U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 12 2005

IN RE: Applicant: [redacted]

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:

[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 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 September 15, 1999, at the San Ysidro, California Port of Entry attempted to procure admission into the United States. The applicant presented a 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 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 the same day 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 reveals that on September 20, 1999, Border Patrol Agents apprehended the applicant and his prior removal order was reinstated pursuant to section 241(a)(5) of the Act. The applicant was removed to Mexico. The record further 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 inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(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 his Lawful Permanent Resident (LPR) father and his U.S. citizen 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 the Act and denied the Form I-212 accordingly. *See Director's Decision* dated September 20, 2004.

On appeal, counsel submits a brief in which he states that the Director improperly denied the Form I-212 since he failed to consider a recent Ninth Circuit Court decision and did not weigh the positive and negative factors in the applicant's case.

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, [redacted] 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 may nonetheless obtain adjustment of status if his Form I-212 is 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 states: "... 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 proceedings does not reveal that the applicant's prior removal order was reinstated at the time he filed the Form I-212. Since this case arises in the Ninth Circuit, [redacted] is controlling. The applicant is not subject to section 241(a)(5) of the Act.

On appeal counsel states that the Director failed to consider any positive factors in the applicant's case. Counsel states that the applicant is the son of a LPR and father of three U.S. citizens who will suffer extreme hardship if the waiver application is not granted. In addition counsel states that the applicant is gainfully employed, is a person of good moral character and has filed income taxes.

The AAO conducts the final administrative review and enters the ultimate decision for CIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir. 2003).

To recapitulate, the applicant was removed from the United States twice, on September 15, 1999, and September 20, 1999. The applicant reentered the United States after his second removal without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after his second removal, the AAO finds that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C § 1182(a)(9)(C)(i).

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, he 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.
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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.

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.

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. 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 on September 20, 1999, considerably less than ten years ago.

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.[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 be returning immediately to the United States. This reading would deprive section 212(a)(9)(C)(ii) of any impact at all.