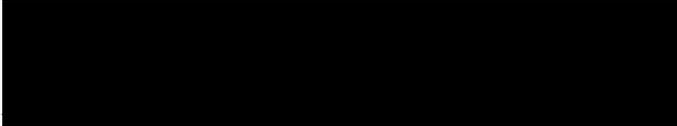




U.S. Citizenship
and Immigration
Services

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Office: CALIFORNIA SERVICE CENTER

Date: SEP 27 2005

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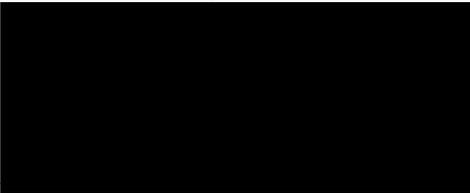
Applicant:



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 November 13, 1999, at the San Ysidro California Port of Entry attempted to procure admission into the United States by fraud and willful misrepresentation of a material fact. The applicant presented a Border Crossing Card (Form I-586) that did not belong to her. 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 and section 212(a)(7)(A)(i)(I) of the Act, 8 U.S.C. § 1182 (a)(7)(A)(i)(I) for being an immigrant not in possession of a valid immigrant visa or other valid entry document. Consequently on November 14, 1999, 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 an unknown date, after her removal, 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 by her spouse. The applicant is inadmissible under sections 212(a)(9)(C) of the Act, 8 U.S.C. § 1182(a)(9)(C) and 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her U.S. citizen spouse, child and stepchild.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors, In addition the Director determined that as a result of the applicant's reentry without permission or inspection the warrant of deportation will be reinstated and the applicant is not eligible for any relief or benefit from her application. The Director denied the Form I-212 accordingly. See *Director's Decision* dated November 2, 2004.

On appeal counsel does not dispute the fact that the applicant was removed in 1999 and that she re-entered without permission, but states that this is the very reason why she is filling the Form I-212. Counsel states that the applicant's reentry does not show a continuous abuse and disregard for the laws of the United States as stated in the Director's decision. In her brief counsel states that the Director's decision cited *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), in which the alien lacked family ties in the United States and there was no indication of hardship to be suffered by anyone other than a temporary hardship to an employer. Counsel states that *Matter of Tin*, dealt with an application for a labor certification and not a family based petition, as is the present case. Furthermore counsel states that the requisite factors cited in *Matter of Tin*, supra, and *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978) are present in the applicant's case.

Counsel states that the fact that the applicant returned to Mexico to bury her two murdered brothers and her reentry after her removal to resume her life with her spouse and children, does not show a callous conscience. Counsel further states that the applicant has been living in the United States since approximately 1985, with the exception of her short departure to Mexico in 1999, she has never had a criminal conviction, she has worked steadily, has been an exemplary mother, stepmother and wife, pays her taxes and there is nothing to support the Director's statement that she lacks good moral character. According to counsel, the Director ignored the hardship the applicant's U.S. citizen child and stepchild would sustain if the applicant were not permitted to remain in the United States. Both children have written declarations regarding the hardship they would suffer if the applicant were deported that were ignored by the Service. In addition counsel states that

the applicant's case establishes that she and her U.S. citizen family members would suffer emotional, psychological and financial hardship if the Form I-212 is not granted. Furthermore counsel states that the Service decision ignored the fact that the applicant's spouse suffers from diabetes, which the applicant helps to control with medication and preparation of his diet. Counsel refers to *Matter of Carbajal*, I.D. 2765 (Comm. 1978) which states that "a record of immigration violations standing alone will not conclusively supports a finding of lack of good moral character." Counsel states that the Director's decision refers to the applicant's removal in the plural implying that she is a consistent immigration violator, which is not the case in this matter. Finally counsel states that the service failed to analyze any of the equities in the case and to address any of the hardships to be sustained by the applicant's family members. Counsel requests that the waiver be granted because the applicant is a good wife and mother, and she should be given a second chance to immigrate and live with her family in the United States.

Before the AAO can adjudicate the appeal and weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for any relief under the Act.

The Director determined that section 241(a)(5) of the Act, 8 U.S.C. 1231(a)(5) applies in this matter and the applicant is not eligible and may not apply for any relief.

Section 241(a) detention, release, and removal or aliens ordered removed.-

(5) reinstatement of removal orders against aliens illegally reentering.- if the Attorney General 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.

In its August 14, 2004, decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the Ninth Circuit Court of Appeals ruled that a Mexican national who returned to the United States following a deportation and had his deportation order reinstated could nevertheless obtain adjustment of status if his Form I-212 was granted. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez* that: "Given the fact that Perez-Gonzalez applied for the waiver *before* his deportation order was reinstated, he was not yet subject to its terms and, therefore, was not barred from applying for relief." The Court further states: "Prior administrative decisions of the Bureau of Immigration Appeals confirm the fact that permission to reapply is available on a *nunc pro tunc* basis, in which the petitioner receives permission to reapply for admission after he or she has already reentered the country."

The record of proceedings does not reveal that the applicant's prior removal order was reinstated at the time she filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. The applicant is eligible to file a Form I-212 and the applicant is not subject to section 241(a)(5) of the Act.

This office finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under sections 212(a)(9)(A) and 212(a)(9)(C)(i) of the Act and therefore must receive permission to reapply for admission.

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

(A) Certain aliens previously removed.-

(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.

(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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

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.

To recapitulate, the applicant was expeditiously removed from the United States on November 14, 1999. By her own admission she reentered the United States in November 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 December 13, 2000.

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.