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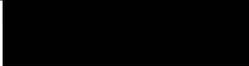
**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: New York, NY

Date:

FEB 20 2009

IN RE:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The District Director, New York City, New York, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on March 6, 1995, was placed in immigration proceedings after entering the United States without inspection in 1991. On June 15, 1995, the immigration judge granted the applicant voluntary departure until December 15, 1995. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On August 31, 1995, the applicant married his then lawful permanent resident spouse, [REDACTED]. On November 20, 1995, the applicant's spouse filed a Petition for Alien Relative (Form I-130), which was approved on August 15, 1996. On September 27, 1996, [REDACTED] became a naturalized U.S. citizen. On September 30, 1996, the applicant filed a motion to reopen before the immigration judge, which was denied on February 20, 1997. On August 26, 1997, a warrant for the applicant's removal was issued. Despite being issued a notice to report for removal, the applicant failed to present himself for deportation or to depart the United States. On October 22, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the approved Form I-130. In October 2003, immigration officers apprehended the applicant. On October 31, 2003, the applicant filed another motion to reopen with the immigration judge, which was denied on November 24, 2003. On December 13, 2003, the applicant was removed from the United States and returned to Mexico where he has since resided. On April 26, 2004, the applicant filed a Form I-212. On November 11, 2005, the Director, Vermont Service Center, denied the Form I-212. The applicant appealed the denial of the Form I-212 to this office. On December 15, 2006, this office dismissed the applicant's appeal. On March 1, 2007, the applicant filed the Form I-212 in conjunction with an Application for Waiver of Inadmissibility (Form I-601) with the U.S. consulate having jurisdiction over his place of residence in Mexico. On March 11, 2008, the U.S. Consulate returned both the Form I-212 and Form I-601 to the applicant, indicating that he was not required to file a Form I-601 and the Form I-212 could be filed with U.S. Citizenship and Immigration Services' (USCIS) New York District Office. On June 2, 2008, the applicant refilled the Form I-212. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 return to the United States and reside with his U.S. citizen spouse and children.

The district director determined that the unfavorable factors outweighed the favorable factors in the applicant's case and denied the Form I-212 accordingly. *See District Director's Decision* dated July 1, 2008.

On appeal, counsel contends that the district director failed to correctly apply case law to her analysis of the applicant's case. Counsel contends that the district director incorrectly found facts to be negative factors in the applicant's case. Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Memorandum of Law*, dated December 19, 2008. In support of her contentions, counsel submits only the referenced memorandum of law. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens 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 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.
- (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 on a 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 Secretary has consented to the alien's reapplying for admission.

Counsel, the applicant and his spouse assert that the applicant has remained outside the United States and lived in Mexico since he was removed on December 13, 2003. The record reflects that the approved Form I-130 has been forwarded to the NVC for processing of the applicant's immigrant visa at a U.S. Consulate abroad. The AAO finds the evidence of record sufficient to establish that the applicant is waiting to consular process his immigrant visa at a U.S. Consulate in Mexico.

The AAO finds that the U.S. Consulate in Ciudad Juarez was incorrect in finding that the applicant was not required to file a Form I-601. The Consulate found that the applicant had not accumulated more than one year of unlawful presence in the United States. However, the applicant accumulated unlawful presence from April 1, 1997, the date on which unlawful presence provisions were enacted under the Act, and October 31, 2003, the date on which a stay of removal was granted. While the applicant filed a Form I-485, only the proper filing of an *affirmative* application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. See *Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002*. Since the applicant filed his Form I-485 after his voluntary departure had become an order of removal and he had failed to depart the United States, the applicant's Form I-485

was not affirmatively filed. Accordingly, the applicant is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), as an alien who has accumulated more than one year of unlawful presence and is seeking admission within ten years of his last departure. To seek a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), an applicant must file a Form I-601.

As required by 8 C.F.R. § 212.2(d), an immigrant visa applicant who is outside the United States and requires both a waiver and permission to reapply for admission must simultaneously file the Form I-601 and the Form I-212 with the U.S. Consulate having jurisdiction over the applicant's place of residence. The AAO recognizes that the applicant had filed both applications with the U.S. Consulate and that it was through the U.S. Consulate's incorrect findings that his applications were incorrectly returned to him. However, the district director does not have jurisdiction over the Form I-212, and, as the applicant has not complied with the regulatory requirements for filing the Form I-212, the application in this matter was improperly filed. Additionally, Chapter 43.2 of the *Adjudicator's Field Manual* dictates that a Form I-601 should be adjudicated prior to adjudication of a Form I-212. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.