

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY

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

H4

FILE: [REDACTED] Office: SAN FRANCISCO, CA

Date: DEC 27 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:

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.

Thank you,

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 the Administrative Appeals Office (AAO) subsequently withdrew the director's decision and remanded the matter to the field office director for entry of a new decision. The field office director has certified her decision to the Administrative Appeals Office (AAO) for review. The AAO withdraws the field office director's certified decision and remands the matter.

The applicant is a native and citizen of Mexico who, on January 12, 1997, appeared at the [REDACTED] California port of entry. The applicant presented a California Birth Certificate bearing the name [REDACTED] Avalos." 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.

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.

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 July 10, 2009.

On appeal, counsel contended 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). *See Attachment*, dated July 22, 2009. In support of her contentions, counsel submitted only the referenced attachment.

On April 20, 2010, the AAO remanded the decision to the field office director finding that the record did not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act because his illegal reentry occurred prior to April 1, 1997. The AAO did determine, however, that the applicant was 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 determined that the applicant was inadmissible under the provisions of section 212(a)(6)(C)(ii) of the Act and that no waiver was available. *See AAO's Decision*, dated April 20, 2010.

On November 24, 2010, the field office director certified her decision to the AAO for review, stating that the applicant is inadmissible under section 212(a)(9)(C) of the Act and the applicant is statutorily ineligible for permission to reapply for admission.² The field office director also stated that USCIS is bound by the decisions of the immigration judge and BIA in finding that the applicant is not inadmissible under section 212(a)(6)(C)(ii) of the Act.³

² 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. The AAO notes that its decision does not rely upon memorandum and that the published decision issued by the Supreme Court, Ninth Circuit Court of Appeals (Ninth Circuit) and BIA do not address inadmissibility under section 212(a)(9)(C) of the Act where the applicant reentered the United States without admission or parole prior to the enactment of IIRIRA.

³ While the field office director contends that this office is bound by the decisions made by the immigration judge and BIA in the applicant's case, the AAO finds that this office is not bound by unpublished decisions. While 8 C.F.R. § 1003.1(g) provides that precedent decisions of the BIA, Attorney General and the Secretary of Homeland Security are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. As previously discussed in its decision, the precedent case law to which the immigration judge and BIA cited does not pertain to inadmissibility under section 212(a)(6)(C)(ii) of the Act. The precedent 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 precedent case cited by the immigration judge involved a criminal statute whose elements require 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). The Act does not require that the false claim to citizenship be knowing or "willful"; it just requires that the

We are withdrawing the certification in this matter because the field office director committed a procedural error when certifying her November 24, 2010 decision to the AAO. The regulation governing certifications at 8 C.F.R. § 103.4(a)(2) states:

Notice to affected party. When a case is certified . . . the official certifying the case shall notify the affected party using a Notice of Certification (Form I-290C). The affected party may submit a brief to the officer to whom the case is certified within 30 days after service of the notice. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

Here, when certifying her decision to the AAO for review, the director did not issue a Form I-290C to the applicant or notify him of the opportunity to supplement the record. We, therefore, withdraw the field office director's certification and remand the matter for issuance of a new certification notice that conforms to the regulation at 8 C.F.R. § 103.4(a)(2).

ORDER: The director's November 24, 2010 decision is withdrawn and the matter remanded for entry of a new certification notice.

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 IIRIRA, 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.