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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

[redacted]

FILE: [redacted] Office: HOUSTON, TX Date: OCT 05 2010

[redacted]

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:

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,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Houston, Texas, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 November 10, 1996, appeared at the Otay Mesa, California port of entry. The applicant presented an I-586 border crossing card bearing the name '[redacted] The applicant failed to provide her true identity to immigration officers. On the same day, the applicant was placed into immigration proceedings for attempting to enter the United States by fraud. On November 14, 1996, the immigration judge ordered the applicant removed from the United States. On the same day, the applicant was removed from the United States and was returned to Mexico under the name '[redacted]

On September 27, 2004, 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 her behalf by her naturalized U.S. citizen spouse. The Form I-485 indicates that the applicant entered the United States without inspection in November 1996. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212. On January 31, 2206, the Form I-485 was terminated. On November 16, 2006, the Form I-485 was reopened. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). She 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 her naturalized U.S. citizen spouse and four U.S. citizen children.

The field office director determined that the applicant is subject to reinstatement provisions under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5). The field office director determined that an alien subject to reinstatement is ineligible for any relief under the Act. The field office director determined that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for seeking admission within ten years of her last departure after having accrued more than one year of unlawful presence in the United States. The field office director determined that the applicant was required to file the Form I-601 and Form I-212 simultaneously with the U.S. Consulate abroad. The field office director determined that the Form I-212 could not be approved where other grounds of inadmissibility exist and no purpose would be served in adjudicating the Form I-212. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated January 25, 2010.

On appeal, counsel contends that the reason for denial of the Form I-212 is in error. Counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act. Counsel contends that the field office director erred in finding that the Form I-601 and Form I-212 must be filed with the U.S. Consulate abroad. *See Counsel's Brief,* undated. 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.

(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 of Homeland Security] has consented to the alien's reapplying for admission.

While the applicant may be subject to reinstatement under section 241(a)(5) of the Act, the record in this matter does not establish that the applicant's prior removal order has been reinstated.[1] Accordingly, prior to reinstatement of a removal order, an applicant may file a Form I-601 and Form I-212.

While the applicant has accrued more than one year of unlawful presence in the United States since April 1, 1997, the date on which unlawful presence provisions were enacted, the record does not establish that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act because she has not triggered the ground of inadmissibility by departing the United States after accruing the unlawful presence.

While the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud, and is required to file a Form I-

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[1] U.S. Immigration and Customs Enforcement (USICE) may reinstate an applicant's prior removal order under section 241(a)(5) of the Act at any time, even though he or she reentered prior to April 1, 1997, and he or she may have filed a Form I-212, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. *See Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422 (S. Ct. 2006). Reinstatement of removal orders are not within the jurisdiction of USCIS.

601 in order to seek a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), the applicant is seeking adjustment of status and may file the Form I-601 and Form I-212 in conjunction with the Form I-485. *See 8 C.F.R. § 212.2(e).*

Since the applicant's removal order has not yet been reinstated and the applicant is *eligible* to apply for permission to reapply for admission to the United States and a waiver of grounds of inadmissibility in conjunction with the Form I-485, 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 241(a)(5) of the Act and is required to file the Form I-601 and Form I-212 abroad. The matter shall be remanded to the field office director for a full adjudication of the applications on the merits.[2]

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

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[2] The AAO notes that the director combined the decisions on the Form I-212 and Form I-601; however, separate denial notices should be issued, as each application may be appealed to the AAO and would require a separate filing fee. *See* 8 C.F.R. § 103.3. Additionally, this decision has no bearing on whether the applicant has established extreme hardship to a qualifying relative or 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-212and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion. As noted above, a separate decision should be issued for each application and a decision on the Form I-601 should be rendered prior to rendering a decision on the Form I-212. The AAO notes that, in the event that the Form I-601 is denied, the Form I-212 should be denied as a matter of discretion.