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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 07 2005

IN RE:

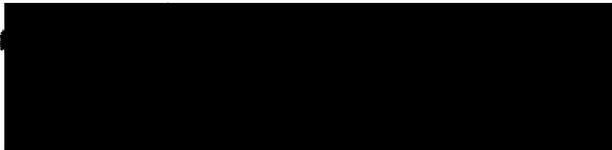
Applicant:



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:

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 for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Director, California Service Center, and 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 October 3, 1999, at the Calexico, California, Port of Entry, applied for admission into the United States. The applicant presented a non-resident Border Crossing Card that did not belong to him. The applicant was found inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182 (a)(6)(C)(i) for having attempted to procure admission into the United States by fraud. Consequently on the same date the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1). The record reflects that the applicant reentered the United States on October 5, 1999, without a lawful admission or parole and without permission to reapply for admission in violation of section 276 the Act, 8 U.S.C. § 1326 (a felony). The applicant is the beneficiary of an approved Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen son. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He 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 remain in the United States and reside with his Lawful Permanent Resident (LPR) spouse and U.S. citizen child.

The Director determined that the applicant was inadmissible under section 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C), of the Act for having been unlawfully present in the United States for an aggregate period of more than one year and was not eligible for an exception or waiver under this section of the Act. The Director then denied the Form I-212 accordingly. See *Director's Decision* dated October 18, 2004.

Section 212(a)(9)(C) of the Act states 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 [now the Secretary of Homeland Security, "Secretary"] 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.

On appeal, counsel submits a brief in which he states that the Director erred in concluding that the applicant is inadmissible due to his illegal reentry and continued residence in the United States. Counsel states that based on a recent Ninth Circuit Court of Appeals decision, the applicant is eligible to file a Form I-212 which if granted would be retroactive to the date on which the alien entered the United States and would not be inadmissible under section 212(a)(9)(C) of the Act. Counsel requests that the Director's decision be vacated and the Form I-212 be granted *nunc pro tunc* to the date of the applicant's reentry.

To recapitulate, the applicant was expeditiously removed from the United States on October 3, 1999. By his own admission he reentered the United States October 5, 1999, without a lawful admission or parole and without permission to reapply for admission and filed an Application to Register Permanent Residence or Adjust Status (Form I-485) on April 5, 2001. Because the applicant reentered the United States after his October 3, 1999, removal and filed a Form I-485 on April 5, 2001, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act.

The AAO is aware of the U.S. Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-94 (9th Cir. 2004). In this decision, the U.S. Ninth Circuit Court of Appeals held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may file, in conjunction with an adjustment of status application, a Form I-212 in order to obtain consent to reapply for admission. If, as a matter of discretion, CIS approved the Form I-212, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. The AAO notes that *Perez-Gonzalez* did *not* hold that section 245(i) of the Act, of itself, relieved the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act. Rather, *Perez-Gonzalez* concerned "the availability of adjustment of status once a favorable determination of permission to reapply has been made." See *Perez-Gonzalez* at 795.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless the alien is "seeking admission more than ten years after the date of the alien's last departure." See Section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. section 1182(a)(9)(C)(ii). 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 *and* that CIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred in 1999, considerably less than ten years ago.

Notwithstanding the arguments on appeal the applicant is subject to the provisions of section 212(a)(9)(C)(i) of the Act and does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212.¹ Accordingly the appeal will be dismissed.

DECISION: The appeal is dismissed.

¹ The AAO notes that, in dicta, the *Perez-Gonzalez* decision suggests that this required ten-year wait does not apply to an alien who has already returned to the United States. See *Perez-Gonzalez, supra* at 794, note 10. The main point of the footnote discussion, however, is that an alien is no longer inadmissible if she or he obtains consent to reapply for readmission, "prior to reembarkation more than ten years after their last departure." This main point is certainly correct. However, this does not mean, as the rest of the note seems to suggest, that an alien can avoid the ten year wait, clearly required by the statute, simply by returning immediately to the United States. This reading would deprive section 212(a)(9)(C)(ii) of any impact at all.