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U.S. Citizenship
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Services

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FILE:



Office: VERMONT SERVICE CENTER

Date: OCT 23 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 Director, Vermont 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 the Dominican Republic who entered the United States without a lawful admission or parole in 1990. On March 3, 1999, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) encountered the applicant after he was arrested for the offense of conspiracy to distribute drugs. On March 31, 1999, a Notice to Appear (NTA) for a removal hearing before an immigration judge was served on the applicant. On April 1, 1999, the applicant was released on a \$5,000 bond. On September 27, 1999, the applicant failed to appear for the removal hearing and he was subsequently ordered removed *in absentia* by an immigration judge pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(A)(i), for having been present in the United States without being admitted or paroled. On October 29, 1999, an immigration judge denied the applicant's Motion to Reopen (MTR) the *in absentia* removal order and on September 19, 2000, a second MTR was denied. An appeal filed with the Board of Immigration Appeals (BIA) was dismissed on March 7, 2001. On July 20, 2001, the applicant was placed on an Order of Supervision (Form I-220B). On March 27, 2002, the United States District Court, Western District of New York transferred a petition for review filed by the applicant in the United States Court of Appeals for the Second Circuit. On October 1, 2002, the Second Circuit Court of Appeals dismissed the petition for review. On the same date the applicant was taken into custody and subsequently, on October 17, 2002, he was removed from the United States. On March 23, 2004, Border Patrol Agents apprehended the applicant. The record reflects that the applicant reentered the United States on or about February 20, 2004, 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 March 23, 2004, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). Consequently, on October 29, 2004, the applicant was removed from the United States. The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen mother. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) 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 and reside with his U.S. citizen children.

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 March 23, 2005.

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

(A) Certain aliens previously removed.-

(ii) Other aliens. - Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such

alien's departure or removal (or within 20 years of such date 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.

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 deterring 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 submits a brief, an affidavit by the applicant's fiancée, a copy of the applicant's mother's and his fiancée's naturalization certificates, copies of a naturalization certificate and alien resident cards belonging to his siblings, a psycho-educational report and documentation showing that one of the applicant's children has learning difficulties, a medical report regarding the other child, and proof that the applicant has obtained a taxpayer identification number and filed an income tax return for the year 2001. In his brief, counsel states that the Director did not sufficiently weigh the fact that the applicant has two U.S. citizen children and ignored their state of health. In addition, counsel states that the applicant's immediate family reside in the United States and that his children need his presence and have been affected by his removal. Finally, counsel states that the applicant's equities outweigh his negative factors. In her affidavit, the applicant's fiancée states that the applicant is an excellent and hard working person. In addition, she states that both their children have learning problems and one suffers from asthma that requires constant supervision. Furthermore, she states that the children are attached to the applicant and need his presence both emotionally and economically.

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).

Before the AAO can review the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. As noted above, the applicant was removed from the United States twice, first on October 17, 2002, and second on October 29, 2004. The applicant reentered the United States after his first 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 applicant is clearly inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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 Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary 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)(II) of the Act may not apply for consent to reapply unless more than ten years have elapsed since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C)(i)(II) 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 October 29, 2004, less than ten years ago. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish eligibility 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. Accordingly, the appeal will be dismissed.

DECISION: The appeal is dismissed.