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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

[REDACTED]

FILE:

[REDACTED]

Office: PHOENIX, AZ

Date: JUL 28 2006

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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The application was denied and a subsequent motion to reopen was dismissed by the Acting District Director, Phoenix, AZ. The matter is now before the Administrative Appeals Office (AAO) on certification. The acting director's decision is affirmed and the application is denied.

The record reflects that the applicant is a native and citizen of Mexico who was found to be ineligible to adjust his status to lawful permanent resident status pursuant to section 245(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1255(i) based on a finding of inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I).

Based on this finding, the acting district director denied the applicant's adjustment of status application. *Decision of the Acting District Director*, at 3, dated May 31, 2005. The acting district director dismissed the subsequent motion to reopen and certified the case to the AAO. *Second Decision of the Acting District Director*, at 3, dated January 24, 2006.

In response to the notice of certification, counsel asserts that pursuant to relevant Ninth Circuit case law, the applicant is eligible to adjust status under section 245(i) of the Act. *Attorney's Brief*, at 2, dated May 19, 2006.

The record includes, but is not limited to, counsel's brief and the applicant's adjustment of status application. The entire record was reviewed and considered in arriving at a decision on the appeal.

The record reflects that the applicant entered the United States without inspection in August 1997 and his U.S. citizen spouse filed Form I-130, Petition for Alien Relative, on April 30, 2001. The applicant remained in unlawful status until his departure in July 2001. The applicant subsequently reentered the United States without inspection in August 2001 and filed Form I-485, Application to Register Permanent Residence or to Adjust Status, on July 11, 2003 pursuant to section 245(i) of the Act. The application was denied on May 31, 2005. Therefore, the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act.¹

Section 212(a)(9)(C)(i) 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

¹ The applicant is also inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act for accruing one year or more of unlawful presence, departing the United States and seeking readmission within ten years of his departure. The applicant accrued unlawful presence from August 1997, the date he entered the United States without inspection, until July 2001, the date he departed the United States.

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

Section 245(i) of the Act states, in pertinent part:

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States-

(A) who-

(i) entered the United States without inspection; and

(B) who is the beneficiary ...of-

(i) a petition for classification under section 204 that was filed with the Attorney General [now, Secretary, Homeland Security, "Secretary"] on or before April 30, 2001;

...may apply to the Attorney General [Secretary] for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence.

(2) Upon receipt of such an application, and the sum hereby required, the Attorney General [Secretary] may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if-

(A) the alien is eligible to receive an immigration visa and is admissible to the United States for permanent residence...

The acting district director did not refute counsel's initial claim, which was based on *Perez-Gonzalez v. Ashcroft*, 379 F. 3d 783 (9th Cir. 2004), that the applicant is eligible to adjust his status even if he is subject to section 212(a)(9)(C)(i)(I) of the Act. *See Second Decision of the Acting District Director*, at 3. However, the acting district director stated that he may only adjust his status if he was granted an exception to his inadmissibility, and as less than ten years had elapsed since the applicant's departure from the United States, the statute prohibited consenting to his reapplication for admission. *Id.*

Counsel asserts that *Perez-Gonzalez* held that if someone is eligible for adjustment of status under § 245(i), then he cannot be rendered inadmissible under section 212(a)(9)(C). *Appeal from Denial of Motion to Reconsider*, at 2, dated January 9, 2006. The AAO notes that *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 August 2001, when he 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 July 2001, section 212(a)(9)(C)(ii) of the Act does not permit USCIS to consent to his re-applying for admission.

Counsel also relies on a recently published decision in the Ninth Circuit, [REDACTED] 439 F. 3d 550 (9th Cir. 2006), in contending that the applicant is eligible to pursue adjustment of status under section 245(i) of the Act. *Attorney’s Brief*, at 2. [REDACTED] an applicant who had entered the United States without inspection and returned to the United States illegally (on multiple occasions), but the court held that permanent inadmissibility under section 212(a)(9)(C)(i)(I) of the Act did not defeat his eligibility for penalty-fee adjustment of status. [REDACTED] 439 F. 3d 550 (9th Cir. 2006). The AAO notes that penalty-fee adjustment of status is an application filed pursuant to section 245(i) of the Act.

The panel’s decision indicates that [REDACTED] “is eligible” for adjustment under section 245(i) of the Act. *Id.* A close reading of the opinion, however, indicates that the panel’s decision does not mean that section 245(i) of the Act, by itself, waives inadmissibility of section 212(a)(9)(C)(i) of the Act. [REDACTED] held that its decision was controlled [REDACTED] *Id.* at 553. [REDACTED] however, approval of a Form I-212 is necessary in order for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act to be eligible for adjustment under section 245(i) of the Act. 379 F.3d at 797. “If the agency chooses to exercise its discretion in his favor on both the Form I-212 and § 212(i) relief, he will be eligible for adjustment of status.” *Id.* The [REDACTED] also concluded there was no principled reason to treat aliens who are inadmissible under section 212(a)(9)(C)(i)(I) of the Act differently from those inadmissible under section 212(a)(9)(C)(i)(II) of the Act. 439 F.3d at 554. These considerations must mean that an alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, like the alien in [REDACTED] who was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, must obtain approval of a Form I-212 before the alien may obtain adjustment of status under section 245(i) of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than ten years have elapsed 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). 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 USCIS has consented to the applicant’s reapplying for admission. In the present matter, the applicant’s last departure from the United States occurred in July 2001, less than ten years ago. He is currently statutorily

ineligible to apply for permission to reapply for admission and therefore, his adjustment of status application cannot be approved.

ORDER: The acting director's decision is affirmed and the application is denied.