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U.S. Citizenship  
and Immigration  
Services

PHOTOCOPY

H4

DEC 23 2004

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date:

IN RE:

Applicant:

[Redacted]

APPLICATION:

Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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:

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 Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of El Salvador who was present in the United States without a lawful admission or parole on or about July 23, 1994. On July 23, 1994 an Order to Show Cause was issued. On October 3, 1995, the applicant failed to appear for a removal hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). On the same day the District Director, San Francisco, California issued a Warrant of Deportation (Form I-205). The applicant failed to surrender for removal or depart from the United States and is therefore inadmissible pursuant to 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 U.S. citizen spouse and child.

The Director determined that the applicant did not file the application for permission to reapply in conjunction with an application for adjustment of status as required by 8 C.F.R. 212.2(e), and denied the application accordingly. See *Director's Decision* dated December 23, 2003.

The regulation at 8 C.F.R. § 212.2(e) states:

Applicant for adjustment of status. An applicant for adjustment of status under section 245 of the Act and Part 245 of this chapter must request permission to reapply for entry in conjunction with his or her application for adjustment of status. This request is made by filing an application for permission to reapply, Form I-212, with the district director having jurisdiction over the place where the alien resides. If the application under section 245 of the Act has been initiated, renewed, or is pending in a proceeding before an immigration judge, the district director must refer the Form I-212 to the immigration judge for adjudication.

On appeal counsel states that the applicant's case was handled by an immigration consultant who failed to give the Immigration and Naturalization Service (now Citizenship and Immigration Service (CIS)) the requested evidence on time. Counsel further states that the applicant was denied because of the immigration consultant's negligence and that an Application for Permanent Resident Status or Creation of a Record of Lawful Permanent Residence (Form I-485) was filed with INS. Furthermore counsel states that if the applicant were removed from the United States his U.S. citizen wife and child would suffer extreme hardship.

Before the AAO can weigh the favorable and unfavorable factors in this case it must first determine if the application was properly filed. The record of proceeding reveals that the applicant filed a Form I-212 on May 26, 2001, and a Form I-485 on March 12, 2003. The Director denied the application because Forms I-212 and I-485 were not filed at the same time as reflected in the record of proceedings and not due an immigration consultant's negligence in providing evidence on time as stated by counsel.

In the instant case the applications were not filed in conjunction with each other and therefore the Form I-212 cannot be adjudicated.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

The AAO notes that this decision is without prejudice to the filing of a new Form I-212 in conjunction with a new Form I-485.

**ORDER:** The appeal is dismissed.