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

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[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 25 2005

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission after Removal into the United States after Deportation 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:

[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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application for permission to reapply for admission after removal was denied by the Director, California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The Director's decision will be withdrawn, and the matter will be remanded to him for further action.

The applicant is a native and citizen of Mexico who on July 21, 2000, at the San Ysidro, California, Port of Entry applied for admission into the United States. The applicant presented an Alien Registration Card (Form I-551) 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 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, 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 U.S. citizen spouse. The applicant is inadmissible under section 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 and children.

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 for any relief or benefit from her Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212). The Director denied the Form I-212 accordingly. *See Director's Decision* dated October 20, 2004.

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 aliens 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 aliens is not eligible and may not apply for any relief under this Act [chapter], and the aliens shall be removed under the prior order at any time after reentry.

On appeal, counsel submits a brief in which he states that the Director's decision is inconsistent with the Ninth Circuit Court of Appeals ruling that requires a removal hearing in immigration court before a removal warrant can be reinstated. In addition counsel requests that the Director's decision be vacated and the applicant's adjustment of status application be approved.

The AAO concurs with counsel in part. Pursuant to *Morales-Izquierdo v.Ashcroft,* 388 F.3d 1299 (9th Cir. 2004) in the Ninth Circuit only an immigration judge can determine whether an individual is removable under section 241(a)(5) of the Act. The Director does not have jurisdiction over the issue of reinstatement. Although in his decision the Director states that a Warrant of Deportation was reinstated, the record of proceedings does not reveal that the Director initiated a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) and therefore the order of removal has never been reinstated.

In its August 14, 2004, decision, [redacted] *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 nonetheless obtain adjustment of status if his Form I-212 was granted. The Ninth Circuit Court of Appeals stated in [redacted] that: "Given the fact that [redacted] 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." Finally the Court stated: ". . . if the alien has applied for permission to reapply in the context of an application to adjust status, the INS is required to consider whether to exercise its discretion in the alien's favor before it can proceed with reinstatement proceedings..."

The record of proceeding does not reveal that a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued at the time the applicant filed the Form I-212. Since this case arises in the Ninth Circuit, [redacted] is controlling. Based on the above the AAO finds that the applicant is eligible to file a Form I-212.

This office finds that although the applicant is not subject to section 212(a)(5) of the Act, she is clearly inadmissible under section 212(a)(9)(A) of the Act and therefore must received 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.
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> > . . . .
> >
> > (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.

The Director denied the Form I-212 because he found that no purpose would be served in approving the application for permission to reapply after deportation or removal, since the applicant was not eligible for any relief or benefit from the application. As noted above the applicant is eligible to file a Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act and the findings in [redacted] If the application is granted the applicant will be eligible to file an Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Act for her inadmissibility under section 212(a)(6)(C)(i) of the Act.

The Director did not properly adjudicate the Form I-212 pursuant to section 212(a)(9)(A)(iii) of the Act. In view of the foregoing, the Director's decision will be withdrawn and the record will be remanded to him in order to properly adjudicate the Form I-212 under section 212(a)(9)(A)(iii) of the Act and enter a new decision, which, if adverse to the applicant is to be certified to the AAO.

ORDER: The Director's decision is withdrawn. The matter is remanded to him for further action consistent with the foregoing discussion.