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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**

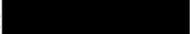
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Date: **FEB 09 2012**

Office: CHICAGO

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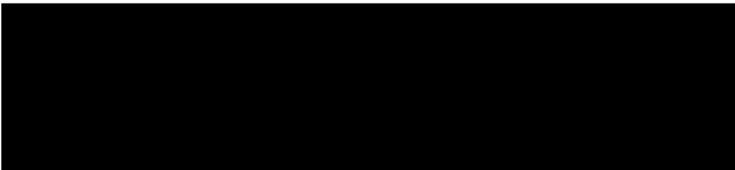
IN RE:

Applicant: 

APPLICATION:

Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(iii) of the
Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(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.

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,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Chicago, Illinois, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The applicant appealed the decision to the Administrative Appeals Office (AAO), and the appeal was dismissed. The matter is now again before the AAO on motion to reconsider. The motion will be granted, the prior decision of the AAO will be withdrawn, and the matter will be remanded to the field office director for further consideration consistent with this decision.

The record reflects that the applicant is a native and citizen of Mexico. He was removed from the United States on June 24, 1975, and he reentered without inspection on an unknown date prior to July 6, 1978. He 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 was also found inadmissible under section 212(a)(9)(C)(i)(II) of the Act for having been previously removed and subsequently entering the United States without being admitted. 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 U.S. citizen wife, mother, children, and siblings.

The field office director determined that the applicant is statutorily ineligible for a waiver of his inadmissibility under section 212(a)(9)(C)(i)(II) of the Act and denied the Form I-212 application accordingly. *Field Office Director's Decision*, dated October 17, 2007.

On appeal, counsel asserted that the retroactive application of section 212(a)(9)(C)(i)(II) of the Act, enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), to the applicant's removal on June 24, 1975 and subsequent reentry without inspection shortly after was in error. *Brief from Counsel with Form I-290B Appeal*, undated.

In a decision dated March 15, 2010, the AAO cited the applicant's extensive immigration and criminal history, and observed that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude, and under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking a benefit under the Act by making a willful misrepresentation. The AAO noted that the applicant's Form I-601 application for a waiver of his inadmissibility was denied by the field office director, and that the applicant did not submit a timely appeal of the decision. Thus, the AAO found that no purpose would be served in approving the applicant's Form I-212 application, as he would remain inadmissible to the United States under other provisions of the Act.

On motion to reconsider, counsel states that the applicant's Form I-601 application for a waiver of his inadmissibility was not properly denied, as the field office director did not address the merits of the application in his October 17, 2007 decision. Counsel contends that the applicant's Form I-601 application remains pending, and that the applicant properly appealed the denial of his Forms I-212 and I-601 applications to the AAO. Counsel again contends that section 212(a)(9)(C)(i)(II) of the Act was erroneously applied in the applicant's case, and that he is eligible for consideration of the merits of his Form I-212 application.

The record contains, but is not limited to: documentation in connection with the applicant's immigration history including a prior removal and entry without inspection; documentation of the applicant's criminal history; tax records for the applicant's family; birth and immigration records for the applicant's family members; and letters in favor of the applicant's admission to the United States. The entire record was considered in rendering this decision on motion.

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.

...

(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 has consented to the alien's reapplying for admission.

The record reflects that the applicant was admitted to the United States as a lawful permanent resident on May 25, 1956. The applicant was charged with multiple crimes between 1966 and 1969, including criminal trespass of a vehicle, theft, grand theft, grand theft auto, burglary, criminal damage to property, robbery, forcible rape, aggravated battery, unlawful use of a weapon, failure to register a firearm, and possession of marijuana. The record lacks dispositions for many of these charges, yet sufficient evidence shows that he was convicted of at least two theft offenses and one battery offense. On June 16, 1969, the applicant was placed into removal proceedings based on a finding that he had committed two crimes involving moral turpitude. On May 13, 1974, an immigration judge ordered the applicant removed from the United States, and he was removed to Mexico on June 24, 1975. The applicant reentered the United States without inspection on an unknown date, but the record supports that this entry occurred prior to July 6, 1978, the date he was arrested for forcible rape.

