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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



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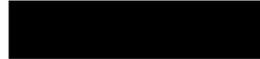


H4

Date: MAY 10 2011

Office: HOUSTON, TX

FILE:



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)

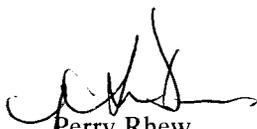
ON BEHALF OF APPLICANT:



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, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 June 7, 1996, filed an Application for Asylum and Withholding of Deportation (Form I-589). On October 1, 1996, the Form I-589 was denied and the applicant was placed into immigration proceedings for having entered the United States without inspection on March 1, 1993. On February 5, 1997, the immigration judge ordered the applicant removed from the United States *in absentia*. The applicant failed to depart the United States.

On May 3, 1997, the applicant married his U.S. citizen spouse. On June 3, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his spouse. On January 6, 2003, the Form I-485 was terminated. On January 18, 2003, the Form I-130 was approved. On December 13, 2005, the applicant's spouse filed a second Form I-130 which was terminated on September 9, 2008. On January 11, 2009, the applicant's spouse filed a third Form I-130. On May 31, 2010, the applicant filed a second Form I-485 indicating that he last entered the United States with advance parole on July 8, 2001. During an interview in regard to the Form I-485 the applicant testified that he last entered the United States with advance parole on November 18, 2002, and he was also admitted with advance parole on June 14, 1998. On February 26, 2010, the third Form I-130 was denied. On May 31, 2010, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On November 8, 2010, 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). 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 U.S. citizen spouse.

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 his last departure after having accrued more than one year of unlawful presence in the United States.¹ The field office director determined that the applicant was required to file an Application for Waiver of Ground of Inadmissibility (Form I-601) and the 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 November 8, 2010.

On appeal, counsel contends that the applicant is not inadmissible for unlawful presence because he filed an application to adjust status or alternatively that the unlawful presence ended with his

¹ The AAO notes that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act for accruing unlawful presence from April 1, 1997, the date on which unlawful presence provisions were enacted, until June 6, 1998, the date on which he first departed the United States, and that his last departure occurred in November 2002. The record reflects that the applicant has failed to file an Application for Waiver of Ground of Inadmissibility (Form I-601) in order to seek a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

departure from the United States on June 6, 1998.² Counsel contends that a Form I-601 is not required; the applicant is not seeking advance permission prior to departure; and though a showing of hardship is not required for permission to reapply for admission, the applicant's spouse will suffer extreme hardship *See Form I-290B*, undated. In support of his contentions, counsel submits the only the referenced Form I-290B. 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 has consented to the alien's reapplying for admission.

The director denied the application, stating that the applicant is required to depart the United States because the applicant's removal order has not yet been executed and he is applying for advance

² While an affirmatively filed application for adjustment of status halts the accrual of unlawful presence during the period of time that it is pending, in the applicant's case his application for adjustment of status was filed after he had been placed into removal proceedings and was ordered removed from the United States and it was, therefore, not affirmatively filed. Indeed the applicant's continuous unlawful presence stopped accruing on June 6, 1998, but the applicant had already accrued more than one year of unlawful presence and the applicant's last departure did not occur on June 6, 1998, but in November 2002.

permission prior to departure, and as such, he is required to file the Form I-212 and Form I-601 with the U.S. consulate overseas. The evidence in the file, however, shows that the applicant's removal order was executed by his departure in 1998. Moreover, even if the removal order had not been executed, the record does not show that the applicant is residing outside of the United States and we withdraw the director's finding that an alien who is currently inside the United States is required to file the Form I-601 and Form I-212 with the U.S. Consulate abroad, even if he or she is applying for advance permission prior to departure, since an applicant may make the appropriate applications to the field office having jurisdiction over his or her U.S. residence.³

While 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 his last departure after accruing more than one year of unlawful presence, and is required to file a Form I-601 in order to seek a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), 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 with the field office having jurisdiction over his residence. *See 8 C.F.R. § 212.2(e)*. The field office director may request that the applicant file a Form I-601, which must be adjudicated prior to adjudication of the Form I-212.

Accordingly, 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 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.⁴

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.

³ The AAO notes that an applicant who processes his or her immigrant visa overseas may incur additional grounds of inadmissibility after approval of the Form I-601 and Form I-212 (such as inadmissibility based on additional unlawful presence triggered by the new departure) for which he or she will be required to file a new Form I-601 and/or Form I-212.

⁴ This decision has no bearing on whether the applicant has or has not 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-212 and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion.