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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: [REDACTED] Office: LOS ANGELES, CA

Date: JUN 18 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: Self-represented

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Los Angeles, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 March 26, 1996, filed an Application for Asylum and Withholding of Deportation (Form I-589), indicating that he entered the United States without inspection on June 23, 1989 under [REDACTED]. On June 5, 1996, the applicant filed a second Form I-589 under [REDACTED]. On October 30, 1996, the applicant's second Form I-589 was referred to an immigration judge and he was placed into immigration proceedings for having entered the United States without inspection on June 23, 1989. On November 17, 1997, the immigration judge granted the applicant voluntary departure until August 1, 1998. The applicant filed a motion to reopen immigration proceedings, which was granted on April 1, 1998. On April 15, 2002, the immigration judge granted the applicant voluntary departure until June 14, 2002. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On September 26, 2003, the BIA dismissed the applicant's appeal and granted him 30 days of voluntary departure. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.¹ The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On December 10, 2003, the Ninth Circuit denied the applicant's petition for review for lack of jurisdiction.

On October 27, 2005, the applicant's original Form I-589 was referred to an immigration judge and he was placed into immigration proceedings for having entered the United States without inspection on June 23, 1989. On February 2, 2006, the immigration judge ordered the applicant removed *in absentia*.

On October 24, 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 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 remain in the United States and reside with his three U.S. citizen children.²

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to

¹ The AAO notes that, while an application for asylum halts the accrual of unlawful presence during the period of time that it is pending and on appeal, in the applicant's case, since he engaged in unauthorized employment before and during the pendency of the application for asylum, the asylum application did not stop the accrual of unlawful presence. See Section 212(a)(9)(B)(iii)(II). The Biographical Information Sheet (Form G-325A), dated September 25, 1997, indicates that the applicant has been employed in various positions from June 1989 until the execution date of the Form and an employment letter in the record indicates that the applicant was employed in 1999 and 2000. The applicant was issued employment authorization valid from July 26, 1999 until July 25, 2000. The applicant, however, did not accrue unlawful presence in the United States from November 17, 1997 until August 1, 1998; April 15, 2002 until June 14, 2002; and September 26, 2003 until October 26, 2003, the dates during which he was granted voluntary departure. The applicant failed to file a stay of removal with the Ninth Circuit and, therefore, voluntary departure expired during the pendency of the petition for review.

² The AAO notes that the record fails to establish that the applicant is the beneficiary of any immigrant or nonimmigrant visa petition that would offer him a means of acquiring lawful residence in the United States.

apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 16, 2009.

On appeal, the applicant states that he is the victim of a lawyer who took his money and did not help him or his family.³ *See Petitioner's Brief*, dated July 16, 2009. In support of his contentions, the petitioner submits only the referenced brief. 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 of an 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

³ The applicant's contentions are unpersuasive. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). The applicant has failed to meet any of these requirements.

territory, the [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

....

(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.

The record in this matter establishes that the applicant last entered the United States without inspection in January 1995. *See Application for Cancellation of Removal (Form EOIR-40)*. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have either entered or attempted to reenter the United States without being admitted on or after April 1, 1997, the effective date of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA). The evidence in the record does not establish that the applicant has reentered or attempted to reenter the United States without being admitted on or after April 1, 1997, or after the date on which his voluntary departure became a final order of removal. Accordingly, the record does not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act; however, the applicant is clearly

inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

Since the applicant is *eligible* 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 ineligible for relief under section 212(a)(9)(C) of the Act. The matter shall be remanded to the field office director for a full adjudication of the application on the merits.⁴

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.

⁴ 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 and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion.