U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TUCSON, AZ Date: AUG 03 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Tucson, Arizona, 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 July 5, 1994, filed a Request for Asylum in the United States (Form I-589) under the name "[redacted]," claiming that he was a native and citizen of Guatemala. On January 31, 1998, the applicant was apprehended by immigration officers near Otay Mesa, California. The applicant admitted that he had entered the United States without inspection. The applicant admitted that he had filed the fraudulent Form I-589 in order to obtain employment authorization.[1] Even though the applicant provided his true name as an alias, he failed to reveal his true identity to immigration officers by providing an alternate date of birth. On February 1, 1998, the applicant was placed into immigration proceedings for having entered the United States without inspection on January 31, 1998. On February 5, 1998, the immigration judge ordered the applicant removed from the United States under the name [redacted] On February 5, 1998, the applicant was removed from the United States and returned to Mexico.

On January 30, 1999, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1231(a)(5) under the name '[redacted]' The applicant reentered the United States without inspection on January 29, 1999. Even though the applicant provided his true name as an alias, he again failed to reveal his true identity to immigration officers by providing an alternate date of birth. The applicant admitted that he had resided in the United States for a period of five years. On February 1, 1999, the applicant was removed from the United States and returned to Mexico.

[redacted] the applicant married his U.S. citizen spouse in Napa, California. On April 30, 2001, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on his behalf, which was approved on January 17, 2002. The Form I-130 indicates that the applicant resided in the United States. On January 2, 2003, the applicant filed a Form I-212, indicating that he resided in Mexico.[2] The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for a period of twenty years. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen spouse, two U.S. citizen step-children and two U.S. citizen children.

The field office director determined 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), for illegally reentering the United States after having been removed. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States

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[1] As such, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for obtaining immigration benefits by fraud.

[2] The AAO notes that there is no evidence that the applicant has departed the United States. The record lacks evidence of the date on which he departed the United States as well as evidence to establish that he has since continuously resided outside the United States.

for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated September 29, 2009.

On appeal, counsel contends that the specific language of section 245(i) of the Act permits the applicant to apply for adjustment of status. Counsel contends that the applicant is eligible to seek adjustment of status under section 245(i) of the Act because he filed the waiver application prior to reinstatement of the removal order.[3] Counsel contends that *Acosta v. Gonzalez*, 439 F. 3d 550 (9th Cir. 2006) would permit the applicant to apply for permission to reapply for admission.[4] Counsel contends that, even though *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), has overturned the Ninth Circuit's decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), the BIA has acted in excess of its authority and this is not a situation in which *Chevron* deference is appropriate.[5] Counsel contends that the Ninth Circuit, in *Escobar v. Holder*, 567 F.3d 466 (9th Cir. 2009), has previously held that, where their interpretation was based on the unambiguous terms of the statute *Chevron/Brand X* has no relevance.[6] Counsel contends that the applicant warrants a favorable exercise of discretion. *See Counsel's Brief,* dated October 30, 2009. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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

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[3] The field office director did not err in finding the applicant ineligible to apply for adjustment of status pursuant to section 245(i) of the Act, even though the applicant had made the application prior to reinstatement. *See Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007) and *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).

[4] The AAO finds counsel's contentions unpersuasive. The applicant is inadmissible under both section 212(a)(9)(C)(i)(I) and (II) of the Act. Pursuant to 8 C.F.R. § 1003.1(g), BIA precedent decisions are binding on officers of U.S. Citizenship and Immigration Services (USCIS). While counsel notes that *Acosta v. Gonzalez*, 439 F. 3d 550 (9th Cir. 2006) would permit the applicant to apply for permission to reapply for admission, the case law upon which *Acosta* is based has been overturned. *See Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007) and *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10th Cir. Jul 27, 2009). Furthermore, the BIA has held that *Acosta* is no longer binding law and that *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007) is applicable. *See Matter of Diaz and Lopez,* 25 I&N Dec. 188 (BIA 2010).

[5] In 2007, the Ninth Circuit Court of Appeals (Ninth Circuit) found that *Perez-Gonzalez* should be overturned and that the Ninth Circuit should defer to the Board of Immigration Appeals' (BIA) decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). *See Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). Additionally, counsel's retroactivity arguments which mirror the only arguments left before the Ninth Circuit in regard to *Gonzales II,* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).

[6] The case to which counsel cites has no bearing on the applicant's case since it relates to cancellation of removal and not to the issue before the AAO, permission to reapply for admission. As discussed above and below, relevant case law exists on point in regard to permission to reapply for admission.

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.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(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 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 Secretary has consented to the alien's reapplying for admission. [emphasis added]

. . . .

(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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

> The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—
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> (I) the alien's battering or subjection to extreme cruelty; and
>
> (II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The AAO notes that a waiver 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 he or she has *remained outside* the United States for more than 10 years 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); *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez,* 25 I&N Dec. 188 (BIA 2010). 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, the applicant has remained outside the United States since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. While the applicant's last departure from the United States occurred on February 1, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.[7] 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 he is eligible for the benefit sought. The applicant in the instant case does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) or (iii) 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 as a matter of discretion.

ORDER: The appeal is dismissed.

[7] The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.