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[Redacted]

Date: **NOV 22 2013**

Office: SAN DIEGO, CA

[Redacted]

IN RE:

[Redacted]

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

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, San Diego, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to: section 212(a)(9)(A) of the Act as an alien who has been previously removed; section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit; section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year; and section 212(a)(9)(C) of the Act for reentering the United States without being admitted after being previously removed. The applicant is married to a U.S. citizen and seeks permission to reenter the United States in order to reside with her husband and children.

The district director found that the applicant does not warrant a favorable exercise of discretion and denied the application accordingly.

On appeal, counsel contends, among other things, that the district director failed to consider all of the applicant's positive equities and that the applicant warrants a favorable exercise of discretion.

The record includes, but is not limited to, the following documents: a copy of the marriage certificate of the applicant and her husband, [REDACTED], indicating they were married on October 18, 2008; two declarations from [REDACTED] letters from the applicant's children; numerous letters of support, including from [REDACTED] sister and mother; a psychological evaluation; copies of tax records and other financial documents; a copy of the U.S. Department of State's Travel Warning for Mexico and other background materials; a letter from the Federal Bureau of Investigation (FBI); copies of photographs of the applicant and her family; and an approved Petition for Alien Relative (Form I-130). The entire record was reviewed and considered in rendering this decision on the appeal.

Section 212(a)(9) of the Act provides:

(A) *Certain aliens previously removed.*

- (i) *Arriving aliens.* Any alien who has been ordered removed under section [235(b)(1) of the Act] . . . and who again seeks admission within 5 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 Attorney General [now Secretary of Homeland Security] has consented to the alien's reapplying for admission.

In this case, the record shows that on January 7, 1998, the applicant attempted to enter the United States by presenting an I-551 Resident Alien Card that did not belong to her. The applicant was apprehended by immigration officials and ordered removed. The record further shows that the next week, on January 14, 1998, the applicant again attempted to enter the United States by presenting an I-551 Resident Alien Card that did not belong to her. The applicant was again apprehended by immigration officials and ordered removed. The record shows that the applicant entered the United States in October 1998 using false documents and remained in the United States until September 2005 when she departed the country pursuant to a grant of advance parole. Counsel concedes that between July 1997 and October 1998, the applicant attempted to enter the United States four times by presenting entry documents that did not belong to her. The record shows, and counsel concedes, that on two of those occasions, the applicant was ordered removed. Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(A) of the Act as an alien who has been previously removed and needs consent from the Secretary to reapply for admission to the United States. The applicant has filed a Form I-212 accordingly.

The district director also found the applicant inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit; section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year; and section 212(a)(9)(C) of the Act for reentering the United States without being admitted after being previously removed. After a careful review of the entire record, for the reasons described below, the AAO finds that in addition to the applicant's inadmissibility under section 212(a)(9)(A) of the Act, the applicant is only inadmissible under section 212(a)(6)(C)(i).

Section 212(a)(6)(C)(i) of the Act provides:

In general.—Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) provides, in pertinent part:

(1) The Attorney General [now Secretary of Homeland Security] may, in the discretion of the Attorney General [now Secretary of Homeland Security], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully permanent resident spouse or parent of such an alien . . . .

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

- (i) In General - Any alien (other than an alien lawfully admitted for permanent residence) who –
    - (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . prior to the commencement of proceedings under section [235(b)(1) or section 240 of the Act], and again seeks admission within 3 years of the date of such alien's departure or removal, or
    - (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.

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.

With respect to inadmissibility for willful misrepresentation of a material fact in order to procure an immigration benefit pursuant to section 212(a)(6)(C)(i) of the Act, the record shows, and counsel concedes, that the applicant attempted to enter the United States using false documents on several occasions and that she entered the United States using false documents in October 1998. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

With respect to unlawful presence, counsel states the applicant accrued over one year of unlawful presence between October 1998 and September 2005, when she was granted parole and departed the United States. In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the Board of Immigration Appeals (BIA) held that an applicant for adjustment of status who left the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act did not make a departure from the United States within the meaning of section 212(a)(9)(B)(i)(II) of the Act. Here, the applicant obtained advance parole under section 212(d)(5)(A) of the Act, temporarily left the United States pursuant to that grant of advance parole, and was paroled into the United States. In accordance with the BIA's decision in *Matter of Arrabally*, the applicant did not make a departure from the United States for the purposes of section 212(a)(9)(B)(i)(II) of the Act. Therefore, the applicant is not inadmissible under section 212(a)(9)(B)(i)(II) of the Act for having been unlawfully present in the United States for more than one year. To the extent the district director found that the applicant entered the United States without inspection in July 1997 and remained until December 1997, the applicant's presence in the United States was less than 180 days and, therefore, she is also not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Regarding inadmissibility under section 212(a)(9)(C) of the Act, the plain language of the statute renders aliens who enter or attempt to reenter the United States *without being admitted* after having been ordered removed inadmissible. There is no evidence in the record showing the applicant has entered, or attempted to reenter, the United States without being admitted after her first removal in January 1998. Rather, the applicant entered, or attempted to enter, the United States by misrepresentation and subsequently reentered under a grant of advance parole. Therefore, the applicant is not inadmissible under section 212(a)(9)(C) of the Act. Accordingly, the applicant is eligible to apply for a waiver of inadmissibility under section 212(i) of the Act, and is eligible to apply for permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other

