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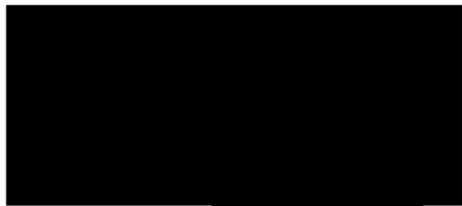
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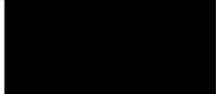
U.S. Citizenship
and Immigration
Services

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FILE:



Office: SAN ANTONIO, TEXAS

Date: OCT 23 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:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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, San Antonio, 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 1982. On July 24, 1996, in the County Criminal Court at Law No. 11 of Harris County, Texas, the applicant was convicted of the offense of possession of 0.01 ounces of marijuana. On December 29, 1999, a Notice to Appear (NTA) for a hearing before an immigration judge was served on him, and the applicant was released on a \$2,500 bond on January 25, 2000. The record of proceeding reflects that an immigration judge found the applicant removable 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, and granted him voluntary departure until August 16, 2000, in lieu of removal. The record further reflects that the applicant departed the United States on August 16, 2000. On February 14, 2002, the applicant reentered without a lawful admission or parole. On February 17, 2002, the applicant was apprehended and an NTA was served on him. On August 16, 2004, the applicant was ordered removed by an immigration judge, pursuant to section 212(a)(6)(A)(i) of the Act. Consequently, on November 22, 2004, the applicant was removed from the United States. 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 travel to the United States and reside with his U.S. citizen spouse and children.

The District 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 application. In addition, the District Director determined 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), for been unlawfully present in the United States for an aggregate period of more than one year, and section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of a violation of any law or regulation relating to a controlled substance. Finally, the District Director found that the applicant did not submit an Application for Waiver of Grounds of Inadmissibility (Form I-601) simultaneously with the Form I-212 as required by the regulation at 8 C.F.R. 212.2(d). The District Director concluded that the applicant is mandatorily inadmissible to the United States and no purpose would be served in granting the Form I-212. The District Director then denied the Form I-212 accordingly. *See District Director's Decision* dated June 25, 2005.

The AAO notes that it is not clear from the record of proceeding if section 241(a)(5) of the Act applies in this case. The applicant and his spouse state that he resides in Mexico. The applicant did not complete the Form I-212 by himself, so the individual who filled out the Form I-212 may have used the applicant's address in the United States in error. Since it is not clear whether the applicant has reentered the United States the AAO will not address the issue of reinstatement, but will dismiss the appeal on other grounds.

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, or

(II) departed the United States while an order of removal was outstanding, and 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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission, reflects that Congress has; (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others; (2) has added a bar to admissibility for aliens who are unlawfully present in the United States; (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

On appeal, the applicant states that since his removal from the United States he resides in Mexico and has not attempted to reenter the United States. In addition, the applicant states that before his removal he was the primary caretaker for his family, working as a mechanic. The applicant further states that his children miss him and it has been very difficult to endure the absence of his family. Additionally, the applicant states that he always has been a responsible father as well as a good example to them. Finally, the applicant requests that the appeal be granted in order to reunite him with his family.

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 entered the United States without inspection in 1982 and departed on August 16, 2000. The applicant accrued unlawful presence in the United States for a period of one year or more. The applicant accrued unlawful presence from April 1, 1997, enactment date of the IIRIRA, until the date of his departure from the United States. Therefore, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(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 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.

In its February 23, 2006, decision, *Acosta v. Gonzales* 439 F.3d 550 (9th Cir. 2006), the Ninth Circuit Court of Appeals concluded that there was no principled reason to treat aliens who are inadmissible under section 212(a)(9)(C)(i)(I) differently from those inadmissible under section 212(a)(9)(C)(i)(II) of the Act. 439 F.3d at 554.

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)(i) 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 22, 2004, 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 eligibility 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.