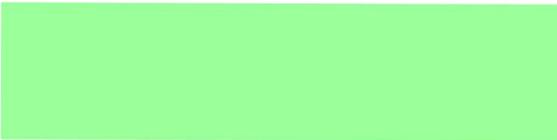


(b)(6)

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals  
20 Massachusetts Avenue, N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



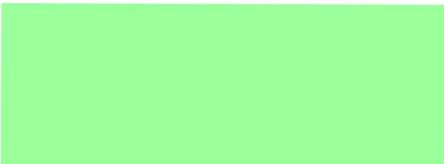
DATE: DEC 01 2014 OFFICE: SAN DIEGO

FILE: [REDACTED]  
[REDACTED]  
consolidated therein)

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)(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,

A handwritten signature in black ink, appearing to read "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). A subsequent appeal and two motions to reopen and reconsider were dismissed by the Administrative Appeals Office (AAO). This matter is now before the AAO on a third motion to reopen and reconsider. The motion will be granted and the prior decision of the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II), for entering the United States without admission after having been removed. The applicant 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).

The District Director determined that the applicant is subject to section 212(a)(9)(C)(i)(II) of the Act and has not remained outside the United States for ten years following his last departure, and denied the applicant's Form I-212 accordingly. *See Decision of District Director*, dated June 11, 2012. On appeal, we determined that the District Director properly denied the applicant's Form I-212. *See Decision of the AAO*, dated January 30, 2013. On motion, we determined that the applicant's unlawful entry following his removal, leading to his inadmissibility pursuant to section 212(a)(9)(C)(i)(II) of the Act, was discovered independently of information submitted in connection with his application under section 245A of the Act. We further determined that there is no indication that the applicant's rights as a class member under "late amnesty" litigation allowed him to enter the United States without inspection. As such, we affirmed our previous decision. *See Decision of the AAO* dated September 6, 2013.

In response to a second motion to reopen and reconsider, we found that the information relating to the applicant's unlawful entry was discovered from sources independent of his legalization application. We also found that the applicant became inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act on March 27, 2005, after his unlawful re-entry to the United States subsequent to his removal, and he was granted advance parole two months he became inadmissible pursuant to this section. As such, we affirmed our previous two decisions. *See Decision of the AAO*, dated February 3, 2014.

In the instant motion, counsel for the applicant requests that we consider the Board of Immigration Appeals (BIA) Decision in *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012). Counsel indicates that *Matter of Arrabally and Yerrabelly* held that not every departure from the United States should constitute a departure triggering the unlawful-presence inadmissibility provisions of the Act, and similarly, not every illegal re-entry should lead to an inadmissibility finding under section 212(a)(9)(C) of the Act, especially where the applicant re-enters to pursue a valid legalization application for humanitarian reasons.

A motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 Service 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). As counsel asserts that we incorrectly applied the law and provides legal authority for his assertion, the motion to reconsider will be granted.

Section 212(a)(9)(C) of the Act states in pertinent part:

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.

As noted in our previous decisions, the applicant was ordered removed to Mexico by an immigration judge on October 22, 2002 and was removed from the United States on August 19, 2004. The applicant filed a Form I-687, Application for Status as a Temporary Resident Under Section 245A of the INA (Form I-687), on March 9, 2005, in which he listed his home address in the United States. Accordingly, a biometrics appointment notice was sent to the applicant at his listed home address. The applicant re-entered the United States from Mexico without admission or parole on or about March 27, 2005, so he could attend this appointment. The applicant subsequently acknowledged in a sworn statement that he re-entered the United States "over the gate" for fingerprints, then went back to Mexico. Accordingly, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act for re-entering the United States without admission or parole subsequent to his removal. Following his return to Mexico, the applicant was granted advance parole to pursue his application for temporary resident status under 245A of the Act and was paroled into the United States on July 3, 2005.

In *Matter of Arrabally and Yerrabelly*, 25 I&N Dec. 771 (BIA 2012), the BIA held that an alien who leaves the United States temporarily pursuant to advance parole under section 212(d)(5)(A) of the Act does 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's inadmissibility was triggered on March 27, 2005, two months before he was granted advance parole, when he illegally re-entered the United

States for his fingerprint appointment. The applicant is not inadmissible for any departure pursuant to a grant of advance parole. Moreover, counsel offers no legal support for extending the holding in *Matter of Arrabally* to the applicant's particular circumstances. Accordingly, the BIA's decision in *Matter of Arrabally* does not cure the applicant's inadmissibility, and he remains inadmissible under section 212(a)(9)(C) of the Act.

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 been outside the United States for more than ten years since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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, 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 last departed the United States on or about March 27, 2005 and entered the United States on July 3, 2005. As such, the applicant has remained outside the United States for less than ten years since his last departure. Based upon this ground of inadmissibility, the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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 not been met.

**ORDER:** The motion is granted and the prior decision of the AAO is affirmed.