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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. NW MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H2

DATE: **AUG 08 2012**

OFFICE: BOISE, IDAHO

File: 

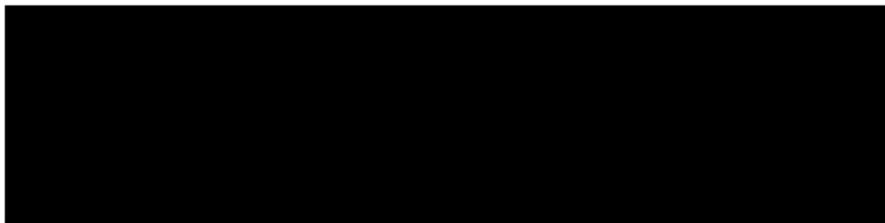
IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(h)
of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Boise, Idaho 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 was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crime involving moral turpitude.¹ The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen spouse and children. The applicant is additionally inadmissible under section 212(a)(9)(C) of the Act for having been ordered removed under section 235(b)(1) or section 240 of the Act and entering the United States thereafter without being admitted.

The Field Office Director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *See Decision of the Field Office Director*, dated August 20, 2009.

On appeal counsel asserts that the Field Office Director erred in determining that the applicant and his family members will not suffer extreme hardship; overlooked hardships and failed to consider all relevant factors; failed to give proper consideration to hardships facing the applicant's children; and improperly discounted hardships the applicant and his family will suffer. *See Form I-290B, Notice of Appeal or Motion*, received September 21, 2009.²

The record contains, but is not limited to: Forms I-290B and counsel's briefs in support of Form I-601 and Form I-212 appeals; various immigration applications and petitions; a hardship declaration; the applicant's declaration; supporting letters from family and friends; medical-related records and internet printouts about bipolar disorder; tax and financial records; family records and photos; the applicant's criminal record; and records concerning his multiple unlawful entries, inadmissibility, removal, and reinstatement of final removal order. The entire record was reviewed and considered in rendering this decision on the appeal.

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

....
(C) Aliens unlawfully present after previous immigration violations.-

¹ The Field Office Director states that the applicant is inadmissible under section 212(a)(2)(A)(i)(I) "after having been convicted of an aggravated felony." The AAO notes that the applicant is inadmissible under section 212(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, not for having been convicted of an aggravated felony.

² Counsel further asserts that the applicant's domestic battery conviction does not constitute a conviction for an aggravated felony. *See Counsel's Appeals Briefs*, dated October 19, 2009. Whether the applicant was convicted of an aggravated felony is irrelevant to the present adjudication and will not, therefore, be addressed by the AAO.

(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 has consented to the alien's reapplying for admission.

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). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, 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* U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission.

In the present matter, the applicant is inadmissible under section 212(a)(9)(C) of the Act due to the fact that he was removed from the United States on December 20, 2001, for a period of 5 years, and again on May 26, 2004, for a period of 20 years, and he re-entered the United States without inspection on March 28, 2004 and most recently in January 2005. The record contains no documentary evidence that the applicant has departed the United States after his May 26, 2004 removal. As the applicant has not been outside of the United States for a total of ten years, he is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating his waiver under section 212(h) of the Act.

Section 291 of the Act, 8 U.S.C. §1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case has not met that burden, in that he has not shown that a purpose would be served in adjudicating his waiver under section 212(h) of the Act due to his inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.