

Identifying data deleted to  
protect privacy unwarranted  
invasion of personal privacy  
PUBLIC COPY



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

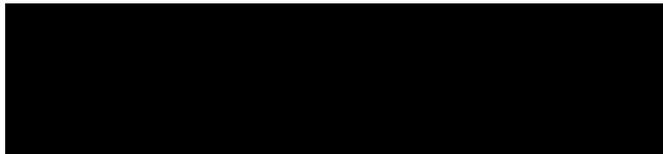
Date: JUN 22 2012 Office: SAN BERNARDINO, CA

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.

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 with the field office or service center that originally decided your case by filing a 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, San Bernardino, California, 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 appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Guatemala who remained in the United States after the date he was allowed to voluntarily depart by the Board of Immigration Appeals (BIA). The applicant is inadmissible to the United States 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 wife and children.

The Field Office Director determined that because the applicant failed to depart the United States in compliance with a grant of voluntary departure, he is ineligible for permission to reapply for admission and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 9, 2011.

On appeal counsel for the applicant contends that the applicant left the United States over eight years ago and is therefore no longer inadmissible under former section 244(e)(1) of the Act. Counsel asserts that the applicant is in fact eligible for permission to reapply for admission.

The record contains statements from the applicant's spouse, evidence of birth, marriage, residence, and citizenship, letters of support, other applications and petitions filed on behalf of the applicant, documentation of deportation proceedings, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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 applicant conceded in deportation proceedings that he entered the United States without inspection in 1991. On [REDACTED] an immigration judge denied his applications for asylum and withholding of removal, and granted him voluntary departure. The BIA dismissed a subsequent appeal on [REDACTED] and granted the applicant 30 days from the date of the order to voluntarily depart the United States. The applicant failed to depart within the time period allowed, and the grant of voluntary departure automatically became an order of deportation to Guatemala. Inadmissibility under section 212(a)(9)(A)(ii) is not contested on appeal. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act for a period of 10 years after his last departure and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

Former section 242b(e)(2) of the Act, 8 U.S.C. § 1252b(e)(2), states, in pertinent part:

(2) Voluntary departure

(A) In general- Subject to subparagraph (B), any alien allowed to depart voluntarily under section 1254(e)(1) of this title or who has agreed to depart voluntarily at his own expense under section 1252(b)(1) of this title who remains in the United States after the scheduled date of departure, other than because of exceptional circumstances, shall not be eligible for relief described in paragraph (5) for a period of 5 years after the scheduled date of departure or the date of unlawful reentry, respectively.

....

(5) Relief covered - The relief described in this paragraph is—

- (A) voluntary departure under section 1252(b)(1) of this title,
- (B) suspension of deportation or voluntary departure under section 1254 of this title, and
- (C) adjustment or change of status under section 1255, 1258, or 1259 of this title.<sup>1</sup>

The record reflects that the applicant left the United States in May 2003, and has remained outside ever since that departure. As such, counsel correctly asserts that the applicant has remained outside the United States for longer than the prescribed period of time under former section 242b(e)(2) of the Act. Therefore, the AAO finds that former section 242b(e)(2) of the Act no longer bars the applicant from obtaining permission to reapply for admission after removal.

Section 212(a)(9) of the Act provides, in pertinent part:

(B) ALIENS UNLAWFULLY PRESENT.-

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

....

(v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such

---

<sup>1</sup> This section was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Public Law No. 104-208. The immigration judge and the BIA granted voluntary departure under former section 244(e)(1) of the Act, and notified the applicant of the consequences for failing to depart under section 242b(e) of the Act. *BIA Decision*, December 19, 1997. The AAO will therefore refer to these former sections of the Act solely to evaluate whether the applicant remains inadmissible for his failure to comply with a grant of voluntary departure.

immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.<sup>2</sup>

The BIA allowed the applicant until January 18, 1998 to depart voluntarily from the United States. He remained past that date, accruing unlawful presence from January 19, 1998 until September 16, 2002 when he filed an application to register permanent residence or adjust status. The applicant departed the United States in May 2003. He therefore accrued more than one year of unlawful presence, and is inadmissible under section 212(a)(9)(B)(i)(II) of the Act. No waiver was filed for this ground of inadmissibility.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(9)(B)(i)(II) of the Act. He has not filed for a waiver of this inadmissibility, therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.

---

<sup>2</sup> The AAO notes that the date of the enactment of the unlawful presence provisions was April 1, 1997.