U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 10 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:

[redacted]

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 Mexico who first entered the United States on August 5, 1989, as a nonimmigrant visitor for pleasure. The applicant overstayed her authorized period of stay and in August 1997 she traveled to Mexico due to a family emergency. On August 28, 1997, at the San Ysidro, California, Port of Entry, she applied for admission into the United States. The applicant presented a counterfeit Temporary Border Crossing Card (Form I-190). She 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, and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I), for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently, on August 29, 1997, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on or about September 2, 1997, without a lawful admission or parole and without permission to reapply for admission, in violation of section 276 of the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed by her Lawful Permanent Resident (LPR) spouse. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i) 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 remain in the United States and reside with her LPR spouse and U.S. citizen children.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. In addition, the Director determined that the applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II) for being unlawfully present in the United States after a previous immigration violation and not eligible to apply for a wavier for a period of ten years. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated October 11, 2005.

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

> (A) Certain aliens previously removed.-
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> > (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.
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> > (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, counsel submits a brief, letters from the applicant's children, an Individualized Educational Plan for one of the applicant's children and letters of recommendation attesting to her good moral character. Counsel states that the Director erred in denying the Form I-212 that had previously been approved. According to counsel no new facts had been presented and the applicant has shown that her family would suffer hardship. In his brief, counsel does not dispute the fact that the applicant was stopped by immigration authorities in August of 1997, but states that she was allowed to return to Mexico voluntarily. Later in his brief, counsel then contradicts his statement and states that the applicant had a previous expedited removal order. In addition, counsel states that in September of 2004 Citizenship and Immigration Services (CIS) determined that a Form I-212 was not required but in October 2005 CIS reopened the matter, revoked the previous decision and denied the Form I-212. Counsel does not dispute the fact that the applicant reentered the United States after her removal but states that she had no other choice because otherwise her children would have been abandoned in the United States without her. Counsel asserts that in his decision the Director states that the equities the applicant presented were gained while she was in unlawful status and, therefore, the applicant is not eligible for the relief sought. Additionally, counsel states that there is no section of the Act or of the Code of Federal Regulations that require that favorable factors be gained while an applicant is in lawful status. Finally, counsel requests that the Form I-212 be granted because the applicant has been in the United States for over 16 years, she is married to a U.S. citizen and has U.S. citizen children, has no arrests or problems with law enforcement authorities, and her family would suffer extreme hardship if she is removed from the United States.

Counsel's assertion regarding the Director's error in denying a previously approved application, is not persuasive. Pursuant to the regulations at 8 C.F.R. § 103.5, the Director may reopen the proceeding or reconsider a prior decision. The AAO notes that CIS did not determine that a Form I-212 was not required in the applicant's case but rather granted a Form I-212, on September 10, 1994, under service file [redacted] which did not contain information about the applicant's expedited removal order. In addition, the AAO notes that although counsel states that the applicant is married to a U.S. citizen, he did not present any documentary evidence to support his statement. The record contains no evidence that the applicant's spouse is a U.S. citizen.

Before the AAO can review the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. As noted above, the applicant was expeditiously removed from the United States on August 29, 1997. She reentered the United States on or about September 2, 1997, without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after her removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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-

(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)(II) 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)(i)(II) 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 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.