



**U.S. Citizenship
and Immigration
Services**

(b)(6)

[Redacted]

DATE: FEB 02 2015

OFFICE: HOUSTON

FILE: [Redacted]

IN RE:

Applicant: [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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), was denied by the Field Office Director, Houston, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Field Office Director for further proceedings consistent with this decision.

The applicant is a native and citizen of El Salvador who was found to be inadmissible to the United States under section 212(a)(9)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A), for having been ordered deported from the United States and seeking admission within the proscribed period. The Field Office Director determined the applicant is ineligible for any relief under the Act, as he is subject to reinstatement pursuant to section 241(a)(5), 8 U.S.C. § 1231(a)(5), of the Act, because the applicant reentered the United States without admission after he was deported. He denied the applicant's Form I-212 accordingly.

On appeal, the applicant, through counsel, contends that he is eligible for *nunc pro tunc* I-212 permission to reenter the United States, because more than 10 years have passed since his order of deportation and subsequent reentry. Counsel also contends that the applicant is not required to wait outside the United States before receiving permission to reenter. *See Form I-290B, Notice of Appeal or Motion*, dated September 19, 2014; *see also Statement Submitted in Support of Appeal*.

The record includes, but is not limited to: briefs and motions; correspondence; affidavits by the applicant and his spouse; a declaration by his uncle; a police clearance letter; documents concerning identity and relationships; employment and financial documents; and documents about conditions in El Salvador. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 241(a)(5) of the Act provides, in relevant part:

If the Attorney General [now Secretary of Homeland Security] finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

The regulation at 8 C.F.R. § 241.8 states, in relevant part:

(a) Applicability.- An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

(1) Whether the alien has been subject to a prior order of removal. . . .

(2) The identity of the alien. . . .

(3) Whether the alien unlawfully reentered the United States. . . .

(b) Notice.- If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement warrants reconsideration of the determination.

(c) Order.- If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

The record reflects that the applicant entered the United States without inspection by U.S. immigration officials on or about October 10, 1992. Subsequent to his entry, U.S. officials apprehended the applicant and placed him in deportation proceedings pursuant to former section 242 of the Act for having entered the United States without inspection in violation of former section 241(a)(1)(B) of the Act. The immigration judge ordered the applicant deported on September 2, 1993. Pursuant to the order, U.S. immigration officials deported the applicant on February 23, 1994. The record further reflects that around May 10, 1994, the applicant reentered the United States without inspection, where the applicant contends he has remained to date.

Although the Field Office Director refers to the applicant's deportation order being subject to reinstatement, the record lacks proof that the applicant was issued a Notice of Intent/Decision to Reinstatement Prior Order (Form I-871), as required by 8 C.F.R. § 241.8(b). Accordingly, the record does not establish that the applicant's prior deportation order was reinstated and that he is precluded from applying for any relief under the Act by section 241(a)(5) of the Act.

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

(A) Certain aliens previously removed.-

...

(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

...

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.

...

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.- Any alien who—

...

(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 mentioned previously, the record reflects that the applicant reentered the United States without inspection around May 10, 1994, about three months after U.S. immigration officials deported him pursuant to an immigration judge's order. The record also reflects the applicant initially filed a Form I-212 application on September 28, 2005,¹ and another Form I-212 application on July 14, 2014, which the Field Office Director denied on September 10, 2014.² The applicant contends that more than 10 years have elapsed since he was ordered deported and his subsequent reentry into the United States. The applicant submits letters of employment, paystubs, tax returns, a mortgage

¹ The record does not reflect an adjudication of this Form I-212 application.

² The denial of the Form I-212 application in 2014 is the matter before us on appeal.

statement, and a police clearance letter. The most recent letter of employment, dated June 18, 2014, indicates the applicant is employed as a field superintendent of a lawn-care company and his date of hire was November 24, 1993. However, the record reflects a gap in the evidence showing the applicant's presence in the United States. The record includes copies of the applicant's federal tax returns filed between 1993 and 2004, and between 2011 and 2013. The most recent paystub is from 2001, and the police clearance letter and mortgage statement are dated 2005. The record therefore is unclear concerning the applicant's presence in the United States between 2006 and 2010.³

Moreover, the Act makes clear that a foreign national must establish admissibility "clearly and beyond doubt." See section 235(b)(2)(A) of the Act; see also 240(c)(2)(A) of the Act. The same is true for admissibility in the context of an application for adjustment of status. See *Kirong v. Mukasey*, 529 F.3d 800, 804 (8th Cir. 2008); see also *Rodriguez v. Mukasey*, 519 F.3d 773, 776 (8th Cir. 2008); *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). The gaps in the record concerning the applicant's whereabouts between 2006 and 2010 may reflect additional exits and reentries into the United States that, if unlawful, could subject him to inadmissibility pursuant to 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 10 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); see also *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

Therefore, we remand the matter to the Field Office Director to determine the applicability of section 212(a)(9)(C) of the Act to the applicant's circumstances. Should the Field Office Director determine the applicant is subject to section 212(a)(9)(C), the Field Office Director will issue a new decision denying the applicant's Form I-212, as the applicant has not remained outside the United States for more than the requisite 10 years and thereby is statutorily ineligible to apply for permission to reapply for admission into the United States after deportation. The matter shall be returned to us in order to adjudicate the present appeal.

In the alternative, should it be determined that the applicant is not subject to section 212(a)(9)(C) of the Act, a determination must be made concerning the applicant's eligibility for an exception under section 212(a)(9)(A)(iii) of the Act. If the exception is granted, no further action will be required by us. Otherwise, if the applicant is not found to be eligible for an exception, the matter shall be returned to us to adjudicate the present appeal.

ORDER: The appeal is remanded for further proceedings consistent with this decision.

³ The record also reflects, however, that the applicant submitted Forms I-821, Applications for Temporary Protected Status, in 2007, 2008, and 2010.