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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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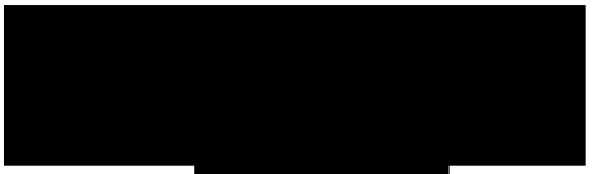

H6

FILE: [redacted] Office: PORTLAND, OR Date: **MAR 1 2 2010**

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director, Portland, Oregon, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on April 24, 2001, filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by , a U.S. citizen. The Form I-485 indicates that the applicant entered the United States without inspection in March 1991. On February 28, 2003, the Form I-130 and Form I-485 were denied.[1]

On January 17, 2008, the applicant filed a second Form I-485 based on a Form I-130 filed on his behalf by his current U.S. citizen spouse. The Form I-485 indicates that the applicant lasted entered the United States without inspection in October 2005. On the same day, the applicant filed the Form I-212, indicating that he resided in the United States. During an interview in regard to the Form I-485, the applicant testified that he entered the United States without inspection in 1991 and remained in the United States until August 22, 2005, when he returned to Mexico. The applicant testified that he successfully reentered the United States without inspection on October 16, 2005. On August 5, 2009, the Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having illegally reentered the United States after accruing more than one year of unlawful presence in the United States. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with his U.S. citizen spouse and three U.S. citizen children.

The acting field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i). The acting field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The acting field office director denied the Form I-212 accordingly. *See Acting Field Office Director's Decision,* dated August 5, 2009.

On appeal, counsel contends that the acting field office director erred in finding the applicant ineligible to apply for permission to reapply for admission because the applicant, despite having entered the United States without inspection after having been removed, should be permitted to seek permission to reapply for admission because he is eligible to apply for adjustment of status under section 245(i) of the Act. Counsel contends that section 245(i) of the Act should trump the requirements of section 212(a)(9)(C)(ii) of the Act mandating that an applicant reside outside the United States for a period of ten years after his or her last departure.[2] Counsel contends that the acting field office director erred in finding the applicant inadmissible under section 212(a)(9)(C) of the

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[1] The AAO notes that the applicant later testified that he and ceased being a couple in 2001. The record reflects that passed away on August 31, 2007, which officially ended the marriage.

[2] Counsel's contention is unpersuasive. Relevant case law has clearly found that an applicant is still inadmissible pursuant to section 212(a)(9)(C) of the Act and requires permission to reapply for admission, even if he or she is eligible for adjustment of status under section 245(i) of the Act.

Act when he is also inadmissible pursuant to section 212(a)(9)(B) of the Act.[3] Counsel contends that section 212(a)(9)(C) of the Act violates the equal protection clause because it punishes those aliens who do not make multiple unlawful entries more severely than those who do. Counsel contends that an alien may make multiple and unlimited unlawful entries as long as the alien does not accrue more than one year of unlawful presence on each occasion.[4] Finally, counsel contends that, since all applicants for adjustment of status are applicants for admission, the applicant is not seeking to enter the United States without admission and is thus not inadmissible pursuant to section 212(a)(9)(C) of the Act.[5] *See Counsel's Brief.* In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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

> (C) Aliens unlawfully present after previous immigration violations.-
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> (i) In general.-Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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.
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> 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.
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> (iii) Waiver

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[3] Counsel's contention is unpersuasive. The two grounds of inadmissibility are not mutually exclusive and an applicant may be inadmissible under both section 212(a)(9)(B)(i)(II) and 212(a)(9)(C) of the Act. While an applicant may be inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, he or she need not be inadmissible under section 212(a)(9)(C) of the Act unless he or she attempts to enter or enters the United States without being admitted. Accordingly, the AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) and 212(a)(9)(C) of the Act and requires a waiver under section 212(a)(9)(B)(v) of the Act and permission to reapply for admission under section 212(a)(9)(C) of the Act.

[4] Counsel's contentions are unpersuasive. Section 212(a)(9)(C) of the Act applies to aliens who accrue more than one year of unlawful presence, *in the aggregate*, thus an alien may not make multiple and unlimited unlawful reentries in order to avoid inadmissibility under section 212(a)(9)(C) of the Act. Additionally, constitutional issues are not within the appellate jurisdiction of the AAO.

[5] Counsel's contention is unpersuasive. The applicant accrued more than one year of unlawful presence and reentered the United States without inspection, i.e. without admission, on October 16, 2005.

> The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—
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> (I) the alien's battering or subjection to extreme cruelty; and
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> (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record reflects that the applicant accrued unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until April 24, 2001, the date on which he filed an affirmative application for adjustment of status. The applicant also accrued unlawful presence in the United States from February 28, 2003, the date on which his application for adjustment of status was denied, until August 22, 2005, the date on which he departed the United States and returned to Mexico. The applicant subsequently reentered the United States without inspection. Accordingly, the applicant has illegally reentered the United States after having accrued more than one year of the unlawful presence in the United States.

The AAO notes that a waiver to section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained 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); *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez,* 25 I&N Dec. 188 (BIA 2010). 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, the applicant has remained outside the United States since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on August 22, 2005, less than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.[6] The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) 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 as a matter of discretion.

ORDER: The appeal is dismissed.

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[6] The applicant will be required to provide proof that he is currently outside the United States and has resided outside the United States for a period of ten years at the time he is eligible to apply for permission to reapply for admission.