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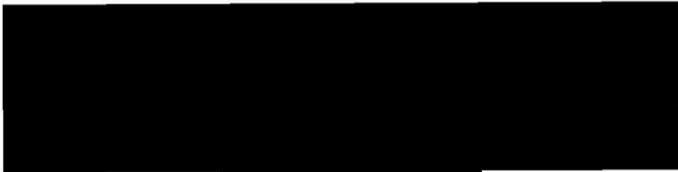
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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Services

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FILE: [Redacted] Office: ATLANTA (CHARLOTTE) Date: AUG 23 2006

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:



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 District Director, Atlanta, Georgia, 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 appeal will be dismissed.

The applicant is a native and citizen of Mexico who immigration officers apprehended on May 20, 1982, after he had entered the United States illegally after having been previously removed. On August 9, 1982, the applicant was convicted of illegally reentering the United States after having been previously removed and was sentenced to 1 year in jail, 94 days of which were suspended in favor of three years of probation. Consequently, the applicant was ordered removed and was returned to Mexico. On August 5, 1990, immigration officers apprehended the applicant after he reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant was allowed to voluntarily return to Mexico. On April 6, 1993, immigration officers apprehended the applicant near Pearce, Arizona, while he was transporting 9 illegal aliens to Rupert, Indiana. The applicant was permitted to voluntarily return to Mexico. On May 15, 1995, the applicant applied for admission to the United States at the Douglas, Arizona, Port of Entry, by applying for an Application for Nonresident Alien's Border Crossing Identification Card (Form I-190). The applicant's application was denied and he was voluntarily returned to Mexico. On July 31, 1997, the applicant applied for admission to the United States at the Douglas, Arizona, Port of Entry, by applying for a Form I-190. The applicant's application was denied and he was voluntarily returned to Mexico. On October 11, 1997, the applicant filed the Form I-212. In April 1998 the applicant entered the United States without a lawful admission or parole and without permission to reapply for admission. On April 2, 2001, 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 behalf of the applicant by his U.S. citizen daughter. The applicant is, therefore, 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 two U.S. citizen daughters.

The district director determined that the applicant was an alien who required permission to reapply for admission into the United States. The district director determined that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) applies in this matter and that no waiver is available for the applicant's inadmissibility under section 212(a)(9)(A)(iii) of the Act. The district director then denied the Form I-212 accordingly. *See District Director's Decision* dated April 26, 2005.

On appeal, counsel contends that section 241(a) of the Act does not apply to the applicant because he is entitled to a determination of the Form I-212 because he is applying for adjustment of status and applied for permission to reapply for admission prior to any decision with regard to reinstatement of the prior removal order. *See Applicant's Brief*, dated May 24, 2005.

Section 241(a) of the Act states in pertinent part:

(5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212 or that the district director reinstated the prior removal order after he denied the Form I-212. As such, the AAO will determine whether the applicant is eligible for relief pursuant to the filing of the Form I-212.

On appeal, counsel contends that the district director incorrectly referred to section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), when he determined that the applicant was inadmissible as an alien who had been arrested and removed and was seeking admission within five years of the removal order. The AAO finds that the district director erred in referring to section 212(a)(6)(B) of the Act since that ground of inadmissibility refers to a five-year bar for an alien who failed to attend an immigration hearing. There is no evidence in the record to suggest the applicant should be classified as such.

Counsel also contends that the applicant is not inadmissible as an alien seeking admission within five years after the execution of the removal order because the applicant only entered the United States in April 1998. As discussed above, the applicant has consistently returned to the United States prior to April 1998, therefore, counsel's assertions are unpersuasive. Finally, counsel contends that, because the applicant filed the Form I-212 prior to his reentry into the United States in April 1998, he complied with the requirement that an alien who has been removed must apply for permission to reapply for admission prior to his embarkation into the United States. As noted above, the applicant returned to the United States on several occasions prior to April 1998 and the Form I-212 was not adjudicated prior to the applicant's unlawful entry into the United States in April 1998.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. As noted previously, the applicant was removed from the United States on August 9, 1982. Prior to August 5, 1990, the applicant reentered the United States after his removal without a lawful admission or parole and without permission to reapply for admission. The applicant was allowed to voluntarily return to Mexico. Prior to April 6, 1993, the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant was allowed to voluntarily return to Mexico. The applicant attempted to enter the United States on May 15, 1995 and July 31, 1997 and was allowed to withdraw his applications and voluntarily return to Mexico on both occasions. In April 1998, the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. The applicant last departed the United States on July 31, 1997 and has remained in the United States since April 1998.

The AAO finds that the applicant is clearly inadmissible under sections 212(a)(9)(A) and 212(a)(9)(C)(i) of the Act and, therefore, must receive permission to reapply for admission.

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 on a 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 has consented to the alien's reapplying for admission.

(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.

(ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

- (B) departure from the United States;
- (C) reentry or reentries into the United States; or
- (D) attempted reentry into the United States.

The record reflects that, on August 9, 1982, the applicant was removed from the United States. In April 1998, the applicant reentered the United States after his removal without a lawful admission or parole and without permission to reapply for admission. Therefore, the applicant is clearly inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The record reflects further that the applicant last departed the United States no earlier than on July 31, 1997. The AAO notes that an exception to section 212(a)(9)(C)(i) of the Act is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than 10 years have elapsed since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that Citizenship and Immigration Services (CIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred no earlier than July 31, 1997, less than ten years ago. He is currently statutorily ineligible to apply for permission to reapply for admission.

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. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed.

ORDER: The appeal is dismissed.