The applicant did not have an approved Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal, at the time of his reentry. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. The applicant's Form I-212 application is the subject of the present motion.

In a brief dated April 2, 2010, counsel discusses the applicant's Form I-601 application for a waiver, and states that the application was not properly denied, as the field office director did not address the merits of the application in his October 17, 2007 decision. Specifically, counsel observes that the field office director did not discuss the applicant's inadmissibility under section 212(a)(2)(A)(i) of the Act, but only referenced the applicant's non-waivable inadmissibility under section 212(a)(9)(C)(i)(II) of the Act as the basis for the decision. Counsel asserts that the Form I-601 application remains pending as a result.

Upon review, it is noted that the field office director issued a decision on October 17, 2007 denying the applicant's Form I-601 application for waiver. In the absence of a timely appeal or motion, the field office director's denial is final, and the AAO cannot entertain counsel's arguments regarding its merits. The denial of the Form I-601 application is not properly before the AAO, and counsel has cited no persuasive authority to support that the AAO may deem the Form I-601 a pending matter over which it has jurisdiction.

Counsel asserts that the applicant's Forms I-601 and I-212 applications were properly appealed to the AAO with his single Form I-290B and filing fee, as the two matters are intricately connected and overlapping. Counsel cites the regulation at 8 C.F.R. § 103.3(a)(2)(i) to stand for the proposition that multiple applications may be appealed to the AAO with a single Form I-290B. However, while the regulation does not explicitly state that only one application may be appealed with a single Form I-290B, it also does not state that multiple matters may be addressed with a single filing and filing fee, and we find no basis to disregard the longstanding interpretation that the regulation requires a separate Form I-290B for separate decisions regarding separate applications. Counsel cites no persuasive authority to support that the applicant's single Form I-290B and filing fee may be treated as two appeals.

In part 2 of the Form I-290B in question, dated November 7, 2007, the applicant indicated that he was appealing the denials of his Forms I-212, I-601, and I-485 applications. It is first noted that the AAO lacks jurisdiction over an appeal of the denial of a Form I-485 application, and the AAO properly declined to treat the appeal as relating to the applicant's Form I-485 application to adjust his status to lawful permanent resident.¹ The AAO treated the appeal as a request for review of the denial of the applicant's Form I-212 application. As the applicant did not file a separate Form I-290B appeal of the field office director's denial of his Form I-601 application, that application is not before the AAO, and it remains denied.

Counsel observes that the AAO commented on matters relating to the applicant's Form I-601 and suggests that this fact supports that the AAO was also considering the Form I-601 application. However, a discussion of the applicant's inadmissibility under sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) of the Act, and his failure to obtain a waiver for these grounds, is also relevant to adjudication of his Form I-212 application. On motion, the AAO does not find that the applicant's Form I-290B was treated as an appeal of his Form I-601 application at any time.

Counsel contends that the retroactive application of section 212(a)(9)(C)(i)(II) of the Act to the applicant's removal on June 24, 1975 and subsequent reentry without inspection was erroneous. The AAO agrees. As the applicant's removal and subsequent reentry without inspection occurred prior to

¹ The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

the April 1, 1997 enactment of section 212(a)(9)(C)(i)(II) of the Act, he is not inadmissible under this section. The date that the applicant filed his Form I-485 application to adjust his status to lawful permanent resident, May 12, 1999, is not determinative of whether he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Accordingly, the applicant is not statutorily barred from seeking permission to reapply for admission into the United States after his deportation, pursuant to the present Form I-212 application.

The field office director denied the present Form I-212 application solely on the basis of the finding that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. As this finding was in error, the field office director shall issue a new decision that reaches the merits of whether the applicant warrants a favorable exercise of discretion and approval of his Form I-212 application under section 212(a)(9)(A)(iii) of the Act.

It is noted that the field office director also denied the applicant's Form I-601 application for a waiver based solely on the finding that he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. As that finding was in error, the field office director may, as a matter of discretion, reopen the Form I-601 application on U.S. Citizenship and Immigration Services (USCIS) motion and issue a new decision that reaches the merits.

ORDER: The motion is granted, the prior decision of the AAO is withdrawn, and the matter is remanded to the field office director for further proceedings consistent with this decision.