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

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PUBLIC COPY

[REDACTED]

FILE:

[REDACTED]

Office: HOUSTON, TEXAS

Date: JUL 17 2006

IN RE:

Applicant:

[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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the District Director, Houston, Texas, and 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 entered the United States without a lawful admission or parole in May 1997. On July 7, 1997, the applicant was encountered at the Harris County Sheriff's office after he was arrested for driving under the influence. On July 11, 1997, a Notice to Appear (NTA) for a hearing before an immigration judge was served on him, and the applicant was released on a \$10,000 bond. On August 4, 1997, the applicant was ordered removed 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) for having been present in the United States without being admitted or paroled. Consequently, the applicant was removed from the United States on August 6, 1997. The record reflects that the applicant reentered the United States on August 9, 1997, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 District Director determined that the applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having reentered the United States, without being admitted, after having been removed, and is not eligible to file the Form I-212 at this time. The District Director denied the Form I-212 accordingly. *See District Director's Decision* dated October 19, 2004.

Section 212(a)(9)(C) of the Act states in pertinent part:

(C) Aliens unlawfully present after previous immigration violations.-

(i) In general. -Any alien who-

(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 Attorney General [now the Secretary of Homeland Security, "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.

On appeal, counsel submits a brief in which he states that the District Director erred, as a matter of law, in denying the Form I-212 without considering the discretionary factors and in stating that the applicant is not eligible for a waiver because he was found inadmissible pursuant to section 212(a)(9)(C) of the Act. Counsel states that the District Director's decision is contrary to precedent decisions of the Board of Immigration Appeals (BIA) and not respectful of Congress' intent found in section 245(i) of the Act. Counsel further refers to BIA decisions to confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country. In his brief, counsel states that contrary to the District Director's statement that no waiver is available to the applicant, a waiver of inadmissibility under section 212(a)(9)(C) of the Act is found at 8 C.F.R. § 212.2. Counsel refers to the regulations at 8 C.F.R. that state that the District Director has the authority to adjudicate, in conjunction with an adjustment application, a Form I-212 and that the approval of a Form I-212 shall be retroactive to the date on which the alien embarked or reembarked at a place outside the United States. In addition, counsel states that section 245(i) of the Act applies in this case. The applicant is an alien who entered the United States without inspection, a Form I-130 was filed on his behalf after January 14, 1998, and he was physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000. Finally, counsel states that the applicant's removal from the United States and his subsequent unlawful reentry do not trigger a statutory bar to adjustment of status, because a waiver of section 212(a)(9)(C) of the Act is available at 8 C.F.R. § 212.2, and he requests that the District Director's decision be vacated and the case remanded to him in order to adjudicate the Form I-212.

The proceeding in the present case is for an application for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's possible eligibility for adjustment of status under section 245(i) of the Act. The AAO does note, however, that applicants for adjustment of status under section 245(i) of the Act, as with all applicants for adjustment of status, must be admissible to the United States. *Section 245(i)(2)(A) of the Act*. There are exceptions for applicants under 245(i) of the Act, but admissibility under section 212(a)(9)(C) is not one.

The AAO finds that the Director was correct in his finding. As noted above, the applicant was removed from the United States on August 6, 1997. He reentered the United States three days after his removal, without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after his removal, the AAO finds that he is clearly inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act. The AAO notes that the regulations at 8 C.F.R. § 212.2 do state that a waiver pursuant to section 212(a)(9)(C) of the Act is available to an applicant.

However, an alien who is inadmissible under section 212(a)(9)(C)(i)(II) 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)(i)(II) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that CIS has consented to the applicant's reapplying for admission. The applicant 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.