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U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 14 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 Director, California Service Center, 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 January 2, 2001, at the San Ysidro, California, Port of Entry, applied for admission into the United States. The applicant presented an I-551 Lawful Permanent Resident Card belonging to another, under the name [redacted] 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. Consequently, on January 3, 2001, 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 without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to March 24, 2003, the date on which she filed the Form I-212 indicating she currently resided in Escondido, California. 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 lawful permanent resident spouse.

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 Form I-212. The director then denied the Form I-212 accordingly. *See Director's Decision* dated September 29, 2004.

On appeal, counsel contends that pursuant to the Ninth Circuit Court of Appeals 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 Immigration and Nationality Act (the Act). *See Applicant's Brief,* dated November 24, 2004. Counsel also contends that the favorable factors in the applicant's case outweigh the unfavorable ones.

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 AAO finds that the director erred in finding that section 241(a)(5) of the Act applies in this case. In its August 14, 2004 decision, *Perez-Gonzalez v. Ashcroft, Id.,* the Ninth Circuit Court of Appeals 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. The Ninth Circuit Court of Appeals stated in *Perez-Gonzalez*: "Given the fact that Perez-Gonzalez 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."

The record of proceedings does not indicate that the applicant's prior removal order was reinstated at the time she filed the Form I-212. Since this case arises in the Ninth Circuit, *Perez-Gonzalez* is controlling. As such, the applicant is not barred from relief pursuant to section 241(a)(5) of the Act.

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 expeditiously removed from the United States on January 3, 2001. The applicant reentered the United States after her removal without a lawful admission or parole and without permission to reapply for admission.

The AAO finds that although the applicant is not subject to section 241(a)(5) of the Act, she is clearly inadmissible under section 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:

> (C) Aliens unlawfully present after previous immigration violations.-
>
> (i) In general.-Any alien who-
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> (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.

The AAO notes that an exception to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

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 10 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 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 January 3, 2001, less than ten years ago. She is currently statutorily ineligible to apply for permission to reapply for admission. When the applicant is eligible to file the Form I-212 he may also need to file an Application for Waiver of Grounds of Excludability (Form I-601) of the 212(a)(6)(C)(i) inadmissibility grounds pursuant to section 212(i) of the Act.

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.