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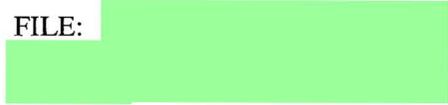


U.S. Citizenship  
and Immigration  
Services

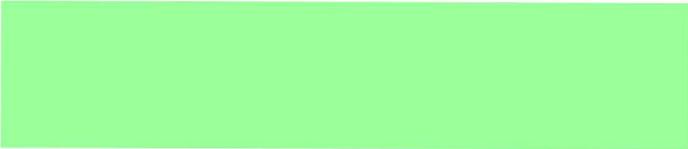


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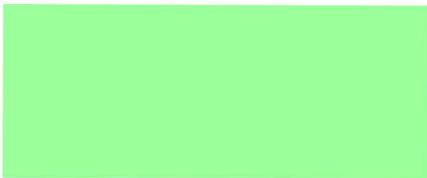
FILE: 

IN RE:

Applicant: 

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 after removal was denied by the Field Office Director, Hialeah, Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record indicates that the applicant, a lawful permanent resident of the United States, is a native and citizen of Nicaragua who was found to be inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). She 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), in order to reside in the United States.

The Field Office Director determined the applicant was admitted for permanent residence on November 28, 1993; however, because the applicant had self-deported and had not waited outside of the United States for the required period, she was inadmissible at that time. The Field Office Director denied the Form I-212, Application for Permission to Reapply for Admission after Deportation or Removal (Form I-212), accordingly. *See Field Office Director's Decision*, dated April 2, 2013.

On appeal, counsel asserts that the applicant has been residing in the United States since 1985 and has satisfied the requirements of her Form I-212 application. Counsel posits that approval is warranted "in the interest of fairness and compassion due to the complexities and compelling factors in this case." *See Letter Brief submitted in Support of Form I-290B, Notice of Appeal or Motion*, dated May 28, 2013.

The record contains, but is not limited to, counsel's briefs, the applicant's immigration applications, financial documents, criminal-case documents<sup>1</sup>, and statements of family members written on the applicant's behalf. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(A) Certain aliens previously removed.-

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five 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-

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<sup>1</sup> The applicant was arrested and charged with resisting a police officer with violence and battery on a police officer. The applicant was convicted of simple battery and sentenced to six months' probation, and therefore deemed to be not inadmissible under section 212(a)(2)(A) of the Act.

- (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 Secretary has consented to the alien's reapplying for admission.

The record reflects that the applicant first entered the United States without inspection on or about April 10, 1985. The applicant was placed into immigration proceedings and filed a Form I-589, Request for Asylum in the United States, on May 21, 1985. On September 18, 1986, the immigration judge denied the applicant's applications for asylum, withholding of deportation, and voluntary departure. The applicant appealed the decision to the Board of Immigration Appeals (BIA), which dismissed her appeal on September 6, 1990.<sup>2</sup> There is no evidence in the record that the applicant received the BIA's decision.

The applicant married a lawful permanent resident who filed Form I-130, Petition for Alien Relative (Form I-130) on her behalf. The Form I-130 was denied on October 19, 1988, because the Immigration and Naturalization Service (INS) lacked jurisdiction. The applicant's spouse filed a second Form I-130, indicating that the applicant would apply for an immigrant visa at the U.S. Embassy in Managua, Nicaragua. The Form I-130 was approved on September 30, 1991. In November 1993 the applicant went to the U.S. Embassy in Nicaragua and was issued an immigrant visa. She was admitted to the United States as an immigrant on November 28, 1993. The applicant received a second alien number when she immigrated.

On March 10, 1994, four months after the applicant entered the United States as a lawful permanent resident, the INS issued a Form I-166, Notice to Deportable Alien of Departure Arrangements (Form I-166), indicating that arrangements had been made for her removal to Nicaragua on April 4, 1994. The record indicates that the Form I-166 was sent to an outdated address and was returned to INS as

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<sup>2</sup> The decision of the District Director, Miami, Florida, dated April 3, 2005, determining that the applicant was ineligible for naturalization and the Field Office Director's decision of April 2, 2013, denying the applicant's Form I-212, incorrectly state that the BIA dismissed the appeal on December 7, 1987.

undeliverable. A copy of the Form I-166 was sent to the applicant's attorney of record in Miami; that Form I-166 was also returned to INS as undeliverable.<sup>3</sup>

In April 2005, after the applicant submitted Form N-400, Application for Naturalization, and appeared for her examination, she was found ineligible because she had left the United States for her immigrant visa while under an order of deportation, thereby self-deporting. After self-deporting the applicant failed to wait the required five years before seeking readmission to the United States, and she had not requested permission to reapply for admission.

Subsequently the applicant's spouse filed a third Form I-130, which was approved on December 9, 2005. On January 12, 2006, the applicant was again placed into immigration proceedings. Proceedings were terminated on September 12, 2006, so the applicant could pursue adjustment of status related to her third approved Form I-130.

After the applicant's spouse was killed in a car accident on September 7, 2008, the applicant's attorney submitted a letter requesting that the applicant's approved Form I-130 be converted to Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360). The applicant's Form I-485, Application to Register Permanent Residence or Adjust Status, was stamped denied on April 16, 2009. A decision letter with the same date addressed to the applicant states that "records indicate . . . that you adjusted status under a previous application. Accordingly, this office will take no further action on the adjustment application."

The applicant filed Form I-360 on July 15, 2010, and it was approved on February 4, 2011.

Section 246 of the Act provides, in pertinent part:

Rescission of Adjustment of Status

a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [now Secretary of Homeland Security, "Secretary"] that the person was not in fact eligible for such adjustment of status, the [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

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<sup>3</sup> The record shows that a third copy of the Form I-166 was sent to the applicant's prior counsel in Texas; however, there is no indication in the record that this attorney and the applicant were in contact after 1985.

The regulation at 8 C.F.R. Part 246.1, regarding notice, states:

If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case, . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

Section 246(a) of the Immigration and Nationality Act (the Act) establishes a five-year statute of limitation on the Secretary's power to rescind erroneously granted adjustments of status; however, the five-year limitation of section 246(a) of the Act does not extend to removal proceedings. *See generally, Asika v. Ashcroft*, 362 F.3d 364 (4<sup>th</sup> Cir. 2004); *Stolaj v. Holder*, 577 F.3d 651 (6<sup>th</sup> Cir. 2009); *Kim v. Holder*, 560 F.3d 833 (8<sup>th</sup> Cir. 2009).

There is no evidence in the record that the applicant was properly served with a notice of intent to rescind her permanent resident status or that her lawful permanent resident status was properly rescinded in accordance with section 246 of the Act, 8 U.S.C. §1256, and 8 C.F.R. § 246.1. Moreover, the record does not indicate that the applicant was issued a final order of removal by an immigration judge, which would have effected a rescission of the applicant's permanent resident status. In the absence of such evidence, it appears that the applicant still maintains lawful permanent resident status. Because the applicant was admitted to the United States as a lawful permanent resident in 1994 and is still a lawful permanent resident, no purpose would be served in approving the application for permission to reapply. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.