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U.S. Department of Homeland Security
20 Massachusetts Avenue NW, Room 3000
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U.S. Citizenship
and Immigration
Services

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H2.

[Redacted]

FILE:

[Redacted]

Office:

LOS ANGELES, CA

Date: SEP 09 2008

IN RE:

[Redacted]

PETITION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:

[Redacted]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant, a native and citizen of the Philippines, entered the United States in August 1993 using a passport and nonimmigrant visa belonging to another individual. She was thus found inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for entering the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen child, born in June 1995.

The district director concluded that as the applicant did not have a United States citizen or lawful permanent resident spouse or parent, she was statutorily ineligible for a waiver of inadmissibility pursuant to section 212(i) of the Act. The district director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated April 6, 2000.

On appeal, counsel contends that the district director erroneously relied on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) [IIRIRA] enacted section 212(i) provisions, rather than utilizing section 212(i) as it read prior to the enactment of IIRIRA, to support his findings that the applicant did not have a qualifying relative for purposes of a section 212(i) waiver and was thus not eligible for a waiver of inadmissibility. As counsel states,

...The Immigration and Naturalization Service found [redacted] [the applicant] inadmissible pursuant to § 212(a)(6)(C)(i), as one who has previously obtain admission into the United States fraud. This ground of inadmissibility may be cured utilizing a waiver of inadmissibility pursuant to 212(i). This waiver was amended by the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ('IIRIRA'). Prior to the enactment date of IIRIRA, the § 212(i) waiver did not possess a 'extreme hardship' component and included as a qualifying relative a legal permanent resident or United States citizen son or daughter.

[redacted] filed her adjustment of status application on June 27, 1996, prior to the enactment date of IIRIRA, September 30, 1996. The INS denied Mrs. [redacted] Form I-601...because they noted that there was no evidence in the record of a United States citizen or legal permanent resident parent or spouse, pursuant to § 212(i) as amended by IIRIRA.

... [redacted] § 212(i) waiver must be adjudicated utilizing the § 212(i) as it read prior to the enactment of IIRIRA. The filing of [redacted]'s application for adjustment of status prior to the enactment date of IIRIRA dictates that her waiver be adjudicated utilizing § 212(i) as it read prior the enactment of IIRIRA...

Brief in Support of Appeal, dated May 31, 2000.

Counsel asserts that the applicant's I-485 was filed prior to IIRIRA came into effect and that the U.S. Supreme Court decision, *Landgraf v USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L.Ed. 2d. 229 (1994), held that there is a presumption against retroactive statutes. Counsel further states that *Magana-Pizano v. INS*, 200 F.3d 603 (9th Cir. 1999) effectively overturned the holding in *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996) by finding that "...application of AEDPA [the Antiterrorism and Effective Death Penalty Act] to cases pending at the time of the enactment of this Act resulted in a retroactive effect which was impermissible and which was not merely a prospective injunctive relief.... as § 212(c) has been found to not be a prospective injunctive relief and application of this section to pending cases resulted in impermissible retroactive effects, application of § 212(i) to cases pending prior to the enactment of IIRIRA must also result in an impermissible retroactive effect...." *Id.* at 7. Based on the above reasoning, counsel concluded that IIRIRA enacted section 212(i) provisions excluding U.S. citizen children as qualifying relatives should not apply to the applicant.

Counsel's argument is not persuasive. *Landgraf* held that a statute has a retroactive effect when:

[I]t would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf at 280. In the absence of specific language regarding Congress' intent, the intent is discerned through traditional tools of statutory construction. See *Henderson* at 129 (citing *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed. 2d 694 (1984)).

Congress' intent in recent years to limit rather than extend the relief available to aliens who have committed fraud or misrepresentation is clear. In 1986, Congress expanded the reach of the grounds of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, and redesignated as section 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). The Act of 1990 imposed a statutory bar on those who make oral or written misrepresentations in seeking admission into the United States and on those who make material misrepresentations in seeking admission into the United States or in seeking "other benefits" provided under the Act.

In 1990, section 274C of the Act, 8 U.S.C. § 1324c. was added by the Immigration Act of 1990 (Pub. L. No. 101-649, *supra*) for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) states that it is unlawful for any person or entity knowingly "[t]o use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act."

Moreover, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act (Pub. L. No. 103-322, September 13, 1994) which enhanced the criminal penalties of certain offenses, including:

(a) [I]mpersonation in entry document or admission application; [and] evading or trying to evade immigration laws using assumed or fictitious name...
See 18 U.S.C. § 1546.

Magana-Pizano dealt specifically with section 440(d) of AEDPA, which statutorily barred aliens from seeking discretionary 212(c) waiver relief from deportation – a right they possessed previously. *See Magana-Pizano, supra.* *Magana-Pizano* held that “...AEDPA § 440(d)'s bar of discretionary relief previously afforded by INA § 212(c) should not apply to aliens whose deportation proceedings were pending when AEDPA became law and to those who can demonstrate that they entered guilty or *nolo contendere* pleas in reliance upon the relief afforded by INA § 212(c)...” *Magana-Pizano* at 614.

In *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271 (2001), the U.S. Supreme Court clarified that section 212(c) relief remained available to criminal aliens who were aggravated felons and had entered into plea agreements prior to the enactment of AEDPA and IIRIRA. In finding that section 212(c) was available under these specific circumstances, the Supreme Court reasoned that:

IIRIRA’s elimination of § 212(c) relief for people who entered into plea agreements expecting that they would be eligible for such relief clearly attaches a new disability to past transactions or considerations. Plea agreements involve a *quid pro quo* between a criminal defendant and the government, and there is little doubt that alien defendants considering whether to enter into such agreements are acutely aware of their convictions’ immigration consequences. The potential for unfairness to people like *St. Cyr* is significant and manifest. Now that prosecutors have received the benefit of plea agreements, facilitated by the aliens’ belief in their continued eligibility for § 212(c) relief, it would be contrary to considerations of fair notice, reasonable reliance, and settled expectations to hold that IIRIRA deprives them of any possibility of such relief.

St. Cyr at 291.

The *St. Cyr* and *Magano-Pizano* decisions are distinguishable from the case at hand in both the law and the facts. First, the decisions specifically addressed the application of section 212(c) of the Act, as amended by the AEDPA and the IIRIRA. The Supreme Court determined that the ultimate repeal of section 212(c) was not retroactive and that section 212(c) relief remains available to those aliens that entered into plea agreements prior to the repeal. The current matter is based on an application for relief under section 212(i) of the Act, which was made more restrictive by IIRIRA. As opposed to section 212(c), the restrictive amendment of section 212(i) has been found to apply retroactively. *Okpa v. INS*, 266 F.3d 313 (4th Cir, 2001). Moreover, *INS v. St. Cyr* and *Magano-Pizano* specifically related to the settled expectations of individual aliens who enter into plea agreements with the government, not with individual aliens subject to inadmissibility based on fraud and/or misrepresentation. The Fourth Circuit reasoned that to consider whether an alien had a reasonable expectation of a waiver at the time that the alien perpetrated a fraud or made a material misrepresentation would make a mockery of the immigration laws of the United States. *See Okpa, supra.* The reasoning set forth in *Okpa* applies with equal force to the applicant’s case.

Section 212(a)(6)(C) of the Act states, in pertinent part, the following:

(i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states, in pertinent part, the following:

(1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General (Secretary) that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In the instant appeal, the applicant has not established that a qualifying relative for purposes of a Form I-601 waiver under section 212(i) of the Act exists. As such, the instant appeal is dismissed.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether the applicant merits a waiver as a matter of discretion. In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.