U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

H4

[redacted]

Date: JUN 25 2012 Office: YAKIMA FIELD OFFICE [redacted]

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal pursuant to 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Yakima, Washington, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C) for having entered the United States without admission after having been ordered removed. The applicant is also inadmissible under section 212(a)(6)(C) of the Act, 8 U.S.C. § 212(a)(6)(C) for having attempted to procure admission to the United States through fraud or willful misrepresentation of a material fact. The applicant 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).

On Form I-290B, in Part 2, "Information about the Appeal or Motion," counsel for the applicant indicates that the applicant wishes to appeal Form # I-212 and Form # I-485.[1] The AAO does not have appellate jurisdiction over an appeal from the denial of an application for adjustment of status (Form I-485). The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception, that does not apply in this case.

The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register. The AAO does not have jurisdiction over an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act. Accordingly, the appeal will be treated solely an appeal of the denial of the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.[2]

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[1] The AAO notes that the applicant filed a second Form I-290B (Notice of Appeal or Motion) on March 12, 2012; however, that form was filed as a "motion to reopen and reconsider" the Field Office Director's decision on the applicant's Form I-485 application for adjustment of status and not as an appeal to the AAO. The Field Office Director dismissed the applicant's motion.

[2] Although counsel for the applicant references the denial of the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, and asks that that the AAO "incorporate herein by this reference all prior briefs, arguments and supporting documentation filed in this matter," the AAO will only consider the denial of the applicant's Form I-212 on appeal. The applicant did not submit a separate Form I-290B (Notice of Appeal or Motion) with the appropriate fee in regards to the denial of their Form I-601.

On December 13, 2011, the Field Office Director denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) stating that the applicant is not eligible for relief under the Act pursuant to section 241(a)(5) of the Act and Section 212(a)(9)(C)(i) of the Act.

On appeal, counsel for the applicant, incorporating all prior briefs and supporting arguments filed in relation to this matter, states that the Field Office Director erred in denying applicant's Form I-212 which was "re-filed more than 10 years after the last de facto departure from the United States."

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

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-
>
> ...
>
> (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.
>
> ...

The record reflects that the applicant was ordered removed on April 22, 2000 and subsequently entered the United States without being admitted on or about May 1, 2000. The applicant does not contest these facts on appeal. As a result of the applicant's entry into the United States without admission after the removal order in her case, she is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Counsel for the applicant states that the applicant was never subject to the inadmissibility at section 212(a)(9)(C)(i) of the Act, but does not provide a basis for that assertion. *Additionally*, counsel states that the applicant should be eligible to apply for permission to reapply after removal due to the fact that the applicant "re-filed" her application for adjustment of status more than five years after her expedited removal order.[3] As stated below, the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act and is not eligible for the exception at section 212(a)(9)(C)(ii), as she is has not remained outside of the United States for a period of ten years since her last departure.

[3] The AAO notes that counsel states that the applicant's expedited removal order was entered on May 31, 1991. The record reflects, however, that the removal order was entered on April 22, 2000.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten years since the date of the alien's last departure from the United States. *See Carillo de Palacios v. Holder*, 662 F.3d 1128 (9th Cir. 2011) and *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the Board of Immigration Appeals holding that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving permission to reapply for admission prior to the expiration of the ten-year bar.

In *Carillo de Palacios*, the Ninth Circuit Court of Appeals, the circuit in which this case arises, held that "the law of our circuit is now settled:"

> According *Chevron* deference to the BIA's interpretation of the relevant statutes, we have held that aliens who are inadmissible under 8. U.S.C. § 1182(a)(9)(C)(i)(I)-(II) are ineligible for adjustment of status under 8 U.S.C. § 1255(i).

Id. at 1130 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). It is clear that the applicant must exit the United States and wait ten years before applying for permission to reapply under section 212(a)(9)(C)(ii) of the Act regardless of any claimed eligibility under section 245(i) of the Act. *Id.* at 1133. The law makes clear that the applicant's claimed eligibility to apply for adjustment of status under section 245(i) does not negate the applicability of the ground of inadmissibility at section 212(a)(9)(C) of the Act to the applicant's case. *See Carillo de Palacios,* 662 F.3d at 1130. Although counsel states that the factual scenario in *Carillo de Palacios* differs from the applicant's case in that the applicant in *Carillo de Palacios* was not applying for admission under section 245(i) more than 10 years after their last unlawful entry for the purposes of section 212(a)(9)(C) of the Act, the BIA and the Court of Appeals for the Ninth Circuit have held that the applicant must remain outside of the United States for 10 years before being eligible to apply for permission to reapply under section 212(a)(9)(C)(ii) of the Act. *Id.* The Ninth Circuit's decision to grant an *en banc* rehearing of *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9th Cir. 2011) does not affect the applicant's present ineligibility for relief under the Act. The applicant remains inadmissible under section 212(a)(9)(C) of the Act and ineligible to apply for an exception at this time.

Moreover, in this case, the Field Office Director determined that the applicant is subject to reinstatement provisions under section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5) and is ineligible for any relief under the Act. Section 241(a)(5) of the Act provides:

> 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 the Act, and the alien shall be removed under the prior order at any time after the reentry.

The record reflects that on March 30, 2010, as a result of the applicant's prior removal order and her subsequent unlawful reentry without admission, the applicant was served with Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The record indicates that the applicant is on an order of

supervision until the reinstatement is executed. There is no support in the record for counsel's statement that the applicant has not been provided notice of the intent to reinstate her prior removal order. Until that order is executed and the applicant has been removed from or has departed the United States, she is ineligible for relief under the Act. *Id.*

Lastly, counsel for the applicant states that the AAO should exercise discretion in the applicant's favor; however, in regards to Form I-212, the AAO does not have discretion under the Act until the applicant has met the criteria set forth in section 212(a)(9)(C)(ii) of the Act.

Because the applicant is not eligible for relief as a result of the decision to reinstate the prior removal order in her case pursuant to section 241(a)(5) of the Act and because the applicant has not met the statutory criteria set forth in section 212(a)(9)(C)(ii), no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States. As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the Field Office Director. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, the AAO finds that the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.