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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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[Redacted]

FILE: [Redacted] Office: FRESNO, CA

Date: DEC 06 2013

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant is a native and citizen of Mexico who, on February 22, 1993, was placed into immigration proceedings for having entered the United States without inspection on February 16, 1993. On August 12, 1993, the immigration judge granted the applicant voluntary departure until September 13, 1993. The applicant's voluntary departure was extended until December 19, 1994. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal. On March 27, 1996, the applicant was removed from the United States and returned to Mexico.

On February 9, 1995, 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 her behalf by her then lawful permanent resident spouse. On July 17, 1997, the applicant filed a Form I-212. The Form I-485 was terminated. On October 22, 1997, the applicant filed a second Form I-485 indicating that she reentered the United States without inspection on April 7, 1996. On October 9, 2003, the applicant filed a second Form I-212. On July 13, 2009, the second Form I-485 was denied. On August 28, 2009, a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) was issued pursuant to section 241(a)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1231(a)(5). On August 28, 2009, the applicant was removed from the United States and was returned to Mexico. In response to a request for further evidence the applicant provided evidence that she has not reentered the United States since her 2009 removal. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 reside in the United States with her now naturalized U.S. citizen spouse and four 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 she 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 13, 2009.

On appeal, former counsel contends that it is impermissibly retroactive to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), to the applicant's case when she 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).<sup>1</sup> See *Former Counsel's Brief*, dated September 2, 2009. In support of his contentions, former counsel submitted 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:

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<sup>1</sup> The AAO notes that this office finds former counsel's contentions on appeal to be unpersuasive; however, as discussed below, the case will be remanded for a full adjudication of the merits of the applicant's Form I-212.

(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 [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
  - (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 March 27, 1996 and she has testified that she returned to the United States without being admitted on only one occasion, April 7, 1996. 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.

Since the applicant is *eligible* 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 ineligible for relief under section 212(a)(9)(C) of the Act. The matter shall be remanded to the field office director for a full adjudication of the application on the merits.<sup>2</sup>

**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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<sup>2</sup> 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 and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion.