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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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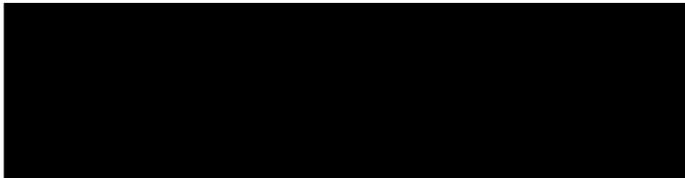
APR 05 2010

IN RE:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Houston Texas, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion to reopen and reconsider is dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Peru who, on June 7, 1998, appeared at the Houston International Airport. The applicant presented her Peruvian passport containing an altered U.S. nonimmigrant visa. The applicant was placed into secondary inspection. The applicant claimed that she was unaware that the visa was fraudulent and stated that she, herself, had applied for the nonimmigrant visa from the U.S. Embassy in Lima, Peru. The nonimmigrant visa had been lifted and altered to reflect the applicant's photograph and biographical information. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and being an immigrant without valid documentation. On June 7, 1998, 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), under her maiden name.

On April 9, 2007, the applicant filed the Form I-212, indicating that she resided in the United States. On April 19, 2007, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of Act, 8 U.S.C. § 1231(a)(5). The applicant had reentered the United States without a lawful admission or parole and without permission to reapply for admission on January 1, 2000. On April 19, 2007, the applicant was removed from the United States and returned to Peru. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for a period of twenty years. 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 reside in the United States with her lawful permanent resident spouse and U.S. citizen child.

The field office director determined 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), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because she had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated August 28, 2007.

On appeal, counsel contended that the field office director erred in finding the applicant inadmissible under section 212(a)(9)(C)(i) of the Act because she had not been properly ordered removed in 1998.¹ Counsel contended that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief*, dated October 29, 2007. In support of his contentions, counsel submitted only the referenced brief.

¹ The AAO notes that the record reflects that the applicant had been properly ordered removed in 1998. Moreover, the AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 1998 and 2007, is eligible for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act.

On May 6, 2009, the AAO dismissed the applicant's appeal because the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The AAO determined that the applicant was not eligible to apply for permission to reapply for admission because she had not remained outside the United States for the required ten years. *Decision of AAO*, dated May 6, 2009.

In his motion to reopen or reconsider, counsel contends that evidence obtained through a Freedom of Information Act (FOIA) reveals that the applicant did not collect her visa from the U.S. Embassy and she did not receive written notice of her removal. Counsel contends that the AAO's denial of the appeal overlooked case law in regard to due process to which the applicant was entitled. *See Form I-290B*, dated June 5, 2009. On the Form I-290B, counsel indicates that he will forward additional evidence and/or a brief within thirty days. The record does not, however, contain any additional evidence and is, therefore, considered complete.²

Section 212(a)(9) 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.
- (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 who 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

² Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. Thus, even if counsel had submitted additional evidence, it would not be considered.

the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. [Emphasis added]

....

(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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subsection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) Requirements for motion to reconsider.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel, in his motion to reopen or reconsider, continues to contend that the applicant utilized the services of a travel agent in order to obtain the nonimmigrant visa and that the evidence revealed through a FOIA supports that assertion; however, the Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A) and the Withdrawal of Application for Admission/Consular Notification (Form I-275) reflect that, at the port of entry, the applicant claimed to have applied for the nonimmigrant visa herself at the U.S. Embassy. At the time of apprehension, the applicant did not claim that she had utilized the services of a travel agent in applying for the nonimmigrant visa and was adamant that she herself had applied for the nonimmigrant visa from the U.S. Embassy. The applicant did not assert at any time that an agent had applied for or received the visa on her behalf. A visa application submitted by an applicant would not be returned to the applicant via an agent if the applicant had submitted the visa application herself. Furthermore, whether or not the applicant was aware that the document she presented was fraudulent is not central to the reason for denying the applicant's Form I-212. The applicant illegally reentered the United States after having been removed and she was removed from the United States because she did not have documentation to enter the United States.

Counsel, in his motion to reopen or reconsider, continues to contend that the applicant was unaware that she was being removed from the United States and that she was not provided with documentation informing her of the removal and the consequences of reentry into the United States. Counsel contends that evidence received in a FOIA establishes that the information packet in regard to the applicant's removal was given to the detention officer escorting her on her trip back to Peru and was directly handed to the Peruvian immigration officer. Counsel contends that the evidence establishes that the applicant was not given the information packet in regard to her removal and she

had no actual or constructive possession of the order. Counsel contends that the removal order does not include evidence that the applicant was advised that she was inadmissible for five years and her signature at the bottom of the Notice to Alien Ordered Removed/Departure Verification (Form I-296) does not constitute sufficient proof that the applicant was given notice that she could not return to the United States for five years. Counsel's contention is unpersuasive. While the copy submitted by counsel reflects that the "original packet" was provided to the detention officer, the record contains a Determination of Inadmissibility (Form I-860) and the Form I-296 that verify the applicant was personally served the notice of inadmissibility and she was free to obtain a translation of such documentation. The Form I-867A also reflects that the applicant was verbally informed that she had committed fraud in her attempt to enter the United States and that she had been ordered removed from the United States. The Form I-867A reflects that the applicant comprehended that she was being ordered removed from the United States.

As such, counsel did not submit evidence or provide information regarding new facts to be provided upon a reopening of the applicant's case. The AAO, therefore, finds that counsel has not met the requirements for a motion to reopen.

Counsel, in his motion to reopen or reconsider, contends that the AAO's denial of the appeal overlooked case law in regard to due process to which the applicant was entitled. As discussed above, the record does not establish that counsel's contentions in regard to the applicant's removal from the United States are substantiated. Moreover, the AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who illegally reentered the United States after having been removed and is, therefore, inadmissible pursuant to section 212(a)(9)(C) of the Act, is eligible for permission to reapply for admission under section 212(a)(9)(C)(ii) or (iii) of the Act.

Counsel did not provide any pertinent precedent decisions to establish an incorrect application of law or policy by the field office director or the AAO. The AAO, therefore, finds that counsel has not met the requirements for a motion to reconsider.

After a careful review of the record, it is concluded that counsel has failed to establish that the contentions and evidence submitted in the motion to reopen and reconsider meet the requirements of a motion to reopen or reconsider. Accordingly, the motion to reopen and reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion to reopen and reconsider is dismissed. The order dismissing the appeal will be affirmed.