U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: SAN DIEGO, CA Date: FEB 15 2011

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 $630. 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 District Director, San Diego, 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 June 12, 1999, appeared at the San Ysidro, California port of entry. The applicant presented his Mexican passport containing an altered U.S. nonimmigrant visa which had been cancelled. The applicant was placed into secondary inspection. The applicant admitted that he knew that the visa had been cancelled and that he had altered the visa to erase the cancellation. The applicant admitted that he did not have valid documentation to enter the United States. The applicant admitted that he had resided in the United States for 8 months. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. On June 13, 1999, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

On November 17, 2003, the applicant married his U.S. citizen spouse in San Marcos, California. On July 22, 2004, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. The Form I-130 indicates that the applicant entered the United States without inspection in June 1999. On November 16, 2005, the applicant's spouse withdrew the Form I-130. On July 11, 2007, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On May 31, 2009, the applicant's spouse filed a second Form I-130, which was rejected. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 U.S. citizen spouse and two U.S. citizen children.

The district director determined that the applicant is inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(C)(i) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(C)(i). The district director determined that the applicant failed to establish that he is eligible for the benefit sought. The district director determined that the applicant failed to establish that a favorable exercise of discretion, if available, is warranted. The district director denied the Form I-212 accordingly. *See District Director's Decision,* dated April 29, 2009.

On appeal, counsel contends that: the applicant is unfamiliar with immigration law and proceedings and did not have counsel; the applicant's ignorance caused him to forgo an important right to apply for the benefit of a waiver that was available to him under the law; the applicant was unaware that he was being removed from the United States for a period of five years;[1] the applicant is entitled to a waiver pursuant to sections 212(a)(6)(F), 212(d)(12) and 274C of the Act, 8 U.S.C. §§ 1182(a)(6)(F), 1182(d)(12) and 1324C, and 22 C.F.R. § 40.66;[2] and the applicant warrants a

[1] The AAO notes that a statement given by the applicant reflects that he was aware that he was being removed from the United States for a period of five years.

[2] The AAO finds that these sections of the Act and federal regulations do not relate to the sections of the Act under which the director found the applicant to be inadmissible. These sections of the Act and federal regulations refer to only civil monetary penalties in relation to using fraudulent documents and to aliens subject to a final order of removal pursuant to section 274C of the Act. The applicant is not subject to a final order of removal pursuant to section 274C of

favorable exercise of discretion. *See Counsel's Brief,* dated May 21, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation already in the record. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states, in pertinent part:

> (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.[3]

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866

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the Act and these sections of the Act and regulations do not have a bearing on whether the applicant is eligible for permission to reapply for admission. Furthermore, section 212(d)(12) of the Act relates to applicants for nonimmigrant status and not to an alien such as the applicant who seeks admission as an immigrant.

[3] There are no indications in the record that the applicant is a VAWA self-petitioner.

(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). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, while the applicant's last departure from the United States occurred on June 13, 1999, more than ten years ago, he has not remained outside the United States for the required ten years and he is currently present in the United States. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.[4]

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.

[4] The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for a period of ten years when he becomes eligible to apply for permission to reapply for admission.