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



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: FRESNO, CA
(RELATES)

Date:

APR 05 2010

IN RE:

[REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Fresno, California, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant is a native and citizen of Mexico who, on July 27, 2007, filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his lawful permanent resident spouse. On the same day, the applicant filed the Form I-212. During an interview in regard to the Form I-485, the applicant admitted that he had last reentered the United States without inspection in March 2001 after he had been caught attempting to enter the United States without inspection and returned to Mexico. The applicant admitted that he had previously resided in the United States from December 31, 1997 until January 1, 1999. The Biographical Information Sheet (Form G-325A) attached to the Form I-130 indicates that the applicant resided in the United States from April 1997 until January 12, 1998, the date on which the form was executed. On August 10, 2009, the Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having illegally reentered the United States after accruing more than one year of unlawful presence in the United States. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii) in order to reside in the United States with his lawful permanent resident spouse and U.S. citizen child.

The field office director determined that 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), for accruing more than one year of unlawful presence in the United States. The field office director determined that the applicant had failed to submit evidence to suggest that his refusal of admission would result in extreme hardship. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated August 10, 2009.

On appeal, counsel contends that the field office director erred in denying the applicant's Form I-212 for failing to submit evidence of extreme hardship. Counsel contends that the field office director failed to consider and fully analyze the documentation submitted in support of the Form I-212. *See Counsel's Brief*, dated September 30, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

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] 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—

- (1) the alien's battering or subjection to extreme cruelty; and
- (2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

While the applicant is inadmissible pursuant to section 212(a)(9)(B) of the Act and requires a waiver under section 212(a)(9)(B)(v) of the Act, the applicant has not submitted an Application for Waiver of Grounds of Inadmissibility (Form I-601) in order to seek such a waiver. A finding of extreme hardship to a qualified family member is required for a waiver under section 212(a)(9)(B)(v) of the Act. The AAO finds that the field office director, while correct in stating that the applicant is inadmissible under section 212(a)(9)(B) of the Act, failed to consider the application before him, i.e. an application for permission to reapply for admission under section 212(a)(9)(C) of the Act. Permission to reapply for admission does not require a finding of extreme hardship, even though hardship to family members may be a favorable factor in determining whether an applicant warrants a favorable exercise of discretion; however, an applicant must first be eligible to apply for permission to reapply for admission.

The record reflects that the applicant accrued unlawful presence in the United States from December 31, 1997, the date on which he entered the United States, until January 1, 1999, the date on which he departed the United States and returned to Mexico. The applicant subsequently reentered the United States without inspection in March 2001. Accordingly, the applicant has illegally reentered the United States after having accrued more than one year of the unlawful presence in the United States.

The AAO notes that a waiver to section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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 since that departure, and that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, while the applicant's last departure from the United States occurred in January 1, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.¹ The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

The AAO further notes that, once the applicant becomes eligible to apply for permission to reapply for admission he will no longer be inadmissible pursuant to section 212(a)(9)(B) of the Act because he will have been outside the United States for a period of ten years.

Since the applicant is ineligible to apply for permission to reapply for admission to the United States, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 on the basis that the applicant is inadmissible under section 212(a)(9)(B) of the Act and has failed to provide evidence of extreme hardship. The matter shall be remanded to the field office director for proper adjudication of the application.²

ORDER: The field office director's decision is withdrawn. The application is remanded to the field office director for entry of a new decision that, if adverse to the applicant, shall be certified to the AAO for review.

¹ The applicant will be required to provide proof that he is currently outside the United States and has resided outside the United States for a period of ten years at the time he is eligible to apply for permission to reapply for admission.

² The AAO notes that this decision has no bearing on whether the applicant does or does not warrant a favorable exercise of discretion. The AAO's decision merely withdraws the director's stated basis for the denial of the application and directs the director to review the applicant's Form I-212 under the applicable standards for permission to reapply for admission under section 212(a)(9)(C) of the Act.