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

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**JUL 15 2005**

IN RE:

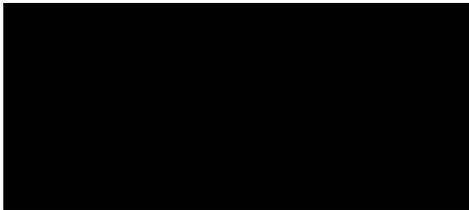
Applicant:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The application for permission to reapply for admission after removal 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 entered the United States on July 2, 1989, in possession of a valid border-crossing card. The record reflects that the applicant departed the United States and on January 30, 1999, attempted to procure admission 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. The applicant 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 January 31, 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 the applicant reentered the United States on an unknown date without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). She 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 U.S. citizen spouse and children.

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 and denied the Application for Permission to Reapply for Admission After Removal (Form I-212) accordingly. See *Director's Decision* dated October 6, 2004.

Section 241(a) detention, release, and removal or aliens ordered removed.-

(5) reinstatement of removal orders against aliens illegally reentering.- if the attorney General finds that an aliens 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 aliens is not eligible and may not apply for any relief under this Act [chapter], and the aliens shall be removed under the prior order at any time after reentry.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> 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 might nonetheless obtain adjustment of status if his Form I-212 was 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 stated: "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."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time she filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The applicant is eligible to file a Form I-212 and she is not subject to section 241(a)(5) of the Act.

This office finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A) of the Act.

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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the aliens' reapplying for admission.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years for others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, counsel asserts that the applicant's due process rights were violated by the Immigration and Naturalization Service (INS) by not giving her the opportunity to present herself before an Immigration Judge. Counsel states that the applicant informed the immigration inspector at the port of entry that her spouse had filed a Form I-130 on her behalf and she was eligible to adjust her status under section 245(i) of the Act. In addition counsel states that the Service failed to consider the applicant's U.S. citizen children as a favorable factor in the case. Counsel submits letters from the applicant, her spouse and her children. In her letter the applicant requests that her application be granted because she has always been an honest and sincere person, a good mother and a good wife and daughter. She does not dispute the fact that she attempted to enter the United States by fraud but states that she had to travel to Mexico because her mother was sick and after visiting her mother she could not be separated from her family. She further states that her daughters need her since one of them suffers from asthma. The applicant's spouse states that if the applicant is not permitted to reside in the United States their children would suffer emotionally and psychologically. In addition he states

that he would suffer economically, the children would not get the attention of their mother and he requests that the applicant be permitted to stay legally in the United States.

The AAO does not have jurisdiction over the circumstances surrounding the applicant's expedited removal from the United States or whether her due process rights were violated. The fact remains that the applicant was removed from the United States on January 31, 1999, and she is therefore inadmissible under section 212(a)(9)(A)(i) of the Act. The proceeding in the present case is limited to the application for permission to reapply for admission into the United States after deportation or removal under section 212(a)(9)(A)(iii) of the Act. That is the only issue that will be discussed.

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 in the United States 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 include the applicant's family ties to U.S. citizens, her spouse and children, the approval of an I-130 relative petition and the absence of any criminal record.

The unfavorable factors in this matter include the applicant's overstay after her initial lawful admission, her illegal stay and employment in the United States, her attempt to gain entry into the United States by fraud, her illegal re-entry subsequent to her January 31, 1999, removal and her lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in *Matter of Lee, supra*, that residence 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 applicant's actions in this matter cannot be condoned. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to establish that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.