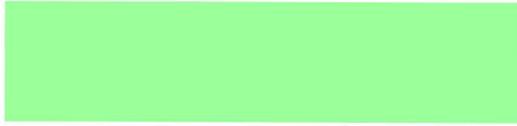




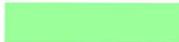
U.S. Citizenship
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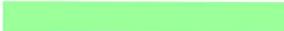
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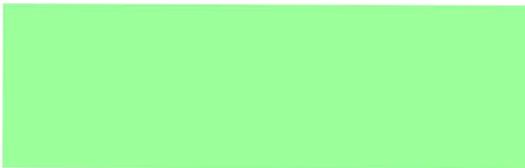
OFFICE: HIALEAH

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,

Ron Rosenberg
Acting 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) on March 19, 2012. The applicant's motion to reconsider was granted and the underlying application was denied by the AAO on July 9, 2012. The applicant's second motion to reconsider his Form I-212 will be granted and the underlying application will remain denied.

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 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 10 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 a motion to reconsider, after consideration of the applicant's arguments, the AAO again determined that the applicant is currently statutorily ineligible to apply for permission to reapply for admission and his underlying Form I-212 was denied. *See Decision of the AAO*, dated July 9, 2012.

In his motion to reconsider, 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. Counsel contends that there is no requirement that the applicant must spend 10 years outside the United States before applying for a waiver under section 212(a)(9)(C)(ii) of the Act and that he doesn't need to be outside of the United States to make his application. Counsel further contends that the *nunc pro tunc* Form I-212 waiver should apply to violations of section 212(a)(9)(C)(ii) of the Act after 10 years have elapsed.

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 remains 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 admission.¹

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 10 years since his last departure. Counsel states that it has been 10 years since the applicant's last departure from the United States and the issue of where those 10 years were spent is inconsequential. In *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), the Board of Immigration Appeals (BIA) 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)). Though counsel continuously asserts that *Matter of Torres-Garcia* does not address where the applicant's 10 years after his last departure from the United States must be spent, the quoted excerpt from the BIA's decision squarely addresses this issue.

Counsel contends that section 212(a)(9)(C) of the Act supports his argument that the applicant is currently eligible to apply for permission to reapply for admission. Counsel states that the language of the statute includes the term "unlawful presence," which indicates presence in the United States. It is noted that counsel is referring to section 212(a)(9)(C)(i)(I) of the Act and the

¹ It is noted that the applicant, in his brief, asserts that his Form I-290B motion to reconsider is applicable to his Form I-212 denial, in addition to his Form I-485 denial. As stated previously, 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.

applicant has been found to be inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Counsel asserts that section 212(a)(9)(C)(ii) refers to aliens seeking admission more than 10 years after the alien's last departure, like the applicant, rather than entry. Counsel also asserts that section 212(a)(9)(C) does not specify that an alien's 10 years after departure need to be spent outside the United States. There has been no dispute that the applicant is reapplying for admission to the United States, pursuant to his Form I-212 application. Further, while not included in the plain language of the statute, the BIA has made a determination, in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that the alien's 10 years after departure must be spent outside the United States. It is noted that, pursuant to 8 C.F.R. § 1003.1(d)(1), the BIA has been vested with the power to provide, through precedent decision, clear and uniform guidance on the proper interpretation and administration of the Act and its implementing regulations.

Counsel further contends that there are *nunc pro tunc* provisions at 8 C.F.R. § 212.2(i)(2) that allow for the applicant to apply for a waiver once 10 years have elapsed since the applicant's departure from the United States. However, the BIA has determined, in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), that 8 C.F.R. § 212.2 does not govern the implementation of section 212(a)(9)(C) of the Act and that an alien may not obtain a 212(a)(9)(C)(i) waiver, retroactively or prospectively, without regard to the 10-year limitation of 212(a)(9)(C)(ii).

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 10 years ago, the applicant has remained outside the United 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 10 years following his last departure from the United States. He is currently statutorily ineligible to apply for permission to reapply for admission, and his Form I-212 application may not be approved.

ORDER: The motion is granted, the prior decision of the AAO is affirmed, and the Form I-212 application remains denied.