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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

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FILE: [REDACTED] Office: CHARLOTTE, NC

Date OCT 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: 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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Charlotte, North Carolina, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 El Salvador who, on January 9, 1995, filed an Application for Asylum and Withholding of Removal (Form I-589) indicating that he entered the United States without inspection on January 10, 1992. On March 14, 1995, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings. On June 13, 1995, the immigration judge ordered the applicant removed *in absentia*. The applicant failed to depart the United States.

On October 13, 2004, the applicant's mother, a native and citizen of El Salvador, became a lawful permanent resident. On December 30, 2004, the applicant's mother filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on May 27, 2005. On June 3, 2009, 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 lawful permanent resident mother.

The field office director determined that the applicant is ineligible to file an application for permission to reapply for permission because the applicant failed to comply with 8 C.F.R. § 212.2(e) requiring that the Form I-212 be filed in conjunction with an Application to Register Permanent Residence or Adjust Status (Form I-485). The field office director found that the applicant had failed to file a Form I-485 and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 23, 2009.

On appeal, the applicant contends that he was a minor when he entered the United States and was placed into immigration proceedings. The applicant contends that his family has resided in the United States for over 14 years and they will suffer extreme emotional, psychological and financial hardships if the Form I-212 is denied. The applicant contends that he owns the home in which the family resides and is the president of the family's business. *See Form I-290B*, dated October 8, 2009. In support of his contentions, the applicant submits the referenced Form I-290B and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

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 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.

The AAO finds that the field office director erred in requiring that the applicant file a Form I-485 in conjunction with filing of the Form I-212. While 8 C.F.R. § 212.2(e) provides that individuals who have filed a Form I-485 must file the Form I-212 in conjunction with the Form I-485, 8 C.F.R. § 212.2(g)(2) provides that an applicant who is physically present in the United States but ineligible to apply for adjustment of status must file the Form I-212 with the district director (field office director) having jurisdiction over his or her residence. The AAO finds that the applicant is present in the United States and is ineligible to apply for adjustment of status since he is inadmissible under section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182(a)(6)(A)(i), for being present in the United States without inspection and does not qualify for the exception for battered spouses under section 212(a)(6)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(6)(A)(ii). The record reflects that, while the applicant meets the physical presence in the United States requirements, he does not have a qualifying petition filed prior to 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 adjustment of status or a waiver of inadmissibility. As such, the applicant is *eligible* to apply for permission to reapply for admission to the United States with the Charlotte, North Carolina field office; however, if an alien is present in the United States without admission or parole, and seeks to adjust his status, the alien is subject to a permanent ground of inadmissibility. Therefore, the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States until he has departed the United States.

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 failed to file the Form I-212 in conjunction with a Form I-485. The matter shall be remanded to the field office director for proper adjudication of the application.¹

Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having obtained immigration benefits by fraud. The record reflects that the applicant filed multiple Applications for Temporary Protected Status (TPS) (Form I-821) indicating that he has not been in

¹ 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 under the applicable standards for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act and case law finding that no purpose would be served in the favorable exercise of discretion in adjudicating applications for permission to reapply for admission for individuals who are otherwise inadmissible to the United States. *See Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964)

immigration proceedings. As such, if the applicant departs the United States in order to seek consular processing of his immigrant visa, the applicant will be required to file an Application for Waiver of Grounds of Inadmissibility (Form I-601) in order to seek a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i). The AAO also notes that, if the applicant departs the United States he will become 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, and will require a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).²

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.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).