



U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: SAN ANTONIO, TEXAS

Date: JAN 18 2007

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, 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 The District Director's decision will be withdrawn, and the appeal dismissed.

The applicant is a native and citizen of El Salvador who entered the United States without a lawful admission or parole on or about July 1, 1981. On or about July 16, 1982, the applicant filed a Request for Asylum in the United States (Form I-589) with the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)). On April 15, 1983, his Form I-589 was automatically terminated due to lack of prosecution. The record reflects that the applicant departed the United States on an unknown date and reentered without a lawful admission or parole on May 10, 1996. The applicant was apprehended and on May 14, 1996, an Order to Show Cause (OSC) for a deportation hearing before an immigration judge was served on him. On September 19, 1996, the applicant failed to appear for the deportation hearing and he was subsequently ordered deported *in absentia* by an immigration judge pursuant to section 241(a)(1)(B) of the Immigration and Nationality Act (the Act), for having entered the United States without inspection. On August 28, 1997, a Warrant of Deportation (Form I-205) was issued. On October 19, 2004, the applicant appeared at a CIS office and was taken into custody. On October 29, 2004, the applicant filed a Motion to Reopen (MTR) deportation proceedings and a request for stay of deportation. On November 11, 2004, an immigration judge denied the MTR. Consequently on January 14, 2005, the applicant was removed from the United States. 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 now 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 Lawful Permanent Resident children.

The District Director determined that the applicant is inadmissible under section 212(a)(6)(B) of the Act, 8 U.S.C. § 1182(a)(6)(B), for failing to attend his deportation hearing, and denied the Form I-212 accordingly. *See District Director's Decision* dated December 16, 2005.

Section 212(a)(6)(B) of the Act states:

Failure to attend removal proceeding. - Any alien who without reasonable cause fails or refuses to attend or remain in attendance at a proceeding to determine the alien's inadmissibility or deportability and who seeks admission to the United States within 5 years of such alien's subsequent departure or removal is inadmissible.

On appeal, counsel submits a brief in which he asserts that the District Director erred in stating that the applicant is subject to section 212(a)(6)(B) of the Act and that he failed to consider the merits of the waiver application. In support of his assertion, counsel submits a copy of a memorandum dated June 17, 1997, from CIS, Office of Programs, entitled, *Additional Guidance for Implementing Sections 212(a)(6) and 212(a)(9) of the Act*, which states: ". . . any alien placed in deportation or exclusion proceedings before April 1, 1997, will not be considered inadmissible under section 212(a)(6)(B) of the Act for failure to attend the removal hearing. . ." Counsel states that since the applicant was served with an OSC in 1996 and an immigration judge issued an *in absentia* order on September 19, 1996, the applicant is not subject to section 212(a)(6)(B) of the Act.

The AAO agrees with counsel and finds the District Director erred in finding that section 212(a)(6)(B) of the Act applies in this case. The memorandum cited by counsel clearly states that an alien placed in deportation proceedings before April 1, 1997 is not subject to section 212(a)(6)(B) of the Act. Although the applicant is not subject to section 212(a)(6)(B) 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, 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.

Before the AAO can weigh the discretionary factors in this case, it must first determine if the Form I-212 was filed with the proper office. To recapitulate, the applicant was ordered deported from the United States on September 19, 1996, and he was removed on January 14, 2005. The applicant was unlawfully present in the United States from April 1, 1997, the date calculation for unlawful presence begins, until the date of his departure. It was this departure that triggered his inadmissibility for unlawful presence. Consequently, he accrued unlawful presence for a period of more than one year and, therefore, the applicant is clearly 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 one year or more. Accordingly, the applicant is required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(v) Waiver. – The Secretary has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Secretary that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The regulation at 8 C.F.R. 212.2(d) states in pertinent part:

Except as provided in paragraph (g)(3) of this section, an applicant for an immigrant visa who is not physically present in the United States and who requires permission to reapply must file Form I-212 with the district director having jurisdiction over the place where the deportation or removal proceedings were held. If the applicant also requires a waiver under section 212(g), (h), or (i) of the Act, Form I-601, Application for Waiver of Grounds of Excludability, must be filed simultaneously with the Form I-212 with the American consul having jurisdiction over the alien's place of residence. The consul must forward these forms to the appropriate Service office abroad with jurisdiction over the area within which the consul is located.

The regulation at 8 C.F.R. 103.2 states in pertinent part:

Applications, petitions, and other documents.

*(a) Filing-(1) General.* Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

The applicant is presently residing in El Salvador. He requires waivers of grounds of inadmissibility under sections 212(a)(9)(B)(v) of the Act, and 212(a)(9)(A)(iii) of the Act. Pursuant to the regulation at 8 C.F.R. 212.2(d), he must file Forms I-601 and I-212 with the American consul having jurisdiction over his place of residence.

The AAO finds that the Form I-212 was not filed with the office that had jurisdiction to adjudicate it. In view of the foregoing, the District Director's decision will be withdrawn as he did not have jurisdiction.

**ORDER:** The appeal is dismissed.