

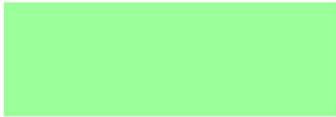


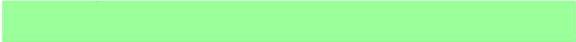
U.S. Citizenship  
and Immigration  
Services

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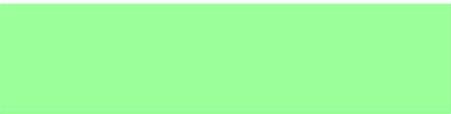
Date: **SEP 06 2013**

Office: SAN DIEGO

FILE: 

IN RE: 

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal pursuant to 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 (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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

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). An appeal of the denial was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The motion will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C) for having entered the United States without being admitted after having been ordered removed. The applicant is also inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for a period of ten years since his last departure as a result of the removal order entered in his case. The applicant 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).

On June 11, 2012, the District Director denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) stating that the applicant is not eligible for relief under the Act pursuant to section 212(a)(9)(C)(i)(II) of the Act. The applicant appealed that decision and on January 30, 2013, the AAO dismissed the applicant's appeal.

The applicant has filed a motion to reconsider the AAO's January 30, 2013 decision, stating that the AAO erred as the applicant's "temporary entry into the United States in order to be processed for a legalization application under section 245A INA should not trigger inadmissibility under section 212(a)(9)(C)(i)(II)." Counsel states that "all information provided in connection with a legalization application" may only be used to make a determination on the legalization application pursuant to section 245A(c)(5) of the Act.

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 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 AAO notes that the applicant filed a motion to reconsider indicating that a brief was submitted with the motion; however, no brief was included in the record in connection with the motion. Counsel submitted legal arguments on Part 3 of the Form I-290B. As set forth below, the arguments by counsel do not establish that our previous decision was based on an incorrect application of law or policy and therefore the motion will be dismissed.

The applicant was found to be inadmissible under section 212(a)(9)(C)(i)(II).

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 of Homeland Security has consented to the alien's reapplying for admission.

As noted in our prior decision, the applicant has a long immigration history in the United States. Only the portion of that history relevant to the underlying Form I-212 application as it relates to the present motion will be discussed. The record reflects that the applicant was ordered removed to his native Mexico by the Immigration Judge in Imperial, California on October 22, 2002. The applicant's appeal of that decision was dismissed by the Board of Immigration Appeals on January 27, 2004. The applicant was apprehended and removed from the United States on August 19, 2004. On March 9, 2005, after his removal from the United States, while he was in Mexico, the applicant filed a Form I-687, Application for Status as a Temporary Resident pursuant to Section 245A of the Act, listing a home address in the United States. A biometrics notice was sent to the applicant at the home address he listed in the United States. The record reflects that the applicant then unlawfully entered the United States without admission on or about March 22, 2005 and presented himself for biometrics at an Application Support Center (ASC) in California. In a sworn statement dated September 26, 2011, the applicant states that he entered the United States "over the gate" for fingerprints, then went back to Mexico. As a result of the applicant's entry into the United States without admission after the removal order in his case, he is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The AAO notes that the applicant later reentered the United States on July 3, 2005 pursuant to advance parole. The record indicates that the applicant has remained in the United States since that time and is not eligible for the exception at section 212(a)(9)(C)(ii).

On motion, counsel states that the applicant's unlawful entry into the United States to attend a biometrics appointment should not trigger inadmissibility under section 212(a)(9)(C) of the Act, as his biometrics appointment was in connection with his application for adjustment of status under section 245A of the Act, 8 U.S.C. § 1255a.

Section 245A(c)(5) of the Act states:

(5) Confidentiality of information

(A) In general

Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may--

- (i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, for enforcement of paragraph (6), or for the preparation of reports to Congress under section 404 of the Immigration Reform and Control Act of 1986;
- (ii) make any publication whereby the information furnished by any particular applicant can be identified; or
- (iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.

