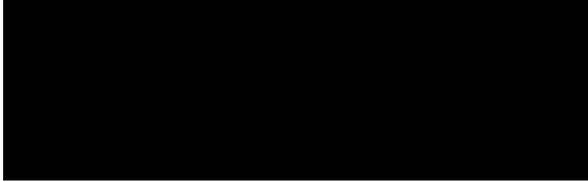




U.S. Citizenship
and Immigration
Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY**

H4



FILE:  Office: NEBRASKA SERVICE CENTER Date: MAY 17 2006

IN RE: 

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, 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, on December 8, 1999, at the Douglas, Arizona, Port of Entry, applied for admission into the United States. The applicant presented an I-186 Border Crossing Card belonging to another. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud. The applicant gave a false name and date of birth. Consequently, on December 8, 1999, the applicant was expeditiously removed from the United States, under the name [REDACTED], pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). On April 17, 2000, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed by the applicant's U.S. citizen spouse. The record reflects that the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to May 30, 2001, the date on which she appeared at CIS' Salt Lake City District Office. On June 4, 2001, the applicant filed the Form I-212. On January 31, 2003, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and the applicant was removed to Mexico on February 6, 2003. The applicant now remains in Mexico. On May 28, 2003, the applicant filed a second Form I-212. The applicant is inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). She 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 re-enter the United States and reside with her U.S. citizen spouse and three U.S. citizen children.

The director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9) of the Act, 8 U.S.C. § 1182(a)(9), for being an alien who seeks admission to the United States after having reentered the United States after having been deported or removed from the United States. The director determined that the applicant was ineligible to apply for permission to reapply for admission. The director then denied the Form I-212 accordingly. *See Director's Decision*, dated October 16, 2003.

On December 16, 2003, the applicant filed a motion to reconsider with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members and that she warranted a favorable exercise of discretion.

On February 4, 2004, the director issued a notice of denial of the motion to reconsider for the same reasons found in the notice of denial of the permission to reapply for admission application.

On March 10, 2004, the applicant filed a second motion to reconsider. On April 14, 2004, the director issued a notice of denial of the second motion to reconsider for the same reasons.

On appeal, counsel states that, while the applicant is inadmissible pursuant to 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 more than one year and seeking readmission within 10 years of her last departure from the United States, she is eligible for a waiver pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). *See Applicant's Brief*, dated June 15, 2004. Counsel also states that the applicant was not given an opportunity to file an Application For Waiver of Grounds of Inadmissibility (Form I-690) pursuant to 8 C.F.R. § 245a.18(c)(1).

The proceedings in the present case are for permission to reapply for admission into the United States after deportation or removal and, therefore, the AAO will not discuss the applicant's grounds of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act. These proceedings are limited to the issue of whether or not the applicant meets the requirements necessary for the ground of inadmissibility under section 212(a)(9)(A) of the Act to be waived.

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 expeditiously removed from the United States on December 8, 1999. The applicant reentered the United States, within five years of her removal, without a lawful admission or parole and without permission to reapply for admission. The applicant was removed under the reinstatement of an order of removal on February 6, 2003.

The AAO finds that the applicant is 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.

(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.

Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, as an alien who reentered the United States without being admitted after having been removed from the United States. The AAO notes that an exception to this ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the ACT. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

Counsel contends that the applicant's Form I-485 is based on the LIFE Legalization Act and that she seeks adjustment under section 245A of the Act. However, the applicant's Form I-485 is based on an approved Form I-130 filed by her U.S. citizen husband. The applicant, therefore, seeks adjustment of status pursuant to section 245 of the Act. An applicant for permanent resident status under section 245A of the Act must establish entry into the United States before January 1, 1982 and continuous residence in the United States in an unlawful status since such date and through May 4, 1988. 8 C.F.R. § 245a.11(b). The AAO notes that the applicant did not enter the United States until 1985 and would, therefore, not qualify as an individual applicant for adjustment of status under section 245A of the Act. The AAO does note that the applicant may have been eligible for adjustment of status through the LIFE Act Amendments Family Unity Provisions. 8 C.F.R. §§ 245a.30 to 245a.37. However, the applicant has never filed an Application for Family Unity Benefits (Form I-817) and her Form I-485 is not based on an approved Form I-817. Alternatively, counsel may be arguing that the applicant is applying for adjustment of status pursuant to section 245(i) of the Act, 8 U.S.C. §1255(i), which is a part of the LIFE Act but is not legalization through the LIFE Act. The applicant has filed a Supplement A to Form I-485 (Form I-485A) and is eligible for the benefits of section 245(i) of the Act because the Form I-130 was filed prior to April 30, 2001. However, section 245(i) of the Act benefits apply to adjustment of status applications under section 245 of the Act and not section 245A of the Act. Moreover, section 245(i) of the Act, which permits an alien who entered the United States without inspection to adjust status, still requires the applicant to be otherwise admissible to the United States. As such, the

applicant is not eligible for a waiver of section 212(a) grounds of inadmissibility pursuant to 8 C.F.R. § 245a.18(c)(1) and counsel's arguments are not relevant to the instant case.

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 February 6, 2003, less than ten years ago. She is currently statutorily ineligible to apply for permission to reapply for admission. The applicant is eligible to re-file the Form I-212 after February 6, 2013, at which time, the applicant will no longer be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act since more than ten years will have passed since her last departure from the United States. However, the applicant will also need to file an Application for Waiver of Grounds of Excludability (Form I-601) for waiver of the 212(a)(6)(C)(i) inadmissibility grounds pursuant to section 212(i) of the Act.

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.