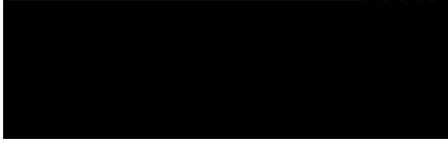




U.S. Citizenship
and Immigration
Services

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



A1

FILE: [REDACTED]

Office: PHOENIX DISTRICT OFFICE

Date: NOV 21 2005

IN RE: [REDACTED]

APPLICATION: Application for Permanent Residence Pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Phoenix, Arizona, who certified his decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be affirmed.

The record reflects that the applicant is a native of Mexico who entered the United States without inspection in September 1997 and returned voluntarily to Mexico in November 1998. In December 1998, the applicant attempted to enter the United States, was apprehended, and voluntarily returned to Mexico. The applicant re-entered the United States without admission in December 1998. The applicant has been in the United States since that time. The applicant married a United States citizen on September 18, 1999 and is the beneficiary of an approved I-130 Petition for Alien Relative filed by her husband. The applicant filed an I-485 Application to Register Permanent Resident or Adjust Status on July 20, 2001.

The director found the applicant inadmissible under section 212(a)(9)(C)(i)(I) of the Act as an alien who attempted to enter the United States illegally, and who later entered illegally, after accruing more than one year of unlawful presence in the United States. The director denied the applicant's I-485 accordingly. *Decision of the District Director, Phoenix, Arizona, dated October 3, 2005.*

In a motion to reconsider the director's initial denial of December 14, 2004 of the applicant's I-485, counsel contends that pursuant to the Ninth Circuit Court of Appeals decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the applicant's inadmissibility should be waived because the applicant filed for adjustment of status pursuant to section 245(i) of the Immigration and Nationality Act (the Act). In support of the motion, counsel submitted a brief. Counsel has not sent further response to the notice of certification.

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

(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 Attorney General has consented to the alien's reapplying for admission. The Attorney General in the Attorney General's discretion may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Attorney General has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A),

or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between--

- (1) the alien's having been battered or subjected to extreme cruelty; and
- (2) the alien's--
 - (A) removal;
 - (B) departure from the United States;
 - (C) reentry or reentries into the United States; or
 - (D) attempted reentry into the United States.

The record indicates that the applicant entered the United States without inspection in September 1997, voluntarily left the United States in November 1998, attempted to enter the United States in December 1998, and entered the United States without admission in December 1998. The applicant accrued unlawful presence from April 1, 1997, the date that section 212(a)(9)(C) of the Act took effect, until November 1998, the date that she returned to Mexico. The applicant re-entered the United States without admission in December 1998 and filed an I-485 on July 20, 2001. In applying to adjust her status to that of lawful permanent resident (LPR), the applicant is seeking admission within 10 years of her November 1998 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(C)(i)(I) of the Act for being unlawfully present in the United States for an aggregate period of more than one year.

The AAO concurs with the director's findings that the applicant was not eligible for the exception found in 212(a)(9)(C)(ii) of the Act because ten years had not elapsed since her departure from the United States, and that the applicant was not eligible for the waiver found in 212(a)(9)(C)(ii) of the Act because there was no evidence that the applicant's departure from, and/or subsequent reentries into the United States were related to battery or extreme cruelty to which she was subjected.

Counsel asserts that under the holding of *Perez-Gonzalez*, the applicant's inadmissibility should be waived because she filed an I-485 pursuant to section 245(i) of the Act. *Perez-Gonzalez* presented for decision the issue of the proper scope of section 241(a)(5) of the Act, which provides that an alien who is subject to a reinstated removal order is not eligible for any relief from removal. Before the United States Immigration and Customs Enforcement (USICE) had reinstated the removal order, the alien in *Perez-Gonzalez* had filed a Form I-212, seeking consent to reapply. Noting that 8 CFR 212.2(e) and (i)(2) allow for "nunc pro tunc" filing of a Form I-212 together with an adjustment application, the court held that USICE could not execute a reinstated removal order so long as the United States Citizenship and Immigration Services (USCIS) had not adjudicated the Form I-212 and the related Form I-485. 379 F.3d at 788.

The applicant in the instant case did not file an I-212. Even if the applicant had filed an I-212, the regulation at 8 CFR 212.2(i)(2) provides that approval of a Form I-212 relates back to the date of the alien's last re-embarkation to the United States. The AAO must consider, therefore, whether the applicant would have been eligible for relief under section 212(a)(9)(C)(ii) of the Act in December 1998, when she last traveled to the United States. Under the plainly stated language of the statute, at least 10 years must have elapsed since the

alien's last departure before the alien may request consent to reapply for admission. Because less than 10 years have elapsed since the applicant last left the United States in November 1998, section 212(a)(9)(C)(ii) of the Act does not permit USCIS to consent to her re-applying for admission.

As the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, the director properly concluded that the applicant is ineligible to become a lawful permanent resident of the United States.

ORDER: The director's decision is affirmed.