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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: CHARLOTTE, NC

Date: MAR 21 2011

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Charlotte, North Carolina, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant is a native and citizen of El Salvador who, on November 25, 1996, filed an Application for Asylum and Withholding of Deportation (Form I-589) indicating that he entered the United States without inspection on September 11, 1995. On February 21, 1997, the applicant's Form I-589 was referred to immigration court and the applicant was placed into immigration proceedings. On April 29, 1999, the applicant withdrew his applications for asylum, withholding of removal and adjustment of status, with prejudice. The immigration judge granted the applicant voluntary departure until October 26, 1999. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On November 15, 2009, 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 his naturalized U.S. citizen spouse. The Form I-485 indicates that the applicant entered the United States without inspection on September 11, 1995. On the same day, the applicant filed the Form I-212. On August 25, 2010, the Form I-485 was denied. 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 remain in the United States and reside with his naturalized U.S. citizen spouse and two U.S. citizen children.

The field office director determined that the applicant is subject to reinstatement provisions under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The field office director determined that an alien subject to reinstatement is ineligible for any relief under the Act. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated August 25, 2010.

On appeal, counsel contends that the reason for denial of the Form I-212 is in error; and the applicant has not reentered the United States and is thus not subject to reinstatement. *See Form I-290B,* dated September 17, 2010. In support of his contentions, counsel submits only the referenced Form I-290B. The entire record was reviewed in rendering a decision in this case.

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 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.

The record reflects that the applicant is not subject to reinstatement under section 241(a)(5) of the Act because he has not yet departed the United States and, therefore, has not executed the removal order. However, pursuant to 8 C.F.R. § 212.2(j), the applicant may apply for advance approval of the Form I-212 as an alien whose departure will execute an order of removal.

Since the applicant's removal order has not yet been executed and the applicant is eligible to apply for permission to reapply for admission into the United States, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 on the basis that the applicant is ineligible for relief under section 241(a)(5) of the Act. The matter shall be remanded to the field office director for a full adjudication of the applications on the merits.[1]

ORDER: The field office director's decision is withdrawn. The application is remanded to the field office director for entry of a new decision that, if adverse to the applicant, shall be certified to the AAO for review.

[1] This decision has no bearing on whether the applicant does or does not warrant a favorable exercise of discretion. The AAO's decision merely withdraws the director's stated basis for the denial of the application and directs the director to review the applicant's Form I-212and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion.