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**U.S. Citizenship
and Immigration
Services**

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[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 26 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 April 27, 2000, at the Otay Mesa, California, Port of Entry, attempted to procure admission into the United States by willful misrepresentation of a material fact. The applicant presented an Alien Registration Card (Form I-551) that did not belong to her. 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 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 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 further reflects that the applicant reentered the United States in May 2000 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 an approved Petition for Alien Relative (Form I-130) filed by her 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.

The Director determined that the applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), for having reentered the United States after a previous immigration violation. In addition, the Director determined that the unfavorable factors in the applicant's case outweighed the favorable factors. The Director then denied the Form I-212 accordingly. *See Director's Decision* dated October 14, 2005.

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.

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 for 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/or from being present in the United States without a lawful admission or parole.

On appeal, counsel states that the Director's decision violates existing case law in the Ninth Circuit Court of Appeals. Counsel refers to the decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Counsel states that based on the decision in *Perez-Gonzalez* "an alien who is eligible to adjust status under 245(i) is not ineligible for a 212 waiver and 245(i) "trumps" 212 in these cases." In addition, counsel states that the applicant's spouse has been diagnosed with extensive prostate cancer and the osteoarthritis which the applicant's spouse has been suffering has progressed and is now diagnosed as "advanced degenerative changes of the lumbar spine". Counsel submits documentary evidence of the applicant's spouse's medical conditions and states that the applicant is his caregiver and her spouse depends on her since he has no other family who can take care of him. Finally, counsel requests that the Form I-212 be granted so that the applicant can remain in the United States and care for her spouse.

The AAO is aware of the Ninth Circuit Court of Appeals decision, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 793-94 (9th Cir. 2004). In this decision, the U.S. Ninth Circuit Court of Appeals held that an alien who is inadmissible under section 212(a)(9)(C) of the Act may file, in conjunction with an adjustment of status application, a Form I-212 in order to obtain consent to reapply for admission. If, as a matter of discretion, CIS approved the Form I-212, the approval would open the way for the alien to apply for adjustment of status under section 245(i) of the Act. The AAO notes that *Perez-Gonzalez* did *not* hold that section 245(i) of the Act, of itself, relieved the alien of inadmissibility under section 212(a)(9)(C)(i) of the Act. Rather, *Perez-Gonzalez* concerned "the availability of adjustment of status once a favorable determination of permission to reapply has been made." See *Perez-Gonzalez* at 795. In addition, 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 permission to reapply was not granted and, therefore, the applicant remains inadmissible.

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 April 27, 2000. 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, the applicant 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 April 27, 2000, 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.