

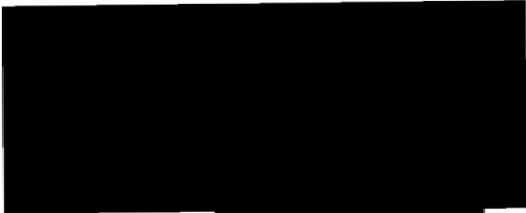
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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: MAR 16 2006

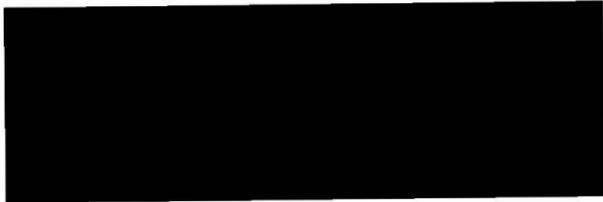
IN RE:

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 (Form I-212) was denied by the Director, California Service Center. A subsequent appeal was sustained and the application approved by the Administrative Appeals Office (AAO). At the request of the Director, the AAO will *sua sponte* reopen the proceedings. The previous AAO decision is withdrawn and the application denied.

The applicant is a native and a citizen of Mexico who entered the United States without a lawful admission or parole in 1986. The Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) apprehended the applicant and on October 20, 1989, an Order to Show Cause (OSC) for a hearing before an Immigration Judge was issued. On December 19, 1989, an Immigration Judge found the applicant deportable pursuant to section 241(a)(2) of the Immigration and Nationality Act (the Act), for entering the United States without inspection, and granted him voluntary departure until June 30, 1990, in lieu of deportation. An appeal to the Board of Immigration Appeals (BIA) was dismissed on June 27, 1994. He was granted thirty days to depart the United States voluntarily. The applicant applied for a stay of deportation that was granted until December 29, 1996. On January 27, 1997, a Warrant of Deportation (Form I-205) was issued. The applicant filed a Motion to Reopen (MTR) with the BIA and a stay of deportation was granted on February 28, 1997, pending a decision on the MTR. On August 1, 1997, the MTR and a motion of a stay of deportation were denied by the BIA. The applicant filed a second MTR on February 2, 1998, which was denied by the BIA on July 20, 1998. The record of proceedings reveals that on September 2, 1998, the applicant departed the United States, executing the pending order of deportation. 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 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 reside in the United States with his U.S. citizen spouse and children.

The Director determined that the applicant was inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of one year or more. In addition the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, and denied the Form I-212 accordingly. *See Director's Decision* dated November 2, 2004. On appeal the AAO determined that the favorable factors in the applicant's case outweighed the unfavorable ones, sustained the appeal and approved the Form I-212. *See AAO Decision*, dated October 7, 2005.

In his request to reopen, the Director states that the applicant reentered the United States subsequent to his September 2, 1998, departure, without a lawful admission or parole and without permission to reapply for admission and, therefore, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I). The Director submits a Form I-130 filed on behalf of the applicant in which he states that he entered the United States on December 24, 2000, without inspection. In addition, the Director submits copies of the applicant's W-2 forms, as well as copies of tax returns for the years 2002, and 2003. Furthermore, the Director submits an Affidavit of Support (Form I-864A) that was signed by the applicant on November 8, 2004, at Chino Hills, California. Finally the Director submits an Application for Immigrant Visa and Alien Registration (Form DS-230) signed by the applicant on October 8, 2004, in which he states that he resides in the United States since October 1998. The AAO notes that none of this information was contained in the record on which its initial decision was based.

Based on the new facts provided, the AAO finds that the applicant reentered the United States after his departure 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) of the Act.

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-

(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.

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 CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on September 2, 1998, less than ten years ago.

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.

**ORDER:** The previous AAO decision is withdrawn and the application denied.