The courts have interpreted section 245A(c)(5) of the Act as not applying in certain situations, particularly where derogatory information has been gleaned from a source other than the initial application under section 245A. *See generally McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483 (1991) (finding that information obtained from a source independent of the confidential application process may be used as grounds for a denial); *Soriano-Vino v. Holder*, 653 F.3d 1096, 1097 (9th Cir. 2011) (finding that “[a]pplying the confidentiality provision to information that was not obtained from the application would violate a cardinal principle of statutory interpretation that a statute be analyzed and applied in accordance with its plain language”); *Patel v. Attorney General of U.S.*, 599 F.3d 295, 298 (3rd Cir. 2010) (holding that “confidentiality provisions of the section of the Immigration and Nationality Act (INA) governing adjustment of status for certain entrants before 1982 did not apply to an application for employment authorization submitted by the child of an applicant for adjustment of status under the Legal Immigration Family Equity”); *Uddin v. Mayorkas*, 862 F.Supp.2d 391 (E.D.Pa. 2012) (holding that “information that USCIS used to deny alien’s adjustment of status was not obtained from SAW application process, but rather, it was obtained from independent source, specifically, questioning of alien and his responses to Notice of Intent to Deny (NOID) adjustment application”); *Lopez v. Ezell*, 716 F.Supp. 443, 444 (S.D.Cal. 1989) (finding that the questioning of aliens by border agents is an act independent of the application process).

When the applicant submitted his Form I-485 application for adjustment of status on December 26, 2010 claiming eligibility for adjustment of status under section 245 of the Act based on his having been paroled into the United States on July 3, 2005, not only was this action not “pursuant to an application” filed under section 245A of the Act, but the applicant nullified the effect of any confidentiality provisions that may have applied to his previous application under section 245A of the Act by using information that he obtained in connection with his legalization application to prove his eligibility for adjustment of status. When the applicant submitted proof of his parole into the United States, USCIS was permitted to look into that information to verify its authenticity. The applicant’s only means of obtaining advance parole was through being present in the United States for a biometric appointment, thus opening inquiry into how he did so when he had been removed from the United States on August 19, 2004. The applicant’s unlawful entry to provide his biometrics, which led to the issuance of his advance parole document that he later presented to gain an immigration benefit other than an application for adjustment of status under section 245A

of the Act, is not protected under the provisions of Section 245A(c)(5) of the Act. As in *Uddin*, no information that was furnished by the applicant in connection with his application under section 245A of the Act led to the discovery of the applicant's unlawful entry after deportation, but rather his unlawful entry after deportation was discovered as a result of documentation that he submitted to USCIS in connection with a subsequent unrelated application. See 862 F.Supp.2d at 401. Moreover, the applicant in a sworn statement dated August 18, 2011, stated that he "entered over the gate for fingerprints, then went back to Mexico." Again, the information regarding the applicant's unlawful entry after removal was obtained independently of "information furnished by the applicant" in connection with his application under 245A of the Act. The AAO finds that this information may be used to prove the applicant's inadmissibility under section 212(a)(9)(C) of the Act.

Counsel also states that the applicant was "merely exercising his rights as a class member under the 'late amnesty' case of Northwest Immigrants Rights Project, et. Al. v. USCS, et. Al. 88-CV-00379 JLR (W.D. Was.) (NWIRP)" and that denying his Form I-212 "on an unrelated matter because [the applicant] sought to pursue his rights as a 'late amnesty' application is a violation of the court order in the 'late amnesty' litigation." Counsel has not provided any support for this contention. 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. Moreover, counsel has not cited to nor is the AAO aware of any right by the applicant to evade the immigration laws of the United States by unlawfully crossing the border without inspection in order to pursue an application for adjustment of status under section 245A of the Act. In fact, in *Assa'ad v. U.S. Atty. Gen.* 332 F.3d 1321, 1339 (11th Cir. 2003), the Eleventh Circuit Court of Appeals found that section 245A(d)(2)(A) of the Act waives the ground of excludability only for the eligibility requirement of admissibility, and it "does not give legalization applicants a free pass to cross and re-cross the borders without valid travel documents" but rather "only allows a legalization application to be approved even though the applicant would be inadmissible for lack of labor certification or valid entry documents."

The AAO finds no basis in the motion to reconsider to establish that our prior decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Our prior decision stands that the applicant is inadmissible under section 212(a)(9)(C) of the Act, and an alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has remained outside the United States for more than ten years, which is not the case here. See *AAO Decision*, dated January 30, 2013, p. 3.

The burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. After a careful review of the record, the AAO finds that in the present motion, the applicant has not met this burden. Accordingly, the motion is dismissed.

**ORDER:** The motion is dismissed.