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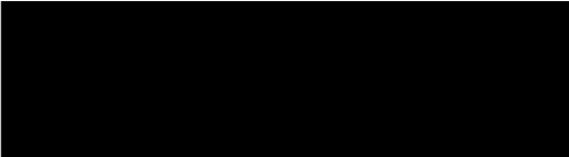
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



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

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FILE:



Office: FRESNO, CA

Date:

**APR 16 2010**

IN RE:



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:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew,  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Fresno, California, 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 The field office director's decision will be withdrawn.

The applicant is a native and citizen of Mexico who, on October 12, 1989, was apprehended by immigration officers during a vehicle stop in the United States. The applicant admitted that he had originally been smuggled into the United States near San Ysidro, California on or around August 5, 1989. The applicant was in possession of a counterfeit lawful permanent resident card and social security card bearing his name. The applicant admitted that he had used these documents in order to obtain employment in the United States. On October 16, 1989, the applicant pled guilty to and was convicted of illegally entering the United States in violation of 8 U.S.C. § 1325. The applicant was fined.

On April 9, 1998, the applicant was convicted of driving under the influence and for having no valid driver's license in violation of sections 23152A and 12500A of the California Vehicular Code. The applicant was sentenced to 180 days in jail and five years of probation. On May 12, 2004, the applicant admitted that he had violated his parole and he was sentenced to an additional 15 days in jail and an extension of probation by 6 months.

On May 20, 2001, the applicant married his then lawful permanent resident spouse in Reno, Nevada. On December 23, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his now naturalized U.S. citizen spouse. The Form I-485 indicates that the applicant last entered the United States without inspection on March 10, 1996. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212 indicating that he resided in the United States. During an interview in regard to the Form I-485, the applicant testified that he had last entered the United States without inspection on March 10, 1991. On August 4, 2009, the Form I-485 and Form I-601 were denied. The field office director found the applicant to be inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant 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 remain in the United States and reside with naturalized U.S. citizen spouse 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 for the required ten years. The field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated August 4, 2009.

On appeal, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), when he relied on the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004). Counsel contends that it has been more than ten years since the applicant's last departure from the United States and he is eligible to apply for permission to reapply for admission. *See Counsel's Brief*, dated

September 9, 2009.<sup>1</sup> 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.-

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

....

(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

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<sup>1</sup> The AAO notes that this office finds counsel's contentions on appeal to be unpersuasive; however, as discussed below, the case will be remanded because the applicant is not required to file a Form I-212.

(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—

(I) the alien's battering or subsection 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.

In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have either entered or attempted to reenter the United States without being admitted on or after April 1, 1997, the effective date of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA). The applicant did not testify, and the evidence in the record does not establish, that the applicant entered or attempted to reenter the United States without being admitted on or after April 1, 1997. Since the record reflects that the applicant has not departed the United States since April 1, 1997, the applicant has, therefore, not illegally reentered the United States after having accrued more than one year of unlawful presence. Moreover, despite the immigration officer's apprehension of the applicant and his conviction for entering the United States illegally, the record does not contain evidence that the applicant has been placed into immigration proceedings or ordered removed from the United States at any time. Accordingly, the record does not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A) or 212(a)(9)(C) of the Act.

The AAO therefore finds that the applicant is currently not required to apply for permission to reapply for admission to the United States because there is no evidence in the record that the applicant has ever been removed from the United States or departed the United States while an order of removal was outstanding. Since the applicant does not require permission to reapply for admission, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 and remands the matter for the director to reopen the applicant's Form I-485 on a service motion for entry of a new decision, as the applicant's adjustment of status application was denied based upon the denial of the Form I-212.

Beyond the decision of the field office director, the AAO finds that the applicant is not required to file a Form I-601, since, based on the record before the AAO, the applicant is not inadmissible under any other provision of the Act. The AAO notes that, while the applicant utilized fraudulent documentation in order to obtain employment, he did not use fraudulent documentation in order to seek to procure or procure a visa, other documentation, or admission into the United States or other benefit provided under the Act.<sup>2</sup>

**ORDER:** The field office director's decision is withdrawn. The matter is remanded to the field office director to reopen the applicant's Form I-485 on a service motion for its continued processing.

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<sup>2</sup> The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).