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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

H4

FILE:

Office: SAN FRANCISCO, CA

Date: **APR 20 2010**

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)

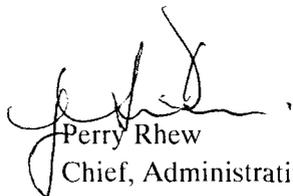
ON BEHALF OF APPLICANT:

Self-represented

**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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Francisco, California denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion to reopen is dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on April 12, 1999, was placed into immigration proceedings for having entered the United States without inspection in 1981. On January 22, 2003, the immigration judge denied the applicant's application for cancellation of removal and granted the applicant voluntary departure until March 24, 2003. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On December 31, 2003, the BIA dismissed the appeal and granted the applicant thirty days of voluntary departure. On January 9, 2004, the applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On September 11, 2004, the applicant's adult U.S. citizen son filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, which was approved on January 28, 2005. On September 2, 2005, the Ninth Circuit denied the applicant's petition for review.<sup>1</sup> On September 23, 2005, the applicant's period of voluntary departure expired. 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 September 20, 2007, the applicant was removed from the United States and returned to Mexico, where he claims to have since resided.<sup>2</sup>

On September 5, 2007, the applicant filed a Form I-212, indicating that all correspondence should be forwarded to his attorney's address in the United States. 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 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 three adult U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision* dated May 30, 2008.

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<sup>1</sup> On appeal, the applicant contended that he did not receive the order of the Ninth Circuit; however, the record reflects that the decision was sent to the applicant's last known address and that, if the applicant had changed his address it was his responsibility to inform the court.

<sup>2</sup> The AAO notes that it appears that the applicant is residing in the United States despite his continued contention that he remains in Mexico. Since the applicant's removal, all correspondence from the applicant came in care of his attorney, even though the applicant was instructed to provide his personal address on the Form I-212 and the Form I-290B clearly reflects that it is filed by the applicant himself. The Form I-290B was postmarked in the United States. The Form I-290B in connection with the motion to reopen was postmarked in the United States. If the applicant is at any time able to overcome the below discussed grounds of inadmissibility and wishes to reapply for permission to reapply for admission, he will be required to provide evidence establishing that he has resided outside the United States since his removal in 2007. If it is later established that the applicant reentered the United States after his removal in 2007, he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and he is ineligible for permission to reapply for admission until he has remained outside the United States for a period of ten years. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) and *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007).

On appeal, the applicant contended that the decision was erroneously denied. The applicant contended that he has always tried to do the right thing and follow the orders of the court. The applicant contended that the decision did not properly balance his equities and that his case was denied due process and fundamental fairness. *See Attachment to Form I-290B*. In support of his contentions, the applicant submitted the referenced attachment and copies of documentation already in the record.

On August 10, 2009, the AAO dismissed the applicant's appeal because is inadmissible under 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 and seeking admission within ten years of his last departure.<sup>3</sup> The AAO found that the applicant has no qualifying family members on which to base a waiver request under section 212(a)(9)(B)(v) of the Act and is, therefore, statutorily ineligible for relief pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v). The AAO found that no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. *Decision of AAO*, dated August 10, 2009.

In the motion to reopen, the applicant contends that his U.S. citizen children are qualifying relatives. *See Form I-290B*, dated August 25, 2009. In support of his motion to reopen, the applicant submits only the referenced Form I-290B. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or

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<sup>3</sup> The record reflects that the applicant accrued unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, and January 22, 2003, the date on which the applicant was granted voluntary departure. The applicant also accrued unlawful presence in the United States from September 23, 2005, the date on which his voluntary departure expired, and September 20, 2007, the date on which he was removed from the United States.

change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

*(3) Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of the motion to reopen, the applicant contends that his U.S. citizen children are qualifying relatives. He states that he has filed evidence of the hardships his children will suffer and wishes to incorporate those documents into his motion to reopen.<sup>4</sup> The applicant contends that, by stating he has no qualifying relatives, the AAO has denied him due process and the hardships of his children should and must be considered in the interests of fundamental justice.

A section 212(a)(9)(B)(v) waiver is dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawful permanent resident *spouse or parent* of the applicant. A section 212(a)(9)(B)(v) waiver may not be based upon extreme hardship to the applicant or his or her child(ren). As such, the applicant's U.S. citizen children are not qualifying relatives upon which he can base a waiver application under section 212(a)(9)(B)(v) of the Act. As discussed in the AAO's decision, the record clearly reflects that the applicant does not have a U.S. citizen or lawful permanent resident parent or spouse.

As such, there can be no basis for a motion to reopen or reconsider unless it is established that the applicant had a U.S. citizen or lawful permanent resident spouse or parent at the time of the AAO's decision. There is no purpose in granting an applicant's Form I-212 if he or she is otherwise statutorily inadmissible.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reopen meet the requirements of a motion to reopen. Accordingly, the motion to reopen is dismissed and the order dismissing the appeal is affirmed.

**ORDER:** The motion to reopen is dismissed. The order dismissing the appeal will be affirmed.

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<sup>4</sup> The AAO notes that the documents to which the applicant refers were already part of the record and were reviewed and considered in rendering the decision to dismiss the applicant's appeal.