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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H4

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 25 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 January 22, 1998, at the San Ysidro, California, Port of Entry, applied for admission into the United States. The applicant presented a counterfeit Arrival-Departure Record (Form I-94), with a stamp indicating that she had been paroled. 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, 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 January 24, 1998, 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 on or about January 29, 1998, 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 beneficiary of a Petition for Alien Relative (Form I-130) filed by her now naturalized U.S. citizen spouse. 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 U.S. citizen spouse and children.

The Director determined that the applicant was inadmissible pursuant to section 212(a)(6)(A)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(A)(i) for having been present in the United States without being admitted or paroled, and section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for having reentered the United States, without being admitted after an immigration violation. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable ones. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated October 26, 2005.

Section 212(a)(9). Aliens previously removed.-

(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.

A review of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) amendments to the Act and prior statutes and case law regarding permission to reapply for admission reflects that Congress has, (1) increased the bar to admissibility and the waiting period from 5 to 10 years in most instances and to 20 years in others, (2) has added a bar to admissibility for aliens who are unlawfully present in the United States, and (3) has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted. It is concluded that Congress has placed a high priority on deterring aliens from overstaying their authorized period of stay and from being present in the United States without lawful admission or parole.

On appeal, counsel submits a brief, documentation submitted previously with the filing of the Form I-212, and a psychological assessment in order to show that the applicant's family would suffer exceptional and extremely unusual hardship if the applicant were not permitted to remain in the United States. In his brief counsel states that on January 24, 1998, the applicant spoke very limited English and she was not aware that she was being "deported." Counsel does not dispute the fact that the applicant reentered without inspection but states that she did so in order to be reunited with her family. In addition, counsel states that the applicant does not have a criminal record, is an active member of her church, a loving mother and a devoted wife, and has never worked without authorization. Counsel further states that the applicant's spouse and children suffer serious medical and developmental conditions. Additionally, counsel states that the applicant is eligible to adjust status pursuant to section 245(i) of the Act, which effectively waives the grounds of inadmissibility, she is eligible to file a Form I-212 while unlawfully present in this country and that the positive factors unquestionably outweigh the unfavorable ones based on the showing of "extreme hardship" to her family. To support his assertions counsel refers to the Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Furthermore, counsel describes the medical conditions the applicant's children suffer from and discusses the hardship the applicant and her family would suffer if she is removed to Mexico and they remain in the United States and the hardship they would suffer if they decide to relocate with her to Mexico. Finally, counsel states that the California Service Center adjudicators misinterpreted the facts and misapplied the existing laws and regulations and failed to recognize that after applying the balancing factors to the applicant's case, she deserves her Form I-212 to be granted in the exercise of discretion.

Counsel's assertions are not persuasive. The record of proceedings contains a Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act (Form I-867B) dated January 24, 1998, regarding the applicant's admissibility into the United States. The interview was conducted in the Spanish language and according to the record of proceedings her statement was read to her before she signed it. During the interview the applicant admitted under oath that she presented a Form I-94, which she had bought for \$50, in order to gain admission into the United States. In addition, the record reflects that the applicant was served with a Notice to Alien Ordered Removed/Departure Verification (Form I-296) that states that she is prohibited from entering, attempting to enter, or being in the United States for a period of 5 years from the date of her departure from the United States. The Form I-296 contains the applicant's picture, signature and fingerprint.

In *Perez-Gonzalez, 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.

In addition, in its February 23, 2006, decision, *Acosta v. Gonzales* 439 F.3d 550 (9th Cir. 2006), the Ninth Circuit Court of Appeals indicates that Mr. Acosta “is eligible” for adjustment under section 245(i) of the Act. *Id.* A close reading of the opinion, however, indicates that the panel’s decision does not mean that section 245(i) of the Act, by itself, waives inadmissibility of section 212(a)(9)(C)(i) of the Act. The *Acosta* panel held that its decision was controlled by *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) *Id.* at 553. Under *Perez-Gonzalez*, however, approval of a Form I-212 is necessary in order for an alien who is inadmissible under section 212(a)(9)(C)(i) of the Act to be eligible for adjustment under section 245(i) of the Act. 379 F.3d at 797. “If the agency chooses to exercise its discretion in his favor on both the Form I-212 and § 212(i) relief, he will be eligible for adjustment of status.” *Id.* Therefore, an applicant who is inadmissible pursuant section 212(a)(9)(C)(i)(II) of the Act, must obtain approval of a Form I-212 before the alien may obtain adjustment of status under section 245(i) of the Act.

The AAO notes that applicants for adjustment of status under section 245(i) of the Act, as with all applicants for adjustment of status, must be admissible to the United States. *Section 245(i)(2)(A) of the Act.* There are exceptions for applicants under 245(i) of the Act, but admissibility under section 212(a)(9)(C) is not one.

Before the AAO can review the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested. As noted above, the applicant was expeditiously removed from the United States on January 24, 1998. She reentered the United States shortly after her removal without a lawful admission or parole and without permission to reapply for admission. Because the applicant illegally reentered the United States after her removal, she is clearly inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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-

. . .

(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)(II) 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)(i)(II) 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 24, 1998, 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.