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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

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 24 2010
RELATES)

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 Director, California Service Center, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on July 2, 2002, appeared at the San Ysidro, California port of entry. The applicant presented a lawful permanent resident card bearing the name [redacted]" The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he did not have valid documentation to enter the United States. The applicant failed to provide immigration officers with his true identity. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. On July 2, 2002, 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) under the name "[redacted]

The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to March 30, 2005, the date on which he filed an Application to Register Permanent Residence or Adjust Status (Form I-485). On June 7, 2006, the applicant filed the Form I-212, indicating that he continued to reside in the United States. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 U.S. citizen spouse and U.S. citizen children.

The 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 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 director determined that the applicant did not warrant a favorable exercise of discretion. The director denied the Form I-212 accordingly. *See Director's Decision,* dated February 7, 2007.

On appeal, former counsel contended that the applicant warranted a favorable exercise of discretion. *See Counsel's Brief,* dated March 23, 2007. In support of his contentions, former counsel submitted only the referenced brief.

On March 13, 2009, the AAO dismissed the applicant's appeal because he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is not eligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. *Decision of AAO,* dated March 13, 2009.

In the motion to reconsider or reopen, counsel contends that the applicant is eligible for adjustment of status under *Acosta v. Gonzalez*, 439 F. 3d 550 (9th Cir. 2006).[1] Counsel contends that the applicant,

[1] The AAO finds counsel's contention unpersuasive. The case law upon which *Acosta* based its decision has been overturned. *See Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007) and *Herrera-Castillo v. Holder*, 573 F.3d

unlike the applicant in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006), was not aware that an official removal order had been imposed on him because he was expeditiously removed.[2] Counsel contends that the applicant's case should be held in abeyance since the decision in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007), is on appeal regarding questions of retroactivity.[3] *See Brief in Support Motion to Reconsider*, dated May 13, 2009. In support of his motion to reconsider, counsel submits the referenced brief and documentation in regard to hardship. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

> (3) *Requirements for motion to reconsider.*
> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

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

> (A) Certain aliens previously removed.-

1004 (10th Cir. Jul 27, 2009). Furthermore, the BIA has held that *Acosta* is no longer binding law and that *Matter of Briones,* 24 I&N Dec. 355 (BIA 2007) is applicable. *See Matter of* [redacted], 25 I&N Dec. 188 (BIA 2010).

[2] Whether an applicant is aware of the prior removal is irrelevant as to whether the applicant is inadmissible under section 212(a)(9)(C) of the Act; however, the AAO notes that the applicant was served with documentation informing him that he was being removed from the United States on July 2, 2002, which included a warning that reentering the United States without permission to reapply for admission would result in additional grounds of inadmissibility. If the applicant has lost this documentation he may request a copy of it by filing a Freedom Of Information Act Request (FOIA). Counsel has failed to make a proper inquiry in order to obtain such documentation.

[3] The restraining order preventing USCIS from denying an applicant's Form I-212 because he or she has not remained outside the United States for a period of ten years, expired on February 6, 2009. While counsel contends that USCIS' denial of the applicant's Form I-212 is premature because a further appeal has been filed in *Gonzales*, the Ninth Circuit denied the plaintiffs' application for an injunction on February 6, 2009, finding that the plaintiffs were unlikely to be successful on appeal. Additionally, the retroactivity arguments on appeal in *Gonzales II* mirror retroactivity arguments dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010). The Ninth Circuit, in *Morales-Izquierdo*, found that *Gonzales II* is a judicial interpretation of a federal statute, which places the decision on a fundamentally different plane from the body of retroactivity jurisprudence upon which counsel relies and that new judicial decisions interpreting old statutes have long been applied retroactively to all cases open on direct review, regardless of whether the events predate or postdate the statute-interpreting decision. *Morales-Izquierdo* at 10, 12. The Ninth Circuit held that applicants, even those eligible for adjustment of status under section 245(i) of the Act, are bound by *Gonzales II*, that *Gonzales II* is not impermissibly retroactive and that a Form I-212 waiver cannot cure inadmissibility under section 212(a)(9)(C) of the Act until an applicant, while residing outside the United States, applies for and receives advance permission, but only after ten years have elapsed since the applicant's last departure from the United States. *Morales-Izquierdo* at 1, 12.

(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.-

(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 AAO finds that when an applicant is statutorily *ineligible* to apply for permission to reapply for admission under section 212(a)(9)(C)(i) of the Act, he or she must apply for permission to reapply for admission from outside the United States and only after he or she has remained outside the United States for a period of ten years. An applicant will be required to show proof of residence outside the United States for the full ten-year period before he or she is eligible to file for permission to reapply for admission. As such, a motion to reopen or reconsider would only warrant reopening of an applicant's case if it is established that the applicant is currently outside the United States **and** that he or she has been outside the United States for the past ten years. The record clearly establishes that the applicant is currently present in the United States. The AAO, therefore, finds that it is not possible for the applicant to be able to prove that he is eligible to apply for permission to reapply for admission at this time. The AAO notes that there can be no basis for a motion to reopen or reconsider until the applicant becomes eligible for permission to reapply for admission. The AAO cannot grant an applicant's Form I-212 if he or she in ineligible. As discussed in its prior decision, the AAO finds that the applicant is *ineligible* to apply for permission to reapply for admission because he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and has not remained outside the United States for the required ten years.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reconsider meet the requirements of a motion to reconsider. Accordingly, the motion to reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion to reconsider is dismissed. The order dismissing the appeal will be affirmed.