

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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



U.S. Citizenship
and Immigration
Services



H4

DATE: JUL 09 2012

OFFICE: HIALEAH

FILE:

IN RE:

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

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Field Office Director, Hialeah, Florida, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). A subsequent appeal was dismissed by the Administrative Appeals Office (AAO), and this matter is now before the AAO on a motion to reconsider. The motion will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico. The applicant was granted *voluntary departure by an immigration judge on November 19, 1993*. The applicant failed to depart within the voluntary departure period and became subject to a deportation order. The applicant departed from the United States pursuant to a grant of advance parole and was paroled back into the United States on February 14, 1998 to pursue his Form I-485 application. The applicant subsequently departed from the United States and was denied entry into the United States on May 20, 1999. The applicant then entered the United States without admission or parole on that same date. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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), 8 U.S.C. §§ 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen spouse and children.

The Field Office Director determined that the applicant did not meet the requirement for consent to reapply because the applicant was in the United States after reentering illegally and ten years had not elapsed since the date of his last departure, and denied Form I-212 accordingly. *See Decision of Field Office Director, dated August 8, 2011*. On appeal, the AAO found that the applicant is currently statutorily ineligible to apply for permission to reapply for admission and dismissed his appeal. *See Decision of the AAO, dated March 19, 2012*.

On appeal, counsel for the applicant asserts that his applicant's form I-212 appeal decision is based on an incorrect interpretation of the law and regulations.

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 has consented to the alien's reapplying for admission.

The applicant is also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II). Counsel for the applicant asserts that notwithstanding the applicant's inadmissibility under section 212(a)(9)(C)(i)(II) of the Act, the applicant is statutorily eligible for permission to reapply for admission¹.

Counsel for the applicant asserts that the applicant can apply for permission to reapply for admission to the United States even though the applicant has not remained outside the United States for ten years since his last departure. In *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the Board of Immigration Appeals (Board) found that aliens subject to section 212(a)(9)(C) are ineligible for permission to reapply for admission under 8 C.F.R. §212.2 because, "as a result of having illegally reentered after previously being formally removed, [they] are by default inadmissible for life [and their] disability may be waived only *after the alien has been outside the United States for ten years.*" (emphasis added) (quoting *Berrum-Garcia v. Comfort*, 390 F.3d 1158 (10th Cir. 2004)). Counsel does not dispute the AAO's finding that the applicant has not remained outside the United States for ten years subsequent to his last departure from the United States.

Counsel further contends that section 212(a)(9)(C) of the Act is not intended to be a recidivist penalty and cites *Matter of Zhicay v. Ashcroft*, 3:05-CV-315, 2005 U.S. Dist. LEXIS 29699 (Dis. Con. 2005), in asserting that the applicant can seek permission to reapply for admission from within the United States. The Board has made it clear that section 212(a)(9)(C)(i)(I) of the Act pertains only to recidivist immigration violators. *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007). Further, *Matter of Zhicay*, 3:05-CV-315, 2005 U.S. Dist. LEXIS 29699 (Dis. Con. 2005), concerns an applicant who failed to depart from the United States after being ordered deported in absentia. 8 C.F.R. 212.2(j) provides for conditional I-212 approval for aliens, such as the applicant in *Matter of Zhicay*, whose departure will execute an order of deportation. *Id.* However, this applicant is not subject to this section of the regulation. This applicant previously self-deported from the United States so that his departure would not execute a deportation order.

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

¹ It is noted that counsel for the applicant asserts that the AAO has not had the opportunity to review the applicant's Form I-485 appeal of September 2, 2011. The AAO notes that the applicant filed Form I-290B, motion to reconsider the denial of his Form I-485, on September 2, 2011 and the field office director denied the motion to reconsider the denial of the Form I-485 on March 29, 2012. 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) and does not have jurisdiction over the applicant's Form I-485 motion to reconsider.

States *and* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and has not remained outside the United States for ten years following his last departure from the United States. He is currently statutorily ineligible to apply for permission to reapply for admission and the motion to reconsider will therefore be dismissed.

ORDER: The motion is dismissed