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**U.S. Citizenship
and Immigration
Services**

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114

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

AUG 25 2005

IN RE:

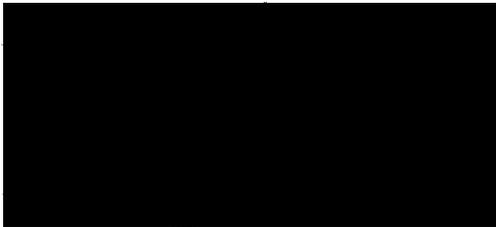
Applicant:



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:



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 for Permission to Reapply for Admission into the United States after Deportation or Removal was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn and the matter remanded to him for further consideration and action.

The applicant is a native and a citizen of Ecuador who was present in the United States without a lawful admission or parole on November 15, 1995. On January 20, 1998, the applicant was served with a Notice to Appear for a removal hearing. On April 22, 1999, the applicant failed to appear for a removal hearing and he was subsequently ordered deported in absentia by an Immigration Judge pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182 (a)(6)(A)(i). The applicant failed to surrender for removal or depart from the United States and on March 25, 2002, he was removed pursuant to section 237(a) of the Act. He is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 travel to the United States and reside with his spouse and child.

The Director determined that the applicant is inadmissible under section 212(a)(6)(B) of the Act and denied the Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *See Director's Decision* dated July 12, 2003.

Section 212(a)(6)(B) of the Act states:

Failure to attend removal proceeding. - Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

There is no waiver available under this section of the Act unless five years have passed since the applicant's departure or removal.

On appeal counsel submits a brief in which he asserts that although the Nebraska Service Center has jurisdiction over adjudicating I-212 waivers for prior deportations they do not have jurisdiction in making a determination of inadmissibility pursuant to section 212(a)(6)(B) of the Act. In support to his assertion counsel submits a memorandum dated June 17, 1997, from the Immigration and Naturalization Service, (now Citizenship and Immigration Services (CIS)) Office of Programs, entitled, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Act*. Counsel states that since the applicant is residing overseas only a Consular Officer has jurisdiction to decide whether section 212(a)(6)(B) of the Act applies to an applicant. Counsel further asserts that the applicant was not properly informed regarding the time, date and place of the removal hearing and was not given the opportunity to show that his failure to attend the removal proceedings was for reasonable cause. Therefore, the applicant should not have been found inadmissible under section 212(a)(6)(B) or the Act.

Counsel's assertions are persuasive. The memorandum cited by counsel states that if an applicant is applying for a visa he or she can establish in an interview with a consular officer that failure to attend or remain in attendance at a removal proceeding was for reasonable cause and therefore, he or she is not inadmissible under section 212(a)(6)(B) of the Act. A review of the record of proceedings reveals that the applicant was

served a Notice to Appear (Form I-862) on January 20, 1998. The Form I-862 indicates the place at which the removal proceedings were to take place but does not indicate the time and date of the proceedings.

Based on the above the AAO finds that the Director did not have the authority to determine whether the applicant is inadmissible under section 212(a)(6)(B) of the Act. The applicant is presently residing in Ecuador applying for a visa and therefore a consular officer must determine if the applicant is inadmissible under section 212(a)(6)(B) of the Act. In addition, the Form I-212 should be filed with the overseas office and should not have been accepted by the Nebraska Service Center.

In view of the foregoing, the Director's decision will be withdrawn. The application is remanded to him in order to reject the Form I-212 as improperly filed and advise the applicant to file an application with the American Consulate overseas.

ORDER: The Director's decision is withdrawn. The matter is remanded to him for further action consisted with the foregoing discussion.