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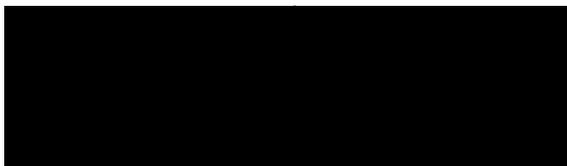
Applicant:



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 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 September 17, 1995 at the Los Angeles International Airport applied for admission into the United States as a returning temporary resident. The applicant was found inadmissible pursuant to section 212(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(5), as an alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor, and section 212(a)(7)(A)(i)(I) of 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. On September 30, 1996, an Immigration Judge granted permission to the applicant to remain in the United States until January 4, 1997. The Immigration Judge's order stipulated that if the applicant failed to depart on or prior to January 4, 1997, the applicant would be excluded and deported from the United States. The applicant failed to surrender for removal or depart from the United States on or prior to January 4, 1997. On March 31, 1998, the applicant was apprehended, and on April 1, 1998 he was removed to Mexico. The record reveals that the applicant reentered the United States in April 1998 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. The applicant is inadmissible pursuant to 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 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 for any relief or benefit from the Act and denied the Form I-212 accordingly. See *Director's Decision* dated October 10, 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 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.

On appeal, counsel submits a brief in which he states that the Director erroneously denied the Form I-212. Counsel states that according to the decision in *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001) the Service cannot reinstate a deportation order prior to April 1, 1997. In addition counsel refers to the decision in *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) that states that the Service does not have jurisdiction to reinstate deportation orders. Finally, counsel states that based on the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) the applicant is eligible to file a Form I-212 that must be adjudicated before a deportation or removal order can be reinstated.

The AAO concurs with counsel in part. The Ninth Circuit Court of Appeals held in *Castro-Cortez v. INS, supra*, that section 241(a)(5) of the Act was not retroactive and did not apply to illegal reentries that occurred prior to the April 1, 1997, enactment date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, (“IIRIRA”), Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009. The applicant in the present case reentered illegally in April 1998 after the enactment date of IIRIRA and therefore *Castro-Cortez v. INS, supra*, is not applicable in this case.

Pursuant to *Morales-Izquierdo v. Ashcroft, supra*, in the Ninth Circuit only an immigration judge can determine whether an individual is removable under section 241(a)(5) of the Act. The Director does not have jurisdiction over the issue of reinstatement. 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.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft, supra*, 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 [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 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.” Finally the Court states: “... 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...”

Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The AAO agrees with counsel and finds that the Director erred in denying the Form I-212 based on the fact that section 241(a)(5) of the Act is applicable in this case. The applicant is not subject to section 241(a)(5) of the Act and he is eligible to file a Form I-212.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 345 F.3d 683 (9th Cir. 2003).

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. To recapitulate, the applicant was removed from the United States on April 1, 1998. The applicant reentered the United States shortly after his removal without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after his removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C § 1182(a)(9)(C)(i).

Section 212(a)(9)(C) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general.-Any alien who-

((I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or

(II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Attorney General [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless the alien is "seeking admission more than ten years after the date of the alien's last departure." *See* Section 212(a)(9)(C)(ii) of the Act. Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on April 1, 1998, less than ten years ago.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. The applicant in the instant case does not qualify for an

exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212.¹ Accordingly, the appeal will be dismissed.

DECISION: The appeal is dismissed.

¹ The AAO notes that, in dicta, the *Perez-Gonzalez* decision suggests that this required ten-year wait does not apply to an alien who has already returned to the United States. *See Perez-Gonzalez, supra* at 794, note 10. The main point of the footnote discussion, however, is that an alien is no longer inadmissible if she or he obtains consent to reapply for readmission, “prior to reembarkation more than ten years after their last departure.” This main point is certainly correct. However, this does not mean, as the rest of the note seems to suggest, that an alien can avoid the ten year wait, clearly required by the statute, simply by returning immediately to the United States. This reading would deprive section 212(a)(9)(C)(ii) of any impact at all.