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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAY 19 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: SELF-REPRESENTED

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 Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Nicaragua who entered the United States without a lawful admission or parole in November 1995. On January 17, 1997, the applicant was apprehended by the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) and an Order to Show Cause (OSC) for a hearing before an immigration judge was issued. On March 11, 1997, an immigration judge ordered the applicant deported from the United States pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act) for having entered the United States without inspection. Consequently on June 13, 1997, the applicant was deported to Nicaragua. The record reflects that the applicant reentered the United States on or about August 24, 2001, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). On October 15, 2004, the applicant appeared at a CIS office for a scheduled interview regarding a Petition for Alien Relative (Form I-130) filed by his U.S. citizen spouse. On the same day 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 as a result, on November 18, 2004, the applicant was removed to Nicaragua. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) and 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 U.S. citizen spouse and child.

The Director determined that section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) applies in this matter and the applicant is not eligible for any relief or benefit from his Form I-212. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated March 9, 2005.

On appeal, filed by the applicant's spouse, she states that the applicant has not returned to the United States since his removal in November 2004 and she has visited him in Nicaragua twice since his removal. The applicant's spouse submits documentary evidence to show that the applicant is residing in Nicaragua. In addition, the applicant's spouse states that she and the applicant have a child together and they would like to be able to reside in the United States. Finally, she states that the applicant has a job offer upon receiving his legal residency.

The AAO finds that the Director erred in finding that section 241(a)(5) of the Act applies in this case. The record of proceedings does not reflect that the applicant re-entered the United States after his second removal of November 18, 2004. The applicant's spouse states that the applicant resides in Nicaragua and presents documents to show that the applicant has not returned to the United States since his removal. Although the applicant is not subject to section 241(a)(5) of the Act, he is clearly inadmissible under section 212(a)(9)(A) of the Act and, therefore, must receive permission to reapply for admission.

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

(A) Certain aliens previously removed.-

....

(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 . . . [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 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.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the District or Service Center Director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

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. To recapitulate, the applicant was removed from the United States on June 13, 1997. The applicant reentered the United States 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 the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C § 1182(a)(9)(C)(i).

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 ten 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 November 18, 2004, considerably less than ten years ago. 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.

DECISION: The appeal is dismissed.