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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

#14

[redacted]

FILE: [redacted] Office: CHICAGO, IL Date: APR 15 2009

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

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).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, Chicago, Illinois, 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 appeal will be dismissed.

The applicant is a native and citizen of Poland who, on October 6, 1970, was placed into immigration proceedings after she overstayed and violated her nonimmigrant status. On November 23, 1970, the special inquiry officer granted the applicant voluntary departure until December 28, 1970. 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 May 20, 1971, the applicant departed the United States and returned to Poland. On October 12, 2004, 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 U.S. citizen child. On June 21, 2005, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Chicago, Illinois District Office. The applicant testified that she had reentered the United States without inspection on July 19, 1999. On December 12, 2006, the applicant filed the Form I-212, indicating that she continued to reside in the United States. The applicant is inadmissible under section 212(a)(9)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C). She seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with her U.S. citizen child.

The district 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 district director determined that the applicant was not eligible to apply for permission to reapply for admission because, while she had remained outside the United States for the required ten years, she did not apply for permission to reapply for admission prior to her reembarkation into the United States. The district director denied the Form I-212 accordingly. *See District Director's Decision,* dated March 26, 2007.

On appeal, counsel contends that the applicant was not advised that there was an alternate order of removal and that she understood that she was departing voluntarily from the United States voluntarily.[1] Counsel contends that the applicant remained outside the United States for the required period of time after her removal.[2] *See Counsel's Brief,* dated April 19, 2007. In support of his contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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[1] The AAO finds counsel's contention unpersuasive. The record contains a Form I-294 providing the applicant with a warning that she was being removed from the United States and was required to write the Chicago, Illinois office or U.S. Consular office to obtain permission to return after her removal. The Form I-294 was executed by the applicant on May 10, 1971, indicating that she received this warning in the Polish language.

[2] The AAO finds that the applicant is no longer inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A) because she remained outside the United States until after the ten year bar expired; however and alien still requires permission to reapply for admission after having been removed from the United States under section 212(a)(9)(C) of the Act, if he or she illegally reenters the United States at any time after having been removed, even if he or she remained outside the United States for the five- or ten-year bar under section 212(a)(9)(A) of the Act. If the applicant had reentered the United States legally she would not need to apply for permission to reapply for admission.

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 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 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. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The AAO notes that an exception to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 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). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago, the applicant has remained outside the United States since that departure, *and* that USCIS has consented to the applicant's reapplying for admission.[3] In the present matter, while the applicant's last departure from the United States occurred on May 20, 1971, more than ten years ago and she remained outside the United States for the required ten years, she has since made an illegal reentry and she is currently present in the United States. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.[4]

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[3] The AAO notes that USCIS' consent must be obtained prior to an applicant's reentry into the United States and an applicant's reentry must be lawful in order to avoid continuing inadmissibility under section 212(a)(9)(C) of the Act.

[4] The AAO notes that, in order to be eligible to apply for permission to reapply for admission under section 212(a)(9)(C) of the Act, the applicant will need to leave the United States and remain outside the United States for a period of ten years from the date of her new departure from the United States. The AAO also notes that the applicant is currently inadmissible under section 212(a)(6)(A) of the Act, 8 U.S.C. § 1182(a)(6)(A), as an alien present in the United States without inspection, and she does not appear to be eligible for adjustment of status under section 245(i) of the Act since the approved Form I-130 was filed on October 4, 2002, after the 2001 filing deadline.

The AAO takes note of the preliminary injunction that had been entered against the ability of the Department of Homeland Security (DHS) to follow *Matter of Torres-Garcia*. *Gonzales v. DHS,* 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board's decision in *Matter of Torres-Garcia* was entitled to judicial deference. *Gonzales II,* 508 F.3d at 1241-42. The Ninth Circuit's mandate was issued on January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new preliminary injunction. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt # 59), *Gonzales v. DHS,* No. C06-1411-MJP (W.D. Wash. Filed February 6, 2006). Thus, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO from applying the rule laid down in *Matter of Torres-Garcia*.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.