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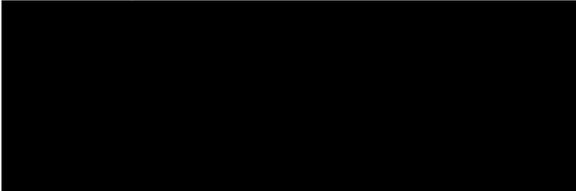
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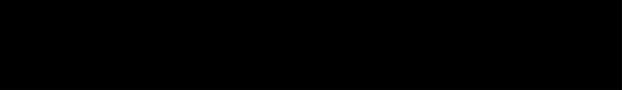
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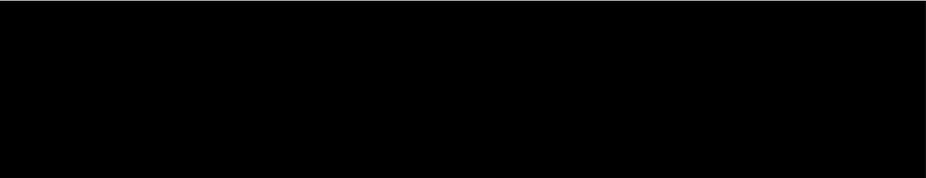
Office: SAN FRANCISCO (SACRAMENTO) Date: OCT 03 2006

IN RE:



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, Chief
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 District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Mexico who, on July 6, 1998, applied for admission to the United States at the San Luis, Arizona, Port of Entry, by presenting an I-586 Border Crossing Card that did not belong to her, under the name ' [REDACTED] She was found to be 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 attempting to procure admission into the United States by fraud. On July 6, 1998, she 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, in March 2000, the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. On August 2, 2004, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Petition for Alien Relative (Form I-130) filed on her behalf by her naturalized U.S. citizen spouse. On April 29, 2005, the applicant filed the Form I-212. The applicant is inadmissible under sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(i) and 1182(a)(9)(C)(i), and 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.

The district director found the applicant inadmissible under section 212(a)(9)(C)(i) of the Act for having reentered the United States, without being admitted, after having been removed from the United States and is not eligible to apply for permission to reapply for admission until ten years after her last departure. The district director denied the Form I-212 accordingly. *Decision of the District Director*, dated August 24, 2005.

On appeal, counsel contends that pursuant to the Ninth Circuit Court of Appeals (Ninth Circuit) 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 Act. In support of the appeal, counsel submitted a brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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 Secretary 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 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 was expeditiously removed from the United States on July 6, 1998. The applicant reentered the United States after her removal without a lawful admission or parole and without permission to reapply for admission in March 2000 and filed the Form I-485 on August 3, 2004. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act.

In applying to adjust her status to that of lawful permanent resident, the applicant is seeking admission within 10 years of her July 1998 departure from the United States. The AAO finds that the applicant is not eligible for the exception found in section 212(a)(9)(C)(ii) of the Act because ten years have not elapsed since her departure from the United States. The AAO also finds that the applicant is not eligible for the exception to the ten year wait period found in section 212(a)(9)(C)(ii) of the Act because there was no evidence that the applicant's departure from, and/or subsequent reentry 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 the Form 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 C.F.R. §§ 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. *Id.* at 788. The Ninth Circuit also found that the Form I-212 may be filed from within the United States, despite language in the Act implying that permission to reapply for admission must be made prior to reembarkation, because requiring an applicant to make such an application prior to entering the United States would circumvent the purpose of section 245(i) of the Act. *Id.* at 789.

In dicta the Ninth Circuit suggests that the required ten-year wait would not apply to an alien who has already returned to the United States. *Id.* at 794, note 10. The main point of the footnote discussion is that an alien is no longer inadmissible if the applicant obtains consent to reapply for readmission "prior to reembarkation more than ten years after their last departure." However, it does not mean, as the remainder of the note suggests, that an applicant can avoid the ten year wait, which is clearly required by the statute, simply by returning immediately to the United States. Such a reading would deprive section 212(a)(9)(C)(i) of the Act of any impact. The point of the Ninth Circuit's footnote and discussion is to find that an applicant need not apply for permission to reapply for admission *prior* to reembarkation but may do so *from within* the United States. It does not mean that the applicant can avoid inadmissibility pursuant to section 212(a)(9)(C)(i) as an alien who has reentered the United States, without being admitted, after having been removed from the United States

Counsel's reading of *Perez-Gonzalez* regarding the availability of a retroactive waiver of the ground of inadmissibility in section 212(a)(9)(C)(i) of the Act directly contradicts the language and purpose of the Act. Such a reading assumes that 8 C.F.R. § 212.2 applies to an application for permission to reapply for admission pursuant to inadmissibility under section 212(a)(9)(C)(i) of the Act. Section 212(a)(9)(C)(i) of the Act differs significantly from section 212(a)(9)(A) of the Act in that there are no time limitations on the inadmissibility because a person who has reentered or attempted to reenter the United States after removal or prior unlawful presence is permanently inadmissible. The language, structure and regulatory history of 8 C.F.R. § 212.2 clearly shows that the regulation was not promulgated to implement the current section 212(a)(9) of the Act and the very concept of retroactive permission to reapply for admission in the context of section 212(a)(9)(C) of the Act directly contradicts the clear language of the Act. Congress has not given the Attorney General authority to grant a waiver of section 212(a)(9)(C) of the Act, either retroactively or prospectively, prior to the end of the ten-year period in cases in which there is no evidence that the applicant's departure from, and/or subsequent reentry into the United States were related to battery or extreme cruelty to which the applicant was subjected. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006).

Moreover, the Board of Immigration Appeals (BIA) has since held that, even if permission to reapply for admission were granted on a "nunc pro tunc" basis, i.e., if the applicant was granted permission to reapply for admission prior to reentering the United States, it does not mean that he was authorized to reenter without lawful admission or parole and that, by surreptitiously crossing the border and not obtaining an immigrant visa through the lawful procedures governing the acquisition of an immigrant visa, an applicant would still be inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. *Id.* At 872.

As such, 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 the applicant is eligible for the benefit sought. The applicant in the instant case 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.