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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

[REDACTED]

H4

Date: **JUL 05 2012**

Office: LOS ANGELES

FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal pursuant to 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Los Angeles, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C) for having entered the United States without admission after having been ordered removed. As the result of the applicant's multiple removal orders, she is also inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), for a period of twenty years. Additionally, the applicant is inadmissible under section 212(a)(6)(C) of the Act, 8 U.S.C. § 212(a)(6)(C) for having attempted to procure admission to the United States through fraud or willful misrepresentation of a material fact. In regards to her inadmissibility under sections 212(a)(9)(C) and 212(a)(9)(A), the applicant 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). The applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, in regards to her inadmissibility under section 212(a)(6)(C) of the Act, was also denied, but is not the subject of this appeal, as addressed below.

On Form I-290B, in Part 2, "Information about the Appeal or Motion," counsel for the applicant indicates that the applicant wishes to appeal Form I-212, Form I-485, and Form I-601. In regards to counsel's indication that the applicant wishes to appeal Form I-485, the AAO does not have jurisdiction over appeals of that application. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003), with one exception, that does not apply in this case. The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1<sup>st</sup> Cir. 1992). All substantive or legislative rule making requires notice and comment in the Federal Register. The AAO does not have jurisdiction over an appeal from the denial of a Form I-485 adjustment application filed under section 245 of the Immigration and Nationality Act. Although the AAO has jurisdiction over appeals of Form I-601, the applicant did not submit a separate Form I-290B (Notice of Appeal or Motion) with the appropriate fee in regards to the denial of their Form I-601. The AAO also notes that the legal arguments in counsel's brief address the denial of Form I-212. Accordingly, the appeal will be treated solely an appeal of the denial of the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal.

On June 8, 2009, the Field Office Director denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) stating that the applicant is not eligible for relief under the Act pursuant Section 212(a)(9)(C)(i)(II) of the Act.

On appeal, counsel for the applicant states that the Field Office Director erred in denying applicant's Form I-212, as the applicant filed her application in reliance on *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

Section 212(a)(9) of the Act states, in pertinent part:

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

...

The record reflects that the applicant was first ordered removed on December 31, 1998 pursuant to section 235(b) of the Act. The applicant then attempted a second entry into the United States with fraudulent documentation on January 5, 1999. She was again ordered removed pursuant to section 235(b) of the Act. The record reflects that the applicant then unlawfully entered the United States without inspection on an undisclosed date in or around 1999. On April 1, 2002 the applicant's prior removal order was reinstated and the applicant was removed from the United States. The applicant unlawfully reentered the United States after her removal at an unknown date and time. The applicant does not contest these facts on appeal. As a result of the applicant's entry into the United States without admission after the removal order in her case, she is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. As stated below, the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act and is not eligible for the exception at section 212(a)(9)(C)(ii), as she is has not remained outside of the United States for a period of ten years since her last departure.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been outside the United States for more than ten years since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the BIA's holding that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving permission to reapply for admission prior to the expiration of the ten-year bar. The Ninth Circuit clarified that its holding in *Duran Gonzalez* applies retroactively, even to

those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *Morales-Izquierdo v. DHS*, 600 F.3d 1076 (9th Cir. 2010). See also *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the courts).

In *Carillo de Palacios*, the Ninth Circuit Court of Appeals, the circuit in which this case arises, held that "the law of our circuit is now settled."

According *Chevron* deference to the BIA's interpretation of the relevant statutes, we have held that aliens who are inadmissible under 8 U.S.C. § 1182(a)(9)(C)(i)(I)-(II) are ineligible for adjustment of status under 8 U.S.C. § 1255(i).

*Id.* at 1130 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). It is clear that the applicant must exit the United States and wait ten years before applying for permission to reapply under section 212(a)(9)(C)(ii) of the Act regardless of any claimed eligibility under section 245(i) of the Act. *Id.* at 1133. The law makes clear that the applicant's claimed eligibility to apply for adjustment of status under section 245(i) does not negate the applicability of the ground of inadmissibility at section 212(a)(9)(C) of the Act to the applicant's case. See *Carillo de Palacios*, 662 F.3d at 1130. The AAO notes that the Ninth Circuit's recent decision to grant an *en banc* rehearing of *Garfias-Rodriguez v. Holder*, 649 F.3d 942 (9<sup>th</sup> Cir. 2011) does not affect the applicant's present ineligibility for relief under the Act. The applicant remains inadmissible under section 212(a)(9)(C) of the Act and ineligible to apply for an exception at this time.

Because the applicant has not met the statutory criteria set forth in section 212(a)(9)(C)(ii), no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States. As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the Field Office Director. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, the AAO finds that the applicant has not met her burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.