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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

**PUBLIC COPY**

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FILE:



Office: SAN FRANCISCO, CA

Date: MAR 10 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:



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 it is now before the Administrative Appeals Office (AAO) on appeal. The director's decision shall be withdrawn and the matter remanded for entry of a new decision.

The applicant is a native and citizen of Mexico who, on December 22, 1982, was placed into immigration proceedings for having entered the United States without inspection in February 1979. On February 1, 1983, the applicant pled *nolo contendere* to and was convicted of transporting/selling a controlled substance, heroin, in violation of section 11352 of the Health and Safety Code of California (HSC). The applicant was sentenced to one year in jail, which was suspended except for 22 days already served, and four years of probation. On October 14, 1983, the charges against the applicant in immigration court were amended to show that the applicant had been convicted of a crime related to a controlled substance. On March 5, 1984, the immigration judge ordered the applicant removed. On March 5, 1984, a warrant for the applicant's removal was issued. The applicant failed to depart the United States. On November 3, 1984, the applicant departed the United States and returned to Mexico.

On May 22, 1985, the applicant was placed into immigration proceedings for having entered the United States without inspection in May 1985. On May 28, 1985, the immigration judge ordered the applicant removed from the United States. On May 29, 1985, the applicant was removed from the United States and returned to Mexico.

On September 3, 1985, the applicant pled *nolo contendere* to and was convicted of sale of heroin with a prior conviction, in violation of section 11352 of the HSC. The applicant was sentenced to four years in jail and four years of probation. On the same day, the applicant's probation was revoked in regard to his prior conviction and he was sentenced to four years in jail and four years of probation to be served concurrently. On January 28, 1987, the applicant was placed into immigration proceedings for having entered the United States without inspection on May 30, 1985. On March 30, 1987, the applicant pled guilty to and was convicted of being a deported alien in the United States in violation of 8 U.S.C. § 1326. The applicant was sentenced to two years in jail, which was suspended except for 179 days already served, and five years of probation.

On September 24, 2006, the applicant 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 U.S. citizen spouse. The Form I-485 indicates that the applicant last entered the United States without inspection in January 1988. During an interview in regard to the Form I-485 the applicant testified that he last entered the United States without inspection in January 1988. On March 6, 2007, the applicant filed a Form I-212, indicating that he continued to reside in the United States. On June 24, 2009, the Form I-485 was denied. 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), for a period of twenty years. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (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 U.S. citizen children.

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 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 June 24, 2009.

On appeal, counsel contends that there is no case law that holds that the field office director may not adjudicate the Form I-212 concurrently with the Form I-485, even though the service may reinstate the applicant's prior removal order. Counsel contends that the field office director's decision conflicts with pertinent regulations. Counsel contends that the regulations permit an applicant to apply for *nunc pro tunc* permission to reapply for admission from within the United States when the applicant files for adjustment of status.<sup>1</sup> *See Counsel's Brief*, dated July 1, 2009. In support of his contentions, counsel 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.

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<sup>1</sup> In light of recent case law in the Ninth Circuit, counsel's contentions are unpersuasive in regard to inadmissibility under section 212(a)(9)(C) of the Act. *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007); *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).

- (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. [emphasis added]

....

(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 of Homeland Security 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—

- (I) the alien's battering or subjection to extreme cruelty; and

- (II) 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 was removed from the United States on November 3, 1984 and May 29, 1985 and he has testified that he last returned to the United States without being admitted in January 1988. 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 applicant did not testify, and the evidence in the record does not establish, that the

applicant entered or attempted to reenter the United States without being admitted on or after April 1, 1997. 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.<sup>2</sup>

**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.

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<sup>2</sup> 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; however, beyond the decision of the field office director, the AAO finds that the applicant is **permanently inadmissible** under the provisions of section 212(a)(2)(A)(i)(II) of the Act, for having been convicted of crimes related to a controlled substance and that no waiver is available to the applicant because he has been convicted of more than one crime and each crime is related to a controlled substance other than 30 grams or less of marijuana, i.e. heroin. As such, no purpose would be served in approving the Form I-212.