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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 and Immigration Services

H4

[redacted]

FILE: [redacted] Office: NEWARK, NJ Date: JUL 30 2010

IN RE: [redacted]

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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Newark, New Jersey, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ecuador who, on November 23, 1995, appeared at the Miami International Airport. The applicant presented his Ecuadorian passport containing a counterfeit ADIT stamp. The applicant was placed into secondary inspection. On the same day, the applicant was placed into immigration proceedings for being inadmissible under 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 for being an immigrant without valid documentation. On January 11, 1996, the immigration judge ordered the applicant removed from the United States. On January 25, 1996, the applicant was removed from the United States and returned to Ecuador.

On February 22, 1997, the applicant married [redacted] a U.S. citizen, in Spring Valley, New York. On May 27, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by Ms. [redacted] The Form I-485 and Form I-130 indicate that the applicant reentered the United States without inspection in February 1996. On December 28, 1999, the Form I-130 and Form I-485 were terminated. On June 15, 2000, Ms. [redacted] divorced the applicant.[1]

On December 3, 2002, the applicant married his current spouse, a naturalized U.S. citizen. On June 23, 2004, the applicant's current spouse filed a Form I-130 on his behalf. On March 25, 2007, the applicant filed a Form I-485 based on the Form I-130. The Form I-485 indicated that the applicant reentered the United States without inspection in February 1996. During an interview in regard to the Form I-485, the applicant testified that he did not return to the United States on February 1996, but rather in January 1997, without inspection. On February 6, 2007, the Form I-130 was approved. On June 7, 2007, the Form I-485 was denied. On March 17, 2008, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212 indicating that he continued to reside in the United States. On October 30, 2009, the Form I-601 was terminated. The applicant is inadmissible under 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 reside in the United States with his naturalized U.S. citizen spouse and three U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion. The field office director determined that the applicant was ineligible to adjust status under 245(i) of the Act. The field office director determined that approval of the applicant's Form I-212 would serve no purpose since the applicant's Form I-601 had been denied and he is inadmissible under section 212(a)(6)(C)(i) of the Act. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision* dated October 30, 2009.

[1] The divorce record indicates that the applicant and Ms. [redacted] separated with the intention of living apart permanently as of the date of marriage, as proven by evidence submitted by Ms. [redacted]

On appeal, counsel contends that the applicant remained outside the United States for more than the one year period required by his removal order.[2] Counsel contends that section 241(a)(5) of the Act should not apply to the applicant because the section was not operative until April 1, 1997.[3] Counsel contends that the regulations permit an applicant to seek *nunc pro tunc* permission to reapply for admission and a waiver of inadmissibility under section 212(i) of the Act. *See Counsel's Letter,* dated December 9, 2009. In support of his contentions, counsel submits the referenced letter, copies of case law and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a) of the Act provides in pertinent part:

> (6) Illegal entrants and immigration violators.-
>
> (A) ALIENS PRESENT WITHOUT admission or parole.-
>
> (i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.
>
> (ii) Exception for certain battered women and children.-Clause (i) shall not apply to an alien who demonstrates that-
>
> (I) the alien qualifies for immigrant status under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1)
>
> (II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

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[2] The AAO finds that, while the applicant asserts that he resided outside the United States for the required one-year period, the record does not contain any evidence to establish his continuous residence outside the United States.

[3] Counsel's contention is unpersuasive. As noted above, the record reflects that the applicant has illegally reentered the United States after April 1, 1997. The case to which counsel cites holds that reinstatement is not impermissibly retroactive. Additionally, the Supreme Court has held that U.S. Immigration and Customs Enforcement (USICE) may reinstate the applicant's prior removal order under section 241(a)(5) of the Act, even though he reentered prior to April 1, 1997, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. *See Fernandez-Vargas v. Gonzales,* 548 U.S. 30, 126 S. Ct. 2422 (U.S. 2006).

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

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 on a 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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

. . . .

(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.
>
> (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—
>
> (1) the alien's battering or subjection to extreme cruelty; and
>
> (2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The AAO notes that an exception to section 212(a)(6)(A)(i) of the Act is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such. While a Form I-130 was filed on behalf of the applicant prior to April 30, 2001, the field office director has determined that the Form I-130 was not approvable when filed. The second Form I-130 was filed on June 23, 2004. Accordingly, the applicant is not the beneficiary of an immigrant visa petition or labor certification filed as of April 30, 2001 that would render his inadmissibility moot pursuant to section 245(i) of the Act. Aliens present within the United States without admission or parole are statutorily ineligible for a waiver of inadmissibility. Therefore, if an alien is present in the United States without admission or parole, the alien is subject to a permanent ground of inadmissibility.

Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(6)(A)(i) of the Act, which are very specific and applicable. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.