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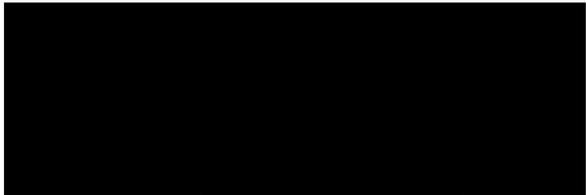
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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FILE:



Office: SAN JOSE, CA  
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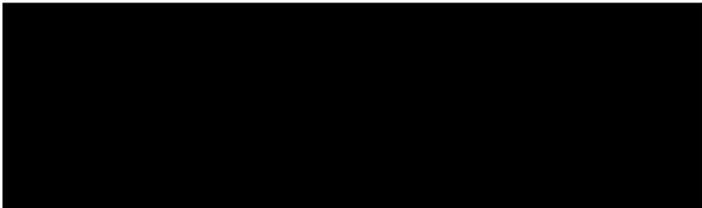
**MAR 15 2010**

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, San Jose, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.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 El Salvador who, on March 22, 1988, was placed into immigration proceedings for having entered the United States without inspection on the same day. On April 27, 1988, the immigration judge ordered the applicant removed from the United States. On May 7, 1988, the applicant was removed from the United States and returned to El Salvador.

On August 10, 1993, the applicant was convicted of false report of the crime in violation of section 148.5 of the California Penal Code. The applicant was sentenced to two years of probation. On October 28, 1993, the applicant pled guilty to and was convicted of possession of a controlled substance, not marijuana, under the influence of a controlled substance and driving under the influence in violation of sections 11350(a) and 11550(a) of the California Health and Safety Code and section 23152(a) Of the California Vehicular Code. The applicant was sentenced to three years of probation.

On May 10, 1999, 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 lawful permanent resident father. The applicant indicated that he reentered the United States without inspection in February 1990. On June 12, 2002, the applicant filed the Form I-212 indicating that he continued to reside in the United States. On October 20, 2005, the applicant's convictions for possession of a controlled substance, under the influence of a controlled substance and driving under the influence were expunged pursuant to section 1203.4 of the California Penal Code because the applicant had satisfied all the terms and conditions of his sentence. On July 27, 2009, the Form I-485 was denied. The applicant is inadmissible indefinitely pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant requests 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 lawful permanent resident father.

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 27, 2009.

On appeal, counsel contends that the applicant, in filing the Form I-212, relied upon the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004) and is therefore eligible to apply for permission to reapply for admission. Alternatively, counsel contends that it has been more than ten years since the applicant's last departure from the

United States and that the applicant's Form I-212 is a continuing application.<sup>1</sup> *See Counsel's Brief*, dated September 4, 2009. 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.-

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<sup>1</sup> The applicant's Form I-212 was filed prior to the Ninth Circuit's decision in *Perez-Gonzalez* and was pending while an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006), had been issued. The AAO finds, therefore, that in filing the Form I-212 under such circumstances, counsel's contention that the applicant reasonably relied upon the Ninth Circuit's *Perez-Gonzalez v. Ashcroft* decision is illogical.

(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 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 subjection 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.

The record in this matter establishes that the applicant was removed from the United States on May 7, 1988 and the Form I-485 indicates that he last returned to the United States without being admitted in February 1990. 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 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.<sup>2</sup>

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<sup>2</sup> Beyond the decision of the field office director, the AAO finds that the applicant is inadmissible under the provisions of section 212(a)(2)(A)(i)(II) of the Act and no waiver is available. The AAO finds that the applicant is not eligible for treatment as a first time offender under *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). In this case, the applicant

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>3</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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has not established that he would have qualified for treatment under the FFOA. The applicant was found guilty of more than one violation related to a controlled substance. The FFOA provides that *an offense*, and not multiple offenses, may be covered by the FFOA. The AAO finds that the applicant is ineligible for treatment as a first-time offender and is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act for having been convicted of a crime related to a controlled substance. The Act makes it clear that a section 212(h) waiver is not available to an alien who has been convicted of a crime related to a controlled substance which is more than simple possession of 30g of marijuana. In this case, the applicant was convicted of possession of a controlled substance: marijuana, and under the influence of a controlled substance. The applicant is, therefore, ineligible for waiver consideration. 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.

<sup>3</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.