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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]

Office: PORTLAND, OREGON

Date: JUL 05 2005

IN RE:

Applicant:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act; 8 U.S.C. §1182(a)(9)(B).

ON BEHALF OF APPLICANT:

[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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The application was denied by the District Director, Portland, Oregon. The case was appealed and subsequently dismissed by the AAO Director, Washington, DC. The matter is now before the AAO on a motion to reopen and/or reconsider. The motion will be granted. The initial decision of the AAO will be withdrawn and the initial district director's decision will be affirmed.

The applicant is a native and citizen of Mexico who was initially found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for more than one year and subsequently re-entering the United States without being admitted. *I-601 Decision of District Director*, dated August 19, 2003. The case was appealed and the AAO dismissed the appeal, however, the AAO stated that the district director erred in finding that the applicant was inadmissible under section 212(a)(9)(C) of the Act and that the applicant is entitled to apply for an extreme hardship waiver pursuant to section 212(a)(9)(B) of the Act, 8 U.S.C. § 1182(a)(9)(B). *Decision of AAO Director*, dated April 29, 2003. Based on this decision, the applicant, through counsel, has filed a motion to reopen and/or reconsider with evidence of eligibility for an extreme hardship waiver.

After careful review of the entire record, the AAO concludes that the initial decision of the district director was correct. The applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act).

Section 212(a)(9)(C)(i) 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.

The record reflects that the applicant entered the United States without inspection in July 1994 and remained until September 2000. He subsequently left in September 2000 and returned in October 2000. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions, until April 23, 2001, the date he filed his application for adjustment of status. *See I-485 Decision of the District Director*, dated May 22, 2002. The AAO finds that the applicant's entry into the United States without inspection in July 1994 constitutes a previous immigration violation which, upon his reentry without inspection into the U.S. in October 2000 after a year of unlawful presence, made the applicant inadmissible under section 212(a)(9)(C)(i).

According to section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii), no relief is available unless the applicant has remained outside of the United States for ten years or he has been battered or subjected to extreme cruelty. The record does not reflect either of these situations. Furthermore, 245(i) does not excuse a violation of section 212(a)(9)(C). The AAO is aware of the judgment in *Perez-Gonzalez v. Ashcroft*, 379

F.3d 783, 793-94 (9<sup>th</sup> Cir. 2004). In this case, the U.S. Ninth Circuit Court of Appeals held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may file, in conjunction with an adjustment application, a Form I-212 to obtain consent to reapply. If, as a matter of discretion, USCIS were to approve the Form I-212, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. Note that *Perez-Gonzalez* did not hold that section 245(i) of the Act itself relieved the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act. Rather, *Perez-Gonzalez* concerned “the availability of adjustment of status once a favorable determination of permission to reapply has been made.” 379 F.3d at 795.

The applicant has not filed a Form I-212 in conjunction with his adjustment application. In many cases, this fact would be a sufficient reason to remand the case to the district director so that the applicant could do so. An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act, however, may not apply for consent to reapply unless the alien is “seeking admission more than 10 years after the date of the alien’s last departure” section 212(a)(9)(C)(ii) of the Act. That is to say, to avoid inadmissibility under section 212(a)(9)(C), it must be the case both that the alien’s last departure was at least 10 years ago and that USCIS has consented to the applicant’s reapplying for admission. The applicant’s last departure was in 2000, considerably less than 10 years ago. As a matter of law, he is not eligible for approval of a Form I-212.

Furthermore, the initial AAO decision determined that the applicant had abandoned his application for adjustment of status as he left the United States without an advance parole document while his I-485 case was pending. *Decision of AAO Director*. at 4. This determination was erroneous in that the applicant did not leave the United States while his I-485 case was pending.

The AAO finds that the applicant is inadmissible under section 212(a)(9)(C) of the Act. Having found that a waiver is inapplicable to this case pursuant to section 212(a)(9)(B) of the Act, no purpose would be served in discussing whether his spouse has established extreme hardship under section 212(a)(9)(B) of the Act.

**DECISION:** The AAO’s decision is withdrawn and the district director’s initial decision is affirmed.