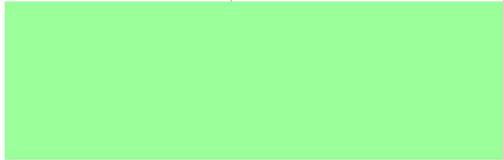


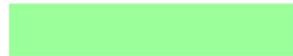


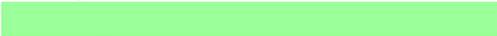
U.S. Citizenship  
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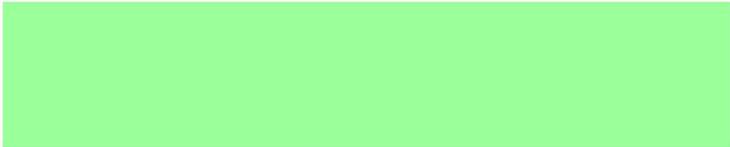
Date: **APR 14 2014** Office: NEBRASKA SERVICE CENTER



IN RE: 

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 (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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who first entered the United States without inspection in December 1996. On or around August 14, 2003 the applicant was taken into Immigration and Customs Enforcement custody and granted voluntary return. He departed the United States in 2003. The applicant then reentered the United States without inspection shortly after this departure, remaining until November 2012. The applicant is currently in Mexico. He seeks permission to reapply for admission into the United States to reside with his U.S. citizen spouse.

In a decision, dated May 28, 2013, the director found the applicant inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C). The director then engaged in a discretionary analysis finding that the applicant did not warrant the favorable exercise of discretion because he was also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having been convicted of possession of cocaine; an inadmissibility for which there is no waiver. The director denied the application accordingly.

On appeal counsel asserts that the director erred in finding that the applicant is ineligible to seek permission to reapply for admission because he has not been outside of the United States for ten years when 8 C.F.R. § 212.2(a) specifically allows for this scenario. He also states that in accordance with *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000) the applicant's drug offense is not a conviction for immigration purposes and the applicant is not inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

The proceedings in the present case are for permission to reapply for admission into the United States. However, the applicant has been found inadmissible under section 212(a)(2)(A)(i)(II) of the Act for having been convicted of possession of cocaine and under section 212(a)(9)(B) of the Act for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. A more detailed explanation of these inadmissibilities is contained in a separate decision pertaining to the applicant's waiver application.

The record also reflects that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act for having reentered the United States without being admitted after a period of unlawful presence. We acknowledge counsel's assertions regarding 8 C.F.R. § 212.2(a) and note that he would be correct in his assertions if the applicant were inadmissible under section 212(a)(9)(A)(ii) of the Act as an applicant seeking permission to reapply for admission after a removal order. However, as the applicant has never been removed, the applicant is not inadmissible under section 212(a)(9)(A)(ii) of the Act. He is inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

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 Attorney General [now the Secretary of Homeland Security, "Secretary"] has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between -

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The record indicates that the applicant first entered the United States without inspection in December 1996. On or around August 14, 2003 the applicant was taken into Immigration and Customs Enforcement custody and granted voluntary return. He departed the United States in 2003. The applicant then reentered the United States without inspection shortly after this departure, remaining until November 2012. The applicant is currently in Mexico. Thus, the applicant accrued unlawful presence from April 1, 1997, the date the unlawful presence provisions were enacted, until his voluntary return in

August 2003. The applicant then reentered the United States without inspection, making him inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

An applicant who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for permission to reapply for admission unless more than ten years have elapsed since the date of the applicant's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Thus, 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 *and* that U.S. Citizenship and Immigration Services has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on or around November 8, 2012, less than ten years ago. The applicant is currently statutorily ineligible to apply for permission to reapply for admission. The appeal of the denial of the waiver application is dismissed as a matter of discretion as its approval would not result in the applicant's admissibility to the United States.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that the applicant is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.