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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

H4

[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: JAN 12 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)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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, San Francisco, 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 appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on March 6, 2003, was placed into immigration proceedings for having entered the United States without inspection in 1989. On December 5, 2003, the applicant's U.S. citizen spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On December 22, 2003, the immigration judge granted the applicant voluntary departure until March 19, 2004. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On December 30, 2004, the BIA dismissed the appeal and granted voluntary departure for a period of 30 days from the date of the decision. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). Since the applicant failed to file a stay of removal and failed to surrender for removal or depart from the United States, the grant of voluntary departure changed to a final order of removal. On May 23, 2005, the Ninth Circuit dismissed the petition for review.

On January 26, 2006, the Form I-130 was denied. On March 8, 2006, the applicant's spouse filed a second Form I-130, which was approved on June 12, 2006. On September 2, 2008, the applicant filed the Form I-212 indicating that he continued to reside 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 U.S. citizen spouse and four 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 April 15, 2009.

On appeal, counsel attaches supporting documents. *See Form I-290B,* dated May 14, 2009. In support of his contentions, counsel submits the referenced Form I-290B, letters from family and friends and financial documentation. On the Form I-290B, counsel indicates that he will forward a brief within thirty days. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the San Francisco, California field office or any other federal office. The record does not contain the brief that counsel indicated would be submitted to the AAO. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location. Accordingly the record is complete.

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

> (6) Illegal entrants and immigration violators.-
> (A) ALIENS PRESENT WITHOUT admission or parole.-

(i) In general.-An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

(ii) Exception for certain battered women and children.-Clause (i) shall not apply to an alien who demonstrates that-

(I) the alien qualifies for immigrant status under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1)

(II) (a) the alien has been battered or subjected to extreme cruelty by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, or (b) the alien's child has been battered or subjected to extreme cruelty by a spouse or parent of the alien (without the active participation of the alien in the battery or cruelty) or by a member of the spouse's or parent's family residing in the same household as the alien when the spouse or parent consented to or acquiesced in such battery or cruelty and the alien did not actively participate in such battery or cruelty, and

(III) there was a substantial connection between the battery or cruelty described in subclause (I) or (II) and the alien's unlawful entry into the United States.

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.

The AAO notes that an exception to section 212(a)(6)(A)(i) of the Act is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such. Immigrant visa petitions benefiting the applicant were filed on December 5, 2003 and March 8, 2006. Accordingly, the applicant is not the beneficiary of an immigrant visa petition or labor certification filed as of April 30, 2001 that would render his inadmissibility moot pursuant to section 245(i) of the Act. Aliens present within the United States without admission or parole are statutorily ineligible for a waiver of inadmissibility. Therefore, if an alien is present in the United States without admission or parole, the alien is subject to a permanent ground of inadmissibility.

Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(6)(A)(i) of the Act, which are very specific and applicable. Therefore, 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. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

The AAO notes that the Form I-130 indicates that the applicant will consular process his family-based visa petition once it is filed and approved. When the applicant departs the United States in order to consular process the family-based petition, he will also become inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act, for accumulating more than a year of unlawful presence, from December 9, 1997, the date on which he became 18 years old, to the date on which he departs the United States. 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), the applicant will need to file an Application for Waiver of Ground of Inadmissibility (Form I-601) in conjunction with a new Form I-212 in order to seek permission to reapply for admission. Both waiver requests should be submitted to the U.S. consulate having jurisdiction over the applicant's place of residence in Mexico. *See* 8 C.F.R. § 212.2(d).

ORDER: The appeal is dismissed.