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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

H4

[redacted]

FILE: [redacted] Office: SAN DIEGO, CA Date: FEB 20 2010

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:

[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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, San Diego, 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 appeal will be dismissed.

The applicant is a native and citizen of China who, on October 30, 1995, was admitted to the United States as a visitor. On May 8, 1996, the applicant filed an Application for Asylum and Withholding of Deportation (Form I-589). The applicant remained in the United States past his authorized stay, which expired on June 24, 1996. On June 26, 1996, the applicant's Form I-589 was referred to an immigration judge and the applicant was placed into immigration proceedings for having remained in the United States past his authorized stay. On December 17, 1996, the immigration judge denied the applicant's applications for asylum and withholding of removal and ordered him removed from the United States. The applicant failed to depart the United States.

On April 12, 1999, the applicant married his then lawful permanent resident spouse in Orlando, Florida. On May 24, 1999, the applicant's spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. During the interview in regard to the Form I-130 the applicant's spouse testified that the applicant resided in China. On September 18, 2000, the Form I-130 was approved.

On July 31, 2002, the applicant filed a motion to reopen immigration proceedings with the immigration judge. On August 13, 2002, the immigration judge denied the applicant's motion to reopen. The applicant filed an appeal of the denial of the motion to reopen with the Board of Immigration Appeals (BIA). On August 21, 2003, the BIA dismissed the applicant's appeal.

On January 8, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Petition for Alien Relative (Form I-130). The applicant indicated that he reentered the United States without inspection on July 12, 2000. On the same day, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On July 6, 2009, the Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 now naturalized U.S. citizen spouse and lawful permanent resident adult son.

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 he had not remained outside the United States for the required ten years. The district director denied the Form I-212 accordingly. *See District Director's Decision*, dated July 6, 2009.

On appeal, counsel contends that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(9)(C) of the Act for illegally reentering the United States after accruing more than one year of unlawful presence in the United States because the applicant did not accrue

unlawful presence in the United States.[1] Counsel contends that it would be unfair to apply *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007) when 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 (9th Cir. 2004). Counsel contends that the applicant is not inadmissible to the United States under section 212(a)(9)(C) of the Act. *See Counsel's Brief,* dated August 5, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation already in the record. 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.-
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> (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.
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> (ii) Other aliens.-Any alien not described in clause (i) who-
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> (I) has been ordered removed under section 240 or any other provision of law, or
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> (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.
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> (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.
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> . . . .
>
> (C) Aliens unlawfully present after previous immigration violations.-

[1] The district director found the applicant inadmissible for illegally reentering the United States after having departed the United States while he had an outstanding order of removal, not for illegally reentering the United States after accruing more the one year of unlawful presence.

(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.

On appeal, counsel contends that the applicant, pursuant to *Matter of Arequin,* 17 I&N Dec. 308 (BIA 1980), was "inspected" and "admitted" to the United States. In support of his contentions, counsel submits an affidavit from the applicant explaining how he passively sat in the passenger seat of his friend's car while she crossed the border and spoke to immigration officers at the port of entry. The AAO notes that the applicant's affidavit directly conflicts with prior affidavits submitted in support of his motion to reopen, the statement he made on the Form I-485 and the testimony he provided at the interview in regard to the Form I-485. Furthermore, the AAO notes that the BIA, in rendering the decision in *Matter of Arequin*, did not indicate that the applicant's testimony alone was sufficient to meet his or her burden in establishing that he or she had been "inspected" and "admitted" to the United States. Going on record without supporting documentary evidence is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO finds that because of the lack of corroborating evidence and the applicant's conflicting testimony, the applicant has not met his burden of establishing that he was admitted to the United States.

The AAO notes that a waiver 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); *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez,* 25 I&N Dec. 188 (BIA 2010). 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. While the applicant's last departure from the United States occurred on December 19, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.[2] The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that the applicant filed the Form I-212 in reliance on *Perez-Gonzalez.* The applicant's Form I-212 was filed while an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia* 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.

The Ninth Circuit, in deferring to the BIA's decision in *Matter of Torres-Garcia,* found that the BIA's findings were reasonable and that the statute is unambiguous and unchanged since its promulgation. The Ninth Circuit found that the issue might have been resolved under the first step of *Chevron USA, Inc. v. Natural Resources Defense Council,* 467 U.S. 87, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), by examining the text of the relevant statutes and their legislative histories. The court found that it must defer to *Torres-Garcia* and that the statute itself is unambiguous. In *Matter of Torres-Garcia*, the BIA found that 8 C.F.R. § 212.2 was not promulgated to implement the current section 212(a)(9) of the Act and that the very concept of retroactive permission to reapply for admission, i.e., permission requested after unlawful reentry, contradicts the clear language of section 212(a)(9)(C) of the Act, which in its own right makes unlawful reentry after removal a ground of inadmissibility that can only be waived by the passage of at least ten years. The BIA found that the *Perez-Gonzalez v. Ashcroft* decision contradicts the clear language of the statute and the legislative policy underlying the statute in general. Since the statute is unambiguous and has been in effect since April 1, 1997, counsel's contention that the correct application of the statute is unfair or a change in the law is unfounded since the applicant's departure under an outstanding removal order, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment.

Finally, the statute and case law clearly states that an alien who has been ordered removed and enters or attempts to reenter the United States without being admitted may seek an exception to permanent

[2] The applicant will be required to submit evidence establishing that she is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.

grounds of inadmissibility when seeking admission more than ten years after the date of the alien's last departure from the United States, if, the applicant receives permission to reapply for admission prior to reentering the United States.[3] *Matter of Torres-Garcia, Supra. and Matter of Diaz and Lopez, Supra.*

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 a waiver or the exception under section 212(a)(9)(C)(ii) or (iii) 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 reentry after obtaining permission to reapply for admission must be a lawful admission to the United States; otherwise, the applicant has again illegally reentered the United States after having been removed and renewed his or her inadmissibility under section 212(a)(9)(C) of the Act.