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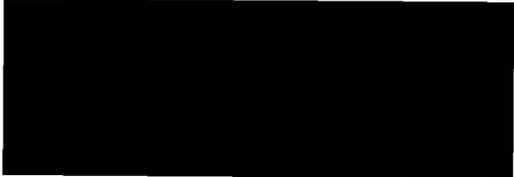
U.S. Department of Homeland Security  
20 Mass, Rm. A3042, 425 I Street, N.W.  
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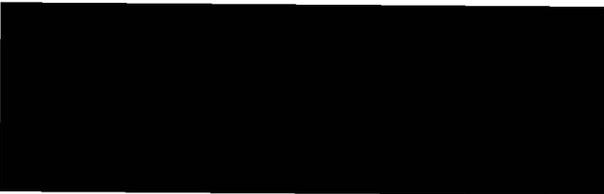


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 08 2005  
WAC-00-146-51912

IN RE: Applicant: [Redacted]

APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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, and is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn and the matter remanded to him for further consideration and action.

The applicant is a native and a citizen of Mexico who was admitted to the United States as a Lawful Permanent Resident (LPR) on December 1, 1990. On April 29, 1998, the applicant was convicted in the Orange County Superior Court of California, State of California, of the offense of driving under the influence (DUI) and was sentenced to one year and four months imprisonment. The applicant was placed in removal proceedings and an Immigration Judge determined that based on the evidence provided the applicant had been convicted of an aggravated felony and he was statutorily ineligible for any form of relief under the INA. The applicant was ordered removed to Mexico under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (the Act), and was removed on January 22, 1999. The applicant is therefore inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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).

The Director determined that since the applicant was a former LPR and was convicted of an aggravated felony, he is not eligible for any exception or waiver of the Act and denied the Form I-212 accordingly. *See Director's Decision* dated February 4, 2004.

On appeal, counsel states that *Matter of Ramos* 23 I&N Dec. 336 (BIA 2002) overruled previous BIA decisions and a conviction of driving under the influence is no longer an aggravated felony. As such, his application to reapply for admission into the United States after removal should be approved.

*Matter of Ramos, supra*, overruled *Matter of Puente*, Interim Decision 3412 (BIA 1999) and *Matter of Magallanes*, Interim Decision 3341 (BIA 1998) and states in pertinent part:

In cases arising in circuits where the federal court of appeals has not decided whether the offense of driving under the influence is a crime of violence under 18 U.S.C. § 16(b) (2000), an offense will be considered a crime of violence if it is committed at least recklessly and involves a substantial risk that the perpetrator may resort to the use of force to carry out the crime; otherwise, where the circuit court has ruled on the issue, the law of the circuit will be applied to cases arising in that jurisdiction.

In the instant case the applicant was convicted under section 23152(a) of the California Vehicle Code, which states that it is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle. The 9<sup>th</sup> Circuit has not found that the offense of driving under the influence is considered a crime of violence. In *Montiel-Barraza v. I.N.S.* 275 F. 3d. 1178 (Jan 2002) the 9<sup>th</sup> Circuit found that a conviction under section 23152(a) was not a crime of violence. Based on the above facts, the AAO finds that counsel was correct in stating that the applicant's conviction is no longer an aggravated felony.

However, the AAO does not have jurisdiction over the Immigration Judge's ruling and cannot change the fact that the applicant was removed from the United States on January 22, 1999. Therefore, he remains

inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act. He is, however, eligible to file the current Form I-212.

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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record of proceedings reflects that the applicant's parents are Lawful Permanent Residents (LPR's) of the United States. In addition on his Form I-212 the applicant states that he is married and has one son. No evidence of their immigration status was submitted with the application. Furthermore, in a letter dated October 18, 2002, the applicant states that he is in the process of getting a police clearance from the La Hanbra Police Station and he will be providing documentation regarding three cases.

The Director found the applicant ineligible for any exception or waiver of the Act and did not weigh the favorable and unfavorable factors of the case. Since the AAO has found the applicant eligible to file a waiver, pursuant to section 212(a)(9)(A)(iii) of the Act, the District Director's decision will be withdrawn and the record will be remanded to him in order to produce a new decision on the merits of the case and to allow the applicant the opportunity to submit evidence to demonstrate that he is eligible for the benefit sought, and that a favorable exercise of the Secretary's discretion is warranted.

The AAO notes that the applicant has another service file under number [redacted] that should be consolidated with service file [redacted] before a decision on the Form I-212 can be made.

**ORDER:** The matter is remanded to the Director for further action consistent with the foregoing discussion.