sections of law; hardship involved to himself and others; and the need for his services in the United States.

In *Tin*, the Regional Commissioner noted that the applicant had gained an equity (job experience) while being unlawfully present in the U.S. The Regional Commissioner then stated that the alien had obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country, and he concluded that approval of an application for permission to reapply for admission would condone the alien's acts and could encourage others to enter the United States to work in the United States unlawfully. *Id.*

*Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978), further held that a record of immigration violations, standing alone, did not conclusively support a finding of a lack of good moral character. *Matter of Lee* at 278. *Lee* additionally held that,

[T]he recency of deportation can only be considered when there is a finding of poor moral character based on moral turpitude in the conduct and attitude of a person which evinces a callous conscience [toward the violation of immigration laws] . . . . In all other instances when the cause of deportation has been removed and the person now appears eligible for issuance of a visa, the time factor should not be considered. *Id.*

The AAO acknowledges the unique and extenuating circumstances in this case. The record shows that the applicant's first husband had filed a Petition for Alien Relative (Form I-130) on the applicant's behalf, which was approved in 2003. The applicant contends, and the record corroborates, that her first husband was kidnapped, held for ransom, never seen again, and presumed dead. According to the applicant, her first husband owned a currency exchange house in Mexico which was robbed at gunpoint in June 1997. The applicant contends the robbery was an inside job by an employee who confessed during a police interrogation that the original plan was to kidnap the applicant for ransom. The applicant contends her immigration violations were "done so only out of absolute fear." A psychological evaluation in the record shows that the applicant and her three children were in treatment for years to help them cope with her first husband's kidnapping and death, and concludes that the applicant's return to Mexico, where her first husband was killed, would shatter any sense of security and safety they have been able to achieve after years of counseling. The AAO takes administrative notice that the U.S. Department of States has issued a Travel Warning urging U.S. citizens to defer non-essential travel to parts of Mexico, including [REDACTED] where the applicant was born. *U.S. Department of State, Travel Warning, Mexico*, dated July 12, 2013. The record further reflects that aside from the applicant's departure in September 2005 pursuant to a grant of advance parole, she has resided continuously in the United States since her entry in October 1998 when she was twenty-three years old. Documentation in the record establishes that two of her children were born in the United States and her third child is a lawful permanent resident. In addition, the record shows that the applicant married her current husband, [REDACTED] a U.S. citizen, after she was lawfully paroled into the United States and that his entire family, including his mother who is a widow, his siblings, nieces, and nephews all live in the United States. The record also shows the applicant owns her own business and has regularly paid income taxes. According to numerous letters in the record, the applicant is a hard worker, an excellent wife, a great role model for

her children, and an asset to the community. Moreover, the record shows the applicant has not had any criminal convictions in the United States.

After a careful review of the entire record, the AAO finds that the favorable factors in this case include: the applicant's long residence in the United States for most of her adult life; the applicant's extensive family ties to the United States; the hardship the applicant and her entire family would suffer if her waiver application was denied; the applicant's ownership of a business in the United States; the applicant's regular payment of taxes while working in the United States; numerous letters of support for the applicant; the applicant's lack of any arrests or criminal convictions; and the unusual circumstances, namely the kidnapping and killing of her first husband, which led to her need to enter and remain in the United States.

The adverse factors in the present case include the applicant's initial entry without inspection; her attempted entries and entry into the United States using fraudulent documentation; the applicant's two orders of removal and her return to the United States without permission after these removals; and periods of unauthorized presence and employment in the United States.

The AAO finds that, although the applicant's immigration violations are serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. 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. After a careful review of the record, it is concluded that the applicant has established that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the appeal will be sustained.

In separate decisions, the Field Office Director denied both the applicant's Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) and Form I-601, Application for Waiver of Admissibility (Form I-601) based solely on the denial of the Form I-212. As the AAO has found that the applicant is eligible for approval of the Form I-212, the Field Office Director shall reopen the decisions on the Form I-485 and Form I-601 on Service motion and render new decisions based on the merits of the applications.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

**ORDER:** The appeal is sustained.