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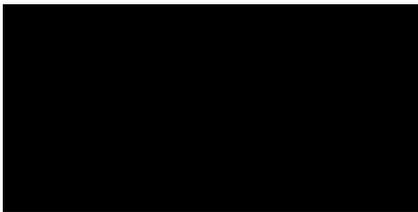
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

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FILE:



Office: OMAHA, NE

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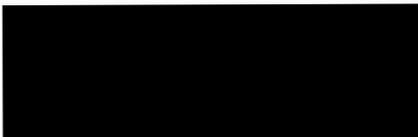
AUG 10 2009

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).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Omaha, Nebraska 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 Mexico who, on March 19, 2001, was apprehended by immigration officials as part of a group of nine illegal aliens being smuggled through the United States. The applicant admitted that he had entered the United States without inspection two days prior. The applicant admitted that he had previously illegally resided in Kingston for three or four years. The applicant was permitted to return to Mexico voluntarily.

On February 20, 2004, the applicant's U.S. citizen spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on August 3, 2004. On August 17, 2005, the applicant appeared at the U.S. Consulate in Ciudad Juarez. The applicant testified that he had never been to the United States. A fingerprint check revealed the applicant's voluntary removal from the United States and documentation establishing his unlawful presence in the United States. The applicant was denied an immigrant visa.¹ On April 13, 2006, the applicant filed the Form I-212 indicating that he resided in Mexico.

On July 12, 2006, the applicant was apprehended after he attempted to elude inspection by concealing himself in the trunk of a vehicle at the San Ysidro, California port of entry. The applicant was placed into secondary inspections. The applicant admitted that he did not have valid documentation to enter the United States. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant without valid documentation. On July 13, 2006, the applicant was expeditiously removed from the United States pursuant to section 235(b)(1) of the Act, 8 U.S.C. § 1225(b)(1).

On July 17, 2006, 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). The applicant had reentered the United States without inspection on July 17, 2006. On August 1, 2006, the applicant pled guilty to and was convicted of illegally entering the United States in violation of 8 U.S.C. § 1325(a)(1). The applicant was sentenced to fifteen days in jail. On August 8, 2006, the applicant was removed from the United States and returned to Mexico. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i), for a period of twenty years. 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.

¹ The AAO notes that the applicant is inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(B)(i)(II), for attempting to obtain immigrant benefits by fraud and for accruing more than one year of unlawful presence and seeking admission within ten years of his last departure. The applicant requires a waiver under both section 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i). In order to seek a waiver an applicant must file an Application for Waiver of Grounds of Inadmissibility (Form I-601). The AAO notes that these are separate and distinct grounds of inadmissibility from permission to reapply for admission. The AAO also notes that, as long as the applicant is ineligible to apply for permission to reapply for admission, any Form I-601 submitted on his behalf would be denied because the applicant requires permission to reapply for admission and no purpose would be served in adjudicating the Form I-601.

§ 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen spouse and U.S. citizen child.

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 31, 2008.

On appeal, counsel contends that the Department of Homeland Security (DHS) has discretion to approve the applicant's application.² *See Form I-290B*, dated August 25, 2008. In support of his contentions, counsel submits the referenced Form I-290B, an affidavit from the applicant's spouse and copies of the applicant's spouse's naturalization certificate and his son's birth certificate. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9)(A) 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

² The AAO notes that counsel contends that he is appealing the denial of a Form I-601. The record reflects that the applicant has not filed a Form I-601. The AAO finds that counsel must be appealing the denial of the Form I-212. The AAO notes that, when an alien is statutorily ineligible to apply for a waiver, DHS does not have the discretion to grant such an application. The AAO notes that, as discussed above, any Form I-601 filed while the applicant is ineligible to apply for permission to reapply for permission would be denied on the same basis as the denial of the applicant's Form I-212.

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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission. [emphasis added]

....

(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 U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on August 8, 2006, less than ten years ago.³ The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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 he 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.

³ The AAO notes that the applicant will be required to provide evidence to establish that he has remained outside of the United States for the entire ten-year period at the time he becomes eligible for permission to reapply for admission.