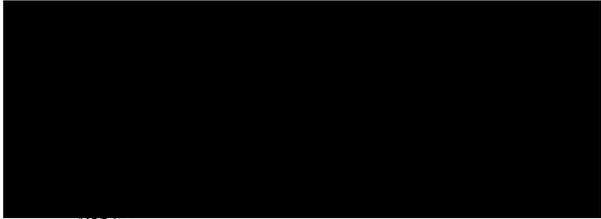




U.S. Citizenship
and Immigration
Services

H4



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

JUN 23 2005

IN RE:

Applicant:



APPLICATION:

Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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:



PUBLIC COPY

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 The Director's decision will be withdrawn, and the matter will be remanded to him for further action.

The applicant is a native and citizen of Mexico who on April 1, 2000, at the San Ysidro, California, Port of Entry represented himself to be a citizen of the United States in order to gain admission into the United States. He orally represented himself to be a citizen of the United States by birth in Los Angeles, California. The applicant was found to be inadmissible 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 the 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 April 2, 2000, 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, but prior to November 30, 2001, the date he married his U.S. citizen spouse, 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 his U.S. citizen spouse. He 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 travel to the United States to reside with his U.S. citizen spouse and child.

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 for any relief or benefit from his Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 7, 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.

On appeal, counsel states that the applicant departed the United States prior to February 3, 2003, the date he appeared at the United States Consulate General in Ciudad Juarez, Mexico. In addition counsel states that the applicant remains in Mexico and therefore he is not subject to section 241(a)(5) of the Act. On appeal, filed November 9, 2004, counsel states that he will be submitting evidence of the applicant's presence in Mexico within 30 days. Furthermore counsel states that the applicant's spouse and child are suffering extreme and unusual hardship. Finally counsel states that the applicant has no further legal impediments to his reentry other than his prior order of removal and his reentry before the statutory period of exclusion was completed and requests that the Form I-212 be granted.

Counsel submits documentary evidence to show that the applicant was present in Mexico on February 3, 2003. In addition on the Form I-212 the applicant indicates that he currently resides in Mexico and there is no documentary evidence indicating otherwise.

The Ninth Circuit Court of Appeals stated in *[REDACTED] v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) that: "Given the fact that [REDACTED] 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." Finally the Court stated: "... if the alien has applied for permission to reapply in the context of an application to adjust status, the INS is required to consider whether to exercise its discretion in the alien's favor before it can proceed with reinstatement proceedings..."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. Based on the above the AAO finds that the applicant is eligible to file a Form I-212.

This office finds that although the applicant is not subject to section 212(a)(5) of the Act, he 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The Director denied the Form I-212 because he found that no purpose would be served in approving the application for permission to reapply after deportation or removal, since the applicant was not eligible for any relief or benefit from the application. As noted above the applicant is eligible to file a Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act and the findings in *Perez-Gonzalez*.

The AAO notes that the applicant may be inadmissible under section 212(a)(2)(C)(ii) of the Act for falsely claiming U.S. citizenship. The proceeding in the present case is for the application for permission to reapply for admission into the United States after deportation or removal and therefore the AAO will not discuss the applicant's possible inadmissibility under other sections of the Act.

The Director did not properly adjudicate the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act. In view of the foregoing, the Director's decision will be withdrawn and the record will be remanded to him in order to properly adjudicate the Form I-212 under section 212(a)(9)(A)(iii) of the Act and enter a new decision, which, if adverse to the applicant is to be certified to the AAO.

ORDER: The Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.