U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: SEP 20 2013 Office: SAN JOSE FILE: [redacted]

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) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Field Office Director, San Jose, California, 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 attempted to procure entry to the United States in December 1996 by presenting an altered Form I-551 stamp. The applicant was ordered excluded and deported from the United States on December 24, 1996. *Order of the Immigration Judge,* dated December 24, 1996 and *Notice to Alien Ordered Excluded by Immigration Judge,* dated December 24, 1996. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 reside in the United States with his U.S. citizen spouse.

The Field Office Director determined that the applicant had not resided outside of the United States for the required five years and thus was statutorily ineligible to seek an exception from his inadmissibility under section 212(a)(9)(A) of the Act. The applicant's Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) was denied accordingly. *See Field Office Director's Decision,* dated October 16, 2012.

On appeal counsel submits a brief, medical documentation pertaining to the applicant and his spouse and a request by counsel to the Social Security Administration, dated November 16, 2012, for the release of any information regarding the applicant and his spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9). Aliens previously removed.-

(A) Certain alien previously removed.-

(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 5 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.

(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 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

As the record establishes, the applicant was excluded and deported on December 24, 1996. He is therefore inadmissible under section 212(a)(9)(A)(ii)(I) of the Act as an Other Alien based on the regulations in effect prior to IIRAIRA (Illegal Immigration Reform and Immigrant Responsibility Act of 1996). The field office director erred in finding the applicant inadmissible under 212(a)(9)(A)(i) of the Act as the record does not indicate that the applicant was removed as an inadmissible alien through expedited removal. Nor does the record indicate that the applicant was removed from the United States as an inadmissible arriving alien under section 240 of the INA. The AAO notes that section 240 of the INA was added by IIRAIRA, which became effective in April 1997- as noted in footnote 29.2 of Chapter 4 of the INA-Inspection; Apprehension; Examination; Exclusion; and Removal- after the applicant was excluded and deported. The AAO finds that the field office director also erred in concluding that as the applicant had not resided outside of the United States for the required five years, he was statutorily ineligible to seek an to seek an exception from his inadmissibility under section 212(a)(9)(A) of the Act. The applicant is eligible to apply for permission to reapply within ten years, pursuant to section 212(a)(9)(A)(ii) of the Act, as section 212(a)(9)(iii) of the Act permits such an application within the period prescribed. *See Form I-212 Instructions.*

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or willful misrepresentation, and his waiver application under section 212(i) of the Act was denied[1], no purpose would be served in considering his application for permission to reapply for admission at this time. Accordingly, the appeal of the field office director's denial of the Form I-212 is dismissed as a matter of discretion.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[1] The AAO notes that the applicant's appeal of the Form I-601 denial is being dismissed in a separate decision.