(b)(6)

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

[redacted]

Date: APR 22 2014 Office: NEBRASKA SERVICE CENTER 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,

Ellen C. Johnson

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the matter 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 was found to be inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act for illegally reentering the United States after being unlawfully present for more than one year. The applicant is married to a U.S. citizen and seeks permission to reenter the United States after his removal in order to reside with his wife and children in the United States.

The director found that ten years have not elapsed since the date of the applicant's last departure and denied the application accordingly.

On appeal, counsel contends that USCIS erred by not addressing the applicant's eligibility to seek permission to reenter the United States in accordance with 8 C.F.R. § 212.2(a) and numerous other regulations. Counsel also contends the applicant's wife has suffered exceptional and extremely unusual hardship since the applicant's departure from the United States.

Section 212(a)(9) 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 Secretary of Homeland Security has consented to the alien's reapplying for admission.

> (iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--
>
> > (I) the alien's battering or subjection to extreme cruelty; and
> >
> > (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

In this case, the record shows that the applicant entered the United States without inspection in August 1997 and departed the United States in December 2002. The record further shows that the applicant illegally reentered the United States without being admitted in February 2003 and departed in September 2008. Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act for reentering the United States without being admitted after being unlawfully present in the United States for an aggregate period of more than one year. Counsel does not contest this finding of inadmissibility on appeal. There is no evidence in the record that the applicant is a VAWA self-petitioner and, therefore, there is no waiver available for this ground of inadmissibility.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten years 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); *see also Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, the BIA has held that it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States, and USCIS has consented to the applicant's reapplying for admission.

In the present matter, the applicant's last departure from the United States occurred in September 2008. Therefore, the applicant has not remained outside the United States for 10 years since his last departure. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Counsel's reliance on numerous regulations for the proposition that the applicant is eligible to apply for permission to reapply for admission is incorrect. The regulations at 8 C.F.R. § 212.2(a) and (b) are applicable to aliens who have been removed from the United States and are, therefore, inadmissible to the United States under section 212(a)(9)(A) of the Act. *See* § 212(a)(9)(A)(i) of the Act ("Any alien who has been ordered removed under § 1225(b)(1) of this title [235(b)(1) of the Act] or at the end of proceedings under § 1229a of this title [240 of the Act] 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."). 8 C.F.R. § 212.2(e) is only applicable, as counsel states in his brief, to aliens seeking to adjust status from within the United

States. These regulations are simply inapplicable to the applicant's case. In the instant case, the applicant has not been removed and he is no longer residing within the United States. Rather, the applicant resided in the United States for five years after entering without inspection, and then subsequently reentered the United States without being admitted, rendering him inadmissible under section 212(a)(9)(C)(i)(I) of the Act. Section 212(a)(9)(C) was enacted pursuant to section 301(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) with the purpose of singling out recidivist immigration violators to make it more difficult for them to be admitted to the United States after having departed. *See In Re Briones*, 24 I&N Dec. 355, 358 (BIA 2007). After the applicant has remained outside the United States for ten years after his last departure, he will be eligible to apply for permission to reapply for admission to the United States through consular processing.

Similarly, 8 C.F.R. § 212.7(d) is also inapplicable in this case. As counsel states, this regulation governs the admissibility of aliens convicted of violent or dangerous crimes. The applicant in this case has not been convicted of a violent or dangerous crime and, therefore, this regulation does not apply. Counsel's reliance on 8 C.F.R. § 287.3 and 8 C.F.R. § 287.8(b)(1) and (2), and his contention that an apprehension at the border, alone, is insufficient to constitute a valid order of removal are also inapplicable as the applicant has not been apprehended at the border or issued an order of removal.

As the director found, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act for re-entering the United States without being admitted after being unlawfully present in the United States for an aggregate period of more than one year. The applicant's last departure from the United States occurred in September 2008. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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.