

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

H-4

[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER
(RELATES)

Date:

FEB 02 2009

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)

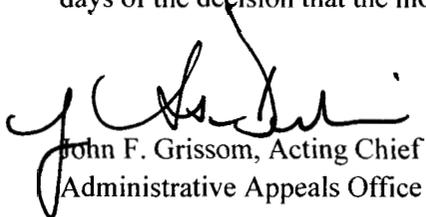
ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be granted, the order dismissing the appeal will be affirmed and the application will be denied.

The applicant is a native and citizen of Mexico whose brother, [REDACTED] on January 13, 1998, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On January 24, 1999, the applicant applied for admission into the United States at the San Ysidro Port of Entry. The applicant presented an I-551 Resident Alien Card bearing the name [REDACTED]” The applicant was placed into secondary inspections, where he admitted that he was not entitled to enter the United States and that he had previously resided in the United States for a period of eight years prior to returning to Mexico and attempting to enter the United States by fraud on this occasion. The applicant was found inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182 (a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for having attempted to procure admission into the United States by fraud and being a immigrant without valid documents. Consequently, on January 25, 1999, 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 without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to April 2, 2001, the date on which he married his U.S. citizen spouse, [REDACTED] in Fresno, California. On July 24, 2001, the applicant filed an Application to Register Permanent Resident or Adjust Status (Form I-485), based on a Form I-130 filed by [REDACTED] on his behalf. On August 30, 2001, the Form I-130 filed by the applicant’s brother, was approved. On December 23, 2002, the Form I-130 filed by [REDACTED] was approved. On January 13, 2004, the applicant’s Form I-485 was denied. On the same day a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Act, 8 U.S.C. § 1231(a)(5), and the applicant was removed to Mexico on January 16, 2004. On August 17, 2004, the applicant filed the Form I-212. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). He 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 reside in the United States with his U.S. citizen spouse and daughter.

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 January 28, 2005.

On April 11, 2006, the AAO dismissed the applicants appeal because the applicant was inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), the applicant had not remained outside the United States for the required ten years prior to seeking permission to reapply for admission, and no purpose would be served in the adjudication of the Form I-212. *Decision of AAO*, dated April 11, 2006.

In his motion to reopen or reconsider, counsel contends that the AAO incorrectly applied case law. *See Counsel’s Motion to Reopen or Reconsider*, dated May 8, 2006. In support of his contentions,

counsel submits only the referenced motion. 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.-

- (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.
- (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 on a 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. [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 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.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

(3) *Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Counsel did not submit evidence or provide information regarding new facts to be provided upon a reopening of the applicant's case. The AAO, therefore, finds that counsel has not met the requirements for a motion to reopen.

In support of his motion to reconsider, counsel contends that the AAO failed to consider Ninth Circuit Court of Appeals (Ninth Circuit) case law, specifically *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), in rendering its decision. The AAO notes that the holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) is currently before the Ninth Circuit and an injunction is currently in place preventing the adjudication of cases involving inadmissibility under section 212(a)(9)(C)(i) of the Act within the Ninth Circuit. *See Gonzalez v. Department of Homeland Security*, D.C. No. CV-06-01411-MJP. Since the AAO is unable to adjudicate the applicant's case in regard to his inadmissibility pursuant to section 212(a)(9)(C)(i) of the Act, this office will limit its review of the applicant's case to the applicant's inadmissibility pursuant to section 212(a)(9)(A)(i) of the Act.

Counsel asserts that the applicant has remained outside the United States and lived in Mexico since he was removed on January 16, 2004. Counsel asserts that the applicant is applying for permission to reapply for admission prior to his return to the United States. The AAO finds the evidence of record sufficient to establish that the applicant is waiting to consular process his immigrant visa at a U.S. Consulate in Mexico.

The AAO notes that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. The AAO also finds the applicant to be inadmissible under section 212(a)(9)(B)(i)(II) of the Act, as an alien who has accumulated more than one year of unlawful presence, from January 1999, the month in which he testified he returned to the United States, until July 24, 2001, the date on which he filed an affirmative Form I-485, and is seeking admission within ten years of his last departure in 2004. To seek a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), an applicant must file an Application for Waiver of Ground of Inadmissibility (Form I-601).

As required by 8 C.F.R. § 212.2(d), an immigrant visa applicant who is outside the United States and requires both a waiver and permission to reapply for admission must simultaneously file the Form I-601 and the Form I-212 with the U.S. Consulate having jurisdiction over the applicant's place of residence. As the applicant has not complied with the regulatory requirements for filing the Form

I-212, the application in this matter was improperly filed.¹ Accordingly, while the motion to reconsider will be granted, the order dismissing the appeal will be affirmed.

ORDER: The motion to reconsider is granted. The order dismissing the appeal will be affirmed.

¹ The AAO notes that the applicant has also subsequently filed a Form I-212 with the San Francisco, California Field Office. Accordingly, the second Form I-212 was improperly filed and the San Francisco, California Field Office does not have jurisdiction over that Form I-212.