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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



U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: YAKIMA, WA

Date:

MAR 21 2011

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:

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Yakima, Washington, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 May 22, 1991, was apprehended by immigration officers while transporting five illegal aliens from National City to Carlsbad, California. The applicant failed to provide immigration officers with his true identity. The record reflects that the applicant agreed to drive the aliens in return for employment and that there was no evidence to establish that the applicant was involved in a prearranged plan in regard to transporting the aliens away from the border after illegal entry. On May 22, 1991, the applicant was placed into immigration proceedings for entering the United States without inspection on April 21, 1991. On May 31, 1991, the immigration judge ordered the applicant removed from the United States. On May 31, 1991, the applicant was removed from the United States and returned to Mexico under the name "Pedro Flores-Montalvo."

On December 19, 1995, the applicant married his lawful permanent resident spouse. On November 17, 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 his behalf by his lawful permanent resident spouse. During an interview in regard to the Form I-485, the applicant admitted that he had last reentered the United States without inspection on April 18, 1993. On October 11, 2005, the Form I-485 was denied. On February 16, 2006, the applicant was placed into immigration proceedings. On March 8, 2007, the applicant filed a Form I-212 indicating that he continued to reside in the United States. On July 23, 2008, the Form I-212 was denied.

On July 23, 2008, the applicant was placed into immigration proceedings. On June 15, 2009, the immigration judge terminated proceedings for the purpose of reinstating the applicant's prior removal order. The applicant filed an appeal with the Board of Immigration Appeals (BIA). On August 11, 2009, the BIA dismissed the applicant's appeal. The applicant filed a petition for review with the Ninth Circuit Court of Appeals (Ninth Circuit). On February 10, 2010, the Ninth Circuit denied the applicant's petition for review, which mandated on April 6, 2010.

On April 12, 2010, the applicant filed a second Form I-485. On August 5, 2010, the applicant filed the Form I-212. On August 13, 2010, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act. On August 16, 2010, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601). On August 19, 2010, the Form I-212 was denied. On August 27, 2010, the Form I-485 was denied. On September 20, 2010, the applicant filed a motion to reopen the Form I-212. On October 20, 2010, the applicant's motion to reopen was granted. The applicant is permanently 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) as an alien convicted of an aggravated felony under section 101(a)(43)(N) of the Act (transporting illegal aliens). 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 lawful permanent resident spouse and two U.S. citizen children.

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act. The field office director determined that the applicant had failed to submit evidence to establish that his refusal of admission would result in exceptional and extremely unusual

hardship. The field office director determined that the applicant has not physically departed the United States or been physically removed from the United States as is required by an applicant seeking permission to reapply for admission. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated November 29, 2010.

On appeal, counsel contends that the field office director misstated the applicable legal standard and failed to weigh the positive and negative factors as required in adjudicating a Form I-212. *See Counsel's Brief*, dated December 27, 2010. In support of his contentions, counsel submits the referenced brief, letters of recommendation from friends and family, medical-documentation 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:

(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. [emphasis added]

The AAO finds that the field office director failed to consider the application before him, i.e. an application for permission to reapply for admission under section 212(a)(9)(A) of the Act. Permission

to reapply for admission does not require a finding of exceptional and extremely unusual hardship, even though hardship to the applicant and family members may be a favorable factor in determining whether an applicant warrants a favorable exercise of discretion.

The AAO further notes that the applicant's conviction records are incomplete and have bearing on other grounds of inadmissibility under which the applicant may be inadmissible. The record does not contain the indictment, plea agreement or court docket printout for the applicant's 1991 charge for domestic violence (violation of section 273.5(A) of the California Penal Code (CPC) resulting in a plea to section 242 battery) and 1997 charge for assault 3 (domestic violence violation with plea to assault 4), which are necessary to find whether the applicant is inadmissible under another section of the Act and are also factors to be considered in determining whether a favorable exercise of discretion is warranted, along with the applicant's other convictions. While the record contains the court docket printout for the applicant's 1993 display weapon charge, it does not contain the indictment or plea agreement, which are vital to determining whether the applicant has been convicted of a crime involving moral turpitude. The state criminal history indicates that the applicant was convicted of exhibiting, displaying or carrying a weapon with the intent to intimidate under 9.41.270 of the Revised Code of Washington (RCW) which also requires that the weapon be apparently capable of producing bodily harm. It is the applicant's burden to establish that he is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act, and that the crime is not a crime of violence.

Since the field office director applied the incorrect standard 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 establish exceptional and extremely unusual hardship. The matter shall be remanded to the field office director for a full adjudication of the application on the merits.¹

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.

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