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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



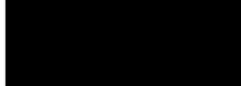
U.S. Citizenship  
and Immigration  
Services

H4



Date: **JUL 05 2012**

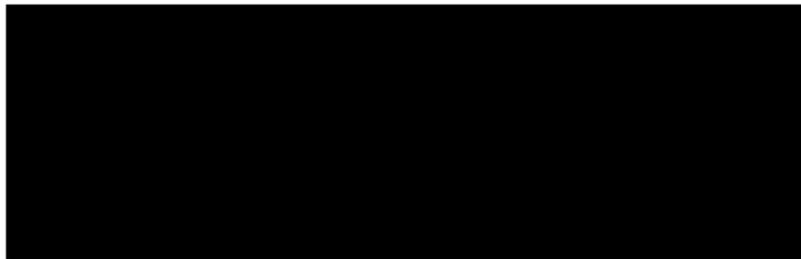
Office: FRESNO, CALIFORNIA

FILE: 

IN RE: Applicant: 

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 application for permission to reapply for admission was denied by the Field Office Director, Fresno, California, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the Field Office Director will be withdrawn and the matter remanded to the Field Office Director to issue a decision on the motion to reopen or reconsider. If the motion is approved, the Field Office Director shall issue a new decision addressing the merits of the applicant's Form I-212 application. If that decision is adverse to the applicant, the Field Office Director shall certify the decision to the AAO for review.

The applicant is a native and citizen of Mexico who was ordered removed from the United States on February 2, 1998, and subsequently reentered on or about February 1998 without inspection. As such, the applicant was found 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). She 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 her qualifying spouse.

The Field Office Director concluded that the applicant did not meet the requirements for consent to reapply for admission and denied the Form I-212 on January 28, 2011. The decision letter specifically states that appeals must be sent to the field office that issued the decision, Fresno, California. It is noted that the Field Office Director properly gave notice to the applicant that she had 33 days to file the appeal by mail. The applicant's attorney filed a Notice of Appeal or Motion (Form I-290B) that was received on March 8, 2011, thirty-nine days after the Field Office Director's decision. The Field Office Director found the appeal was untimely and indicated that he would treat the untimely appeal as a motion to reopen or reconsider. The Field Office Director then denied the motion to reopen or reconsider as untimely in a decision dated April 5, 2011. The applicant filed a second Form I-290B with regard to the decision dismissing the motion, and it was timely received on April 21, 2011.

8 C.F.R. § 103.3(a)(2)(v) indicates:

(B) Untimely appeal.

- (1) Rejection without refund of filing fee. An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.
- (2) Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in Sec. 103.5(a)(2) of this part or a motion to reconsider as described in Sec. 103.5(a)(3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent

decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The Field Office Director concluded that the untimely appeal in this case would be treated as a motion to reopen or reconsider. He then found the motion, like the appeal, was untimely.

By dismissing the motion as untimely, the Field Office Director did not make a decision on the merits of the case as required by 8 C.F.R. § 103.3(a)(2)(v)(B)(2). The matter therefore is remanded to the Field Office Director to determine whether the untimely appeal meets the requirements for a motion to reopen or reconsider and to render a new decision on the merits.

**ORDER:** The decision of the Field Office Director will be withdrawn and the matter remanded to issue a decision on the motion to reopen or reconsider. If the motion is approved, the Field Office Director shall issue a new decision addressing the merits of the applicant's Form I-212 application. If that decision is adverse to the applicant, the Field Office Director shall certify the decision to the AAO for review.