Act."

This is exactly the case in the present matter. The applicant made a false claim to U.S. citizenship and the officer inspecting the applicant at the San Ysidro Port of Entry, found him inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act. A Record of Deportable/Inadmissible Alien (Form I-213) was issued on October 5, 2000, finding the applicant inadmissible pursuant to sections 212(a)(6)(C)(ii) and 212(a)(7)(A)(i)(I) of the Act. On the Form I-860, although 212(a)(6)(C)(i) is marked, it is clearly stated that the applicant is subject to removal because he verbally declared himself to be a U.S. citizen. In addition, the record of proceedings contains a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867B) in which the applicant admitted under oath that he represented himself to be a citizen of the United States on October 4, 2000, in order to gain admission into the United States. The applicant in the instant case does not qualify for the exception under section 212(a)(6)(C)(ii)(II) of the Act. At the time of his false claim to U.S. citizenship the applicant had a pending Application to Register Permanent Residence or Adjust Status (Form I-485) and, therefore, he had no reason to believe that he was a citizen of the United States.

Based on the above facts, the AAO finds that the Form I-860 contains a typographical error. In the present case the applicant attempted to gain admission into the United States as a U.S. citizen. Therefore, the applicant is clearly inadmissible under section 212(a)(6)(C)(ii) of the Act. The applicant in the instant case does not qualify for the exception under section 212(a)(6)(C)(ii)(II) of the Act, and there is no waiver available for inadmissibility under section 212(a)(6)(C)(ii) of the Act.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

No purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. The applicant is not eligible for any relief under the Act and the appeal will be dismissed.

ORDER: The appeal is dismissed.