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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: SAN FRANCISCO, CA Date: APR 2 0 2010
RELATES)

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 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, San Francisco, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant is a native and citizen of Mexico who, on January 12, 1997, appeared at the San Ysidro, California port of entry. The applicant presented a California Birth Certificate bearing the name '[redacted]' The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he did not have valid documentation to enter the United States. The applicant admitted that the U.S. Birth Certificate had been loaned to him by [redacted], the father listed on the birth certificate. The applicant admitted that his two cousins who accompanied him were fully aware that he was a Mexican national. The applicant failed to provide his true identity to immigration officers by providing them with an alternate date of birth. On January 13, 1997, was placed into immigration proceedings for attempting to enter the United States by presenting a U.S. birth certificate. On January 16, 1997, the immigration judge ordered the applicant removed from the United States. On the same day, the applicant was removed from the United States and returned to Mexico.

On January 19, 1997, immigration officers apprehended the applicant after he had entered the United States without inspection. The applicant failed to provide his true identity to immigration officers by altering his date of birth and he was returned to Mexico.

On April 3, 1999, the applicant married his U.S. citizen spouse in Nevada. On May 30, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant reentered the United States without inspection on January 10, 1997. During an interview in regard to the Form I-485, the applicant testified that he last entered the United States at the end of January 1997. On February 4, 2002, the Form I-485 was denied. On February 7, 2002, the applicant was placed into immigration proceedings. On May 10, 2006, the immigration judge found the applicant eligible for adjustment of status. On June 7, 2006, the immigration judge granted the applicant's application for adjustment of status. U.S. Immigration and Customs Enforcement (USICE) appealed the decision to the Board of Immigration Appeals (BIA). On June 28, 2007, the BIA found the applicant ineligible for adjustment of status and remanded the applicant's case for further review by the immigration judge. On May 2, 2008, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On March 18, 2009, the immigration judge terminated proceedings for reinstatement of the applicant's prior removal order.[1] The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 remain in the United States and reside with his 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

[1] The record does not contain any evidence that USICE has reinstated the applicant's prior removal order. The AAO notes that, even though the applicant, as discussed below, is not inadmissible under section 212(a)(9)(C) of the Act, he is still amenable to reinstatement of his prior removal order and USICE may choose to reinstate the removal order at any time.

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 July 10, 2009.

On appeal, counsel contends that it would improper to apply *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), to the applicant's case when he relied on the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).[2] *See Attachment,* dated July 22, 2009. In support of her contentions, counsel submits only the referenced attachment. 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.-
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> (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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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.
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> (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.
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> . . . .

[2] The AAO notes that this office finds counsel's contentions on appeal to be unpersuasive, especially since the applicant filed his Form I-212 after the *Gonzales II* decision was issued; however, as discussed below, the case will be remanded for entry of a new decision.

(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.

(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—

(1) the alien's battering or subjection to extreme cruelty; and

(2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record in this matter establishes that the applicant was removed from the United States on January 16, 1997 and he has testified that he returned to the United States without being admitted on two occasions - both occurring in January 1997. 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. Accordingly, the record does not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act; however, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.

Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(6)(C)(ii) of the Act and no waiver is available. While the AAO notes that the immigration judge found insufficient evidence to find the applicant made a false claim to U.S. citizenship because he did not willfully and knowingly make such a representation, and the BIA, on appeal, sustained the immigration judge's finding, the AAO finds that the case law to which the immigration judge and BIA cite either involve criminal statutes requiring a "willful" false claim or to the standard for finding whether an alien has been "inspected" and do not pertain to inadmissibility under section 212(a)(6)(C)(ii) of the Act.[3] The Act does not require that the false claim to citizenship be knowing or "willful," it just requires that the claim to citizenship be false. During the applicant's immigration hearing he testified that his father gave him the U.S. birth certificate and that his father's friend loaned him the document. The applicant's testimony clearly demonstrates that he was fully aware that he was not entitled to enter the United States in any capacity. As of September 30, 1996, the date of enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. 104-208, aliens making false claims to U.S. citizenship are statutorily ineligible for a waiver of inadmissibility. *See sections 212(a)(6)(C)(ii) and (iii) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(ii) and 1182 (a)(6)(C)(iii).* Therefore, the applicant is mandatorily inadmissible to the United States and no purpose would be served in the favorable exercise of discretion in adjudicating an application to reapply for admission into the United States.[4]

Since the applicant is ineligible to apply for permission to reapply for admission to the United States, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 on the basis that the applicant is inadmissible under section 212(a)(9)(C) of the Act. The matter shall be remanded to the field office director for proper adjudication of the application.[5]

ORDER: The field office director's decision is withdrawn. The application is remanded to the field office director for entry of a new decision that, if adverse to the applicant, shall be certified to the AAO for review.

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[3] The case to which the BIA cites refers to whether an applicant for admission has been inspected when he or she makes a false claim to U.S. citizenship when he or she honestly believed that he or she was entitled to enter the United States as a U.S. citizen. *See Matter of Wong,* 11 I&N Dec. 712 (BIA 1966). The cases cited by the immigration judge involve a criminal statute whose elements requires a "willful" false claim and do not refer to inadmissibility under the Act. *See U.S. v. Karaouni,* 379 F.3d 1139 (9th Cir. 2004).

[4] 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).

[5] The AAO notes that this decision has no bearing on whether the applicant does or does not warrant a favorable exercise of discretion. The AAO's decision merely withdraws the director's stated basis for the denial of the application and directs the director to review the applicant's Form I-212 under the applicable standards for adjudicating applications for permission to reapply for admission when an applicant is mandatorily inadmissible under section 212(a)(6)(C)(ii) of the Act.