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U.S. Citizenship
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Services

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FILE:

Office: MIAMI (TAMPA)

Date: OCT 20 2006

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, Chief
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 Acting District Director, Miami, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Honduras who entered the United States without a lawful admission or parole on or about June 30, 1988. On July 3, 1988, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and an Order to Show Cause (OSC) for a hearing before an immigration judge was served on him. On May 10, 1990, the applicant failed to appear for the deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge, pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering the United States without inspection. On August 26, 1994, the applicant was deported from the United States. The record reveals that the applicant reentered the United States on an unknown date, but shortly after his deportation, 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). On May 21, 2004, an immigration judge denied the applicant's Motion to Reopen (MTR) his deportation proceedings. The applicant filed an appeal with the Board of Immigration Appeals (BIA). The record of proceeding does not include a decision on the appeal by the BIA. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). He 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.

The Acting District 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. The Acting District Director then denied the Form I-212 accordingly. *See Acting District Director's Decision* dated July 1, 2005.

Section 241(a) of the Act 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.

On appeal, counsel asserts that section 241(a)(5) of the does not apply to the applicant because he was ordered deported in absentia based on a defective deportation order. In addition, counsel states that section 241(a)(5) of the Act cannot be applied retroactively because the applicant entered the United States on or about October 20, 1994, prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303(b)(3), 110 Stat. 3009 (IIRIRA). Finally, counsel states that the applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) and eligible to apply for adjustment of status pursuant to section 245(i) of the Act.

The AAO notes that is has no jurisdiction to review the validity of the order of removal, therefore, the AAO will not address counsel's assertion that the order was defective. Further, while the 9th Circuit Court of Appeals has held that an alien subject to reinstatement of a prior order can file a Form I-212 as long as the

order has not yet been reinstated (*See Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004)), the present case is within the jurisdiction of the 11th Circuit Court of Appeals which has not made a similar holding.

In a recent decision, the Supreme Court of the United States held that section 241(a)(5) of the Act applies to those who reentered the United States prior to the enactment of IIRIRA. *Fernandez-Vargas v. Gonzales*, 548 U.S. ___, 126 S. Ct. 244 (June 22, 2006). The fact that the applicant reentered the United States in 1994 has no effect on whether he is subject to section 241(a)(5) of the Act. No purpose would be served in adjudicating the application for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act as the applicant is not eligible for any relief under the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.