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U.S. Citizenship
and Immigration
Services



HW

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: OCT 14 2005

IN RE:

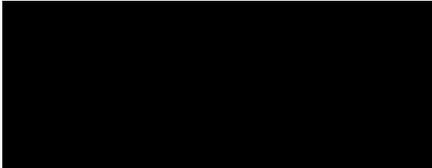
Applicant:



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 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 entered the United States in February 1991 without inspection. The applicant returned to Mexico in April 1997 and on May 25, 1997, at the San Ysidro Port of Entry she attempted to procure admission into the United States by fraud and willful misrepresentation of a material fact. The applicant presented a Guatemalan passport, an Arrival-Departure Record (Form I-94), an Authorization for Parole of an Alien into the United States (Form I-512) and an Employment Authorization Card (Form I-688B) 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 May 26, 1997, 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 in June 1997, 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. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). The record further reflects that the applicant married a U.S. citizen on February 14, 2002, and she is the beneficiary of an approved Petition for Alien Relative (Form I-130). 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.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. See *Director's Decision* dated September 1, 2004.

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, with limited exceptions, 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 states that the Director improperly denied the Form I-212 by falling to consider relevant circumstances set out in case law, and improperly held that the applicant's illegal reentry and continued residence in the United States outweighs positive factors regarding good moral character. In addition counsel asserts that the Service failed to consider the recent Ninth Circuit Court of Appeals decision, [REDACTED] 379 F.3d 783 (9th Cir. 2004).

In [REDACTED] the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The Service's decision also indicated that the alien's prior deportation order was reinstated pursuant to section 241(a)(5) of the Act. The court ruled that the alien, who returned to the United States following a deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The court stated in [REDACTED] "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 applicant in the present case was allowed to file Form I-212 and the Director adjudicated the application pursuant to section 212(a)(9)(A)(iii) of the Act. The application was denied because the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. Although the Director stated in his decision that the warrant of deportation was reinstated the record of proceedings does not contain any documentation initiating reinstatement of the warrant of deportation.

Counsel states that the applicant has never committed any crimes, has never been arrested and has no criminal convictions. In addition counsel submits an affidavit from the applicant's spouse in which he discusses the applicant's character and states that he would suffer extreme emotional hardship if his spouse's application is not granted. He further states that he relies on the applicant's business support and has anxiety over her immigration status.

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.

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), aff'd. 345 F.3d 683 (9th Cir. 2003).

To recapitulate, the applicant was expeditiously removed from the United States on May 26, 1997. The record of proceeding reflects that she reentered the United States in June 1997 without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after her May 26, 1999, removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act.

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

(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 May 26, 1997, 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.