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: MAY 19 2006

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, Chief
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 October 25, 1997, at the Bridge of the Americas, El Paso, Texas, Port of Entry, attempted to procure admission into the United States by willful misrepresentation of a material fact. The applicant presented a Border Crossing Card (Form I-586) in order to return to her residence in Phoenix, Arizona. She 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 willful misrepresentation of a material fact, 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 date 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 the applicant reentered the United States shortly after her removal, 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 derivative beneficiary of an approved Immigrant Petition for Alien Worker (Form I-140) filed on behalf of her spouse. The applicant is inadmissible pursuant to 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 her Lawful Permanent Resident (LPR) spouse and children, and her U.S. citizen child.

The Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones and denied the Form I-212 accordingly. *See Director's Decision* dated March 4, 2005.

On appeal, counsel states that the decision was an abuse of discretion. On appeal, counsel states that the applicant filed the Form I-212 pursuant to *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004). In addition, counsel states that Director did not properly review the case before issuing the decision. Counsel states that the Director incorrectly stated that the Form I-212 was filed on October 2, 2000, when it was actually filed on November 1, 2004. In addition, counsel states that the Director only mentioned the applicant's U.S. citizen child and failed to mention her two LPR children. Additionally, the Director mentioned in his decision that the applicant's marriage to her LPR spouse occurred when they were both aware of her "tenuous status in this country" when in fact she was married in Mexico, years before either spouse arrived in the United States. Counsel points out that the denial states that the applicant "failed to truthfully answer" questions on the Form I-485 and she did not disclose the fact that she was removed from the United States in 1997. Counsel states that the applicant disclosed the 1997 incident in question #9 of the Form I-485 by underlining the word "deported" and adding the words "voluntary departure? 1997", indicating that she did not know if it was a deportation or voluntary departure. Finally, counsel states that even though the applicant actually was invited to a wedding at that time, the Director in his decision stated that this was a misrepresentation of a material fact.

Counsel further states that the applicant has no criminal history, did not use fraudulent documents, she has been married for 19 years, has one U.S. citizen child, two LPR children and two U.S. citizen brothers. Finally, counsel states that the Director abused his discretion in denying the Form I-212 and the applicant's favorable factors outweigh her 1997 deportation and her reentry after her deportation.

The AAO agrees with counsel in part. The AAO finds that the Director erred in stating in his decision that the Form I-212 was filed on October 2, 2000, and that her marriage occurred after her tenuous status in the United States, and in failing to mention her LPR children. Although in question #9 on her Form I-485 the applicant indicated that she had been removed in 1997, she did not answer "yes" to question #10 which asks in pertinent part: "have you, by fraud of willful misrepresentation of a material fact, ever sought . . . entry into the U.S." Therefore, the Director was correct in stating that she failed to answer questions truthfully on the Form I-485, as she did not disclose that her 1997 removal was for misrepresenting her reason for traveling to the United States. While she may have actually been intending to go to a wedding, she was, in fact, returning to resume her unlawful residence.

In *Perez-Gonzalez v. Ashcroft, supra,* the court found that the Service denied the Form I-212 erroneously on the ground that permission to reapply is only available to aliens who are outside the United States, applying at a port of entry, or paroled into the United States. The court ruled that the alien, who returned to the United States following a deportation and had his deportation order reinstated, could still adjust status if his Form I-212 were granted. The applicant in the present case was allowed to file a Form I-212 and the Director adjudicated the application pursuant to section 212(a)(9)(A)(iii) of the Act. The AAO notes that *Perez-Gonzalez* states that ". . . if permission to reapply is granted the approval of Form I-212 is retroactive . . . and therefore, the alien is no longer subject to the grounds of inadmissibility under section 212(a)(9)." The operative word is "if." In the present case, the application was denied because the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. Permission to reapply was not granted and, therefore, the applicant remains inadmissible.

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).

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. To recapitulate, the applicant was expeditiously removed from the United States on October 25, 1997. The applicant reentered the United States immediately after her removal without a lawful admission or parole and without permission to reapply for admission.

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)(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.

. . . .

(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 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.

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 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 October 25, 1997, less than ten years ago. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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.