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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: DENVER Date: JUN 09 2006

IN RE: [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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Denver, Colorado, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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 December 21, 1982, entered the United States without inspection. The applicant was apprehended by immigration officers, placed into proceedings and charged with illegal entry into the United States. The applicant was convicted of illegal entry into the United States and was sentenced to 60 days in jail. Consequently, on March 1, 1983, the applicant was removed from the United States as an alien who entered the United States without inspection. On May 20, 1985, the applicant entered the United States without inspection. The applicant was apprehended by immigration officers and was placed into proceedings. Consequently, on June 25, 1985, the applicant was again removed from the United States as an alien who entered the United States without inspection. The record reflects that, on August 1, 1989 the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission. On October 30, 2002, 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 his behalf by his naturalized U.S. citizen brother. On September 23, 2004, the applicant filed the Form I-212. The applicant was found inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A). He 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 U.S. citizen son and brother.

The district director determined that the applicant was inadmissible to the United States pursuant to section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for being an alien who entered the United States within 20 years after having entered the United States illegally after being previously removed from the United States. In addition, the district 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 Form I-212. The district director then denied the Form I-212 accordingly. *See Director's Decision* dated March 14, 2005.

On appeal, counsel contends that section 241(a) of the Act does not apply to the applicant because he re-entered the United States prior to enactment of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996) and that, pursuant to *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004), the applicant is entitled to a determination of the Form I-212 because he is applying for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i). *See Applicant's Brief,* dated March 21, 2005.

Section 241(a) of the Act states in pertinent part:

> (5) Reinstatement of removal orders against aliens illegally reentering. If the Attorney General [now the Secretary of Homeland Security, "Secretary"] 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.

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 or that the district director reinstated the prior removal order after he denied the Form I-212. As such, the AAO will determine whether the applicant is eligible for relief pursuant to the filing of the Form I-212.

On appeal, counsel states that the facts in this case establish that the applicant warrants a favorable exercise of discretion.

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. As noted previously, the applicant was removed from the United States on March 1, 1983. The applicant reentered the United States after his removal without a lawful admission or parole and without permission to reapply for admission. The applicant was again removed from the United States on June 25, 1985 and reentered the United States after his removal without a lawful admission or parole and without permission to reapply for admission. The applicant last departed the United States on June 25, 1985 and has remained in the United States since August 1, 1989.

The AAO finds that the applicant 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) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
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> (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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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case on a 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 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 Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary 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.

Counsel argues that the Ninth Circuit Court of Appeals (Ninth Circuit) case, *Perez-Gonzalez v. Ashcroft, Supra*, which ruled that a Mexican national who returned to the United States following a deportation and who had his deportation order reinstated may nonetheless obtain adjustment of status if his Form I-212 is granted, applies to the instant case. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez*: "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 stated: "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."

Unfortunately this case does not arise in the Ninth Circuit and *Perez-Gonzalez* is not controlling. The applicant resides within the jurisdiction of the Tenth Circuit Court of Appeals (Tenth Circuit). In its November 23, 2004 decision, *Berrum-Garcia v. Comfort,* 390 F. 3d 1158 (10th Cir. 2004), the Tenth Circuit

respectfully disagreed with the Ninth Circuit's holding in *Perez-Gonzalez,* ruling that a waiver of the lifetime inadmissibility of section 212(a)(9)(C)(i)(II) of the Act is available to aliens only after they have exited the United States and *remained outside the United States* for ten years before applying for the waiver. The AAO notes that an exception to section 212(a)(9)(C)(i) of the Act is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

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 to file the Form I-212 until he has exited the United States and remained outside the United States for a period of ten years. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.