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

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: EL PASO, TX Date: MAR 1 5 2010
RELATES)

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:

[redacted]

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 Field Office Director, El Paso, Texas, 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 June 18, 1994, was placed into immigration proceedings after having entered the United States without inspection on November 9, 1993.[1] On November 21, 1994, the immigration judge granted the applicant voluntary departure until June 1, 1995. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On December 17, 1998, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) as a derivative on an approved Petition for Alien Relative (Form I-130) filed on his mother's behalf by her lawful permanent resident spouse. On May 7, 1999, the Form I-485 was denied. On the same day the applicant was removed from the United States and returned to Mexico.[2]

On November 23, 2001, the applicant filed the Form I-212 indicating that he resided in the United States.[3] The applicant filed a motion to reopen immigration proceedings, which was granted on September 4, 2009. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I) for illegally reentering the United States after having been removed. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his lawful permanent residence father, his U.S. citizen spouse and U.S. citizen children.

The 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), for illegally reentering the United States after having been removed. The 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 field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated May 13, 2009.

On appeal, counsel states that the applicant denies that he returned to Mexico in May 1999.[4] Counsel contends that the applicant's due process rights were violated.[5] Counsel contends that the applicant

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[1] On appeal, counsel contends that the applicant has resided in the United States since 1991. The AAO finds that, at the time he was apprehended and appeared before an immigration judge, the applicant's mother testified that she and her children had last entered the United States on this date.

[2] While counsel contends that the applicant was not removed from the United States, the record contains an executed Warrant of Removal/Deportation (Form I-205), reflecting the applicant's removal from the United States on this date.

[3] On appeal, counsel contends that the Form I-212 was filed without the applicant's knowledge or consent. The AAO finds that the applicant's signature appears on the Form I-212 and the applicant requires permission to reapply for admission.

[4] The record contains an executed Warrant of Removal/Deportation (Form I-205), reflecting that the applicant's departure from the United States was witnessed on May 7, 1999.

is statutorily eligible for a waiver pursuant to section 212(a)(9)(C)(ii) of the Act because it has been more than ten years since the applicant allegedly reentered the United States.[6] *See Attachment to Form I-290B,* dated June 10, 2009. In support of her contentions, counsel submits the referenced attachment and copies of documentation already in the record. On the Form I-290B, counsel indicates that she will forward additional evidence and/or a brief within thirty days. The regulation at 8 C.F.R. § 103.3(a)(2)(viii) and the instructions to Form I-290B require the affected party to submit the brief or evidence directly to the AAO, not to the El Paso, Texas field office or any other federal office. The record does not contain the brief and/or evidence that counsel indicated would be submitted to the AAO. Even if counsel were to submit evidence that a brief was filed with an office other than the AAO, the AAO would not consider the brief on appeal because counsel failed to follow the regulations or the instructions for the proper filing location. Accordingly the record is complete.

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

> (A) Certain aliens previously removed.-
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> (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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or

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[5] The AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 1999 and illegally reentered the United States and is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, despite the reopening of his immigration proceedings, is eligible for permission to reapply for admission under section 212(a)(9)(C) of the Act.

[6] The statute and case law clearly states that an alien who has been ordered removed and enters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking admission more than ten years after the date of the alien's last departure from the United States, ***if***, the applicant receives permission to reapply for admission ***prior to reentering*** the United States. An applicant must, therefore, apply from outside the United States and have resided outside the United States for at least ten years. *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). Additionally, the case law to which counsel cites holds that "as a result of having illegally reentered after previously been formally removed, [they] are by default in admissible for life [and their] disability may be waived only after the alien has been outside the United States for ten years." *Berrum-Garcia v. Comfort,* 390 F. 3d 1158 (10th Cir. 2004).

(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 of Homeland Security] has consented to the alien's reapplying for admission.

. . . .

(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 Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

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—

(I) the alien's battering or subjection to extreme cruelty; and

> (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 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, while the applicant's last departure from the United States occurred on May 7, 1999, more than ten years ago, he has not remained outside the United States for the required ten years and he is currently present in the United States. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.[7]

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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[7] The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.