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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



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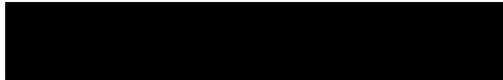


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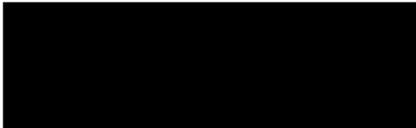
IN RE:



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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 Acting Field Office Director, Portland, Oregon, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). A subsequent appeal was rejected by the Administrative Appeals Office (AAO) as untimely filed. Upon further review, the AAO has determined that the appeal was filed timely and thus will reopen the proceeding on a Service motion. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, according to his sworn testimony before a Service officer on July 19, 2004, entered the United States without inspection in 1990, and resided unlawfully until departing in March 1991. The applicant stated further that he reentered the United States without inspection in August 1991, and resided unlawfully until departing in April 1998. The applicant stated that he last reentered the United States without inspection in July 1998, and has since resided unlawfully in the United States. A review of the record finds no evidence that the applicant was formally ordered removed or deported.

On March 19, 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 his behalf by his lawful permanent resident spouse. Information on the Form I-485 indicates that the applicant reentered the United States without inspection in July 1998. On November 26, 2004, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On August 4, 2009, the Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I). He 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 his lawful permanent resident spouse and three U.S. citizen children.

The acting 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 unlawfully present in the United States for an aggregate period of more than one year. The acting 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 acting field office director denied the Form I-212 accordingly. *See Acting Field Office Director's Decision*, dated August 4, 2009.

On appeal, counsel contends that the applicant is eligible for permission to reapply for admission. Counsel also contends that it would be impermissibly retroactive 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 further that, as more than ten years have elapsed since his 1998 departure, he is eligible for *nunc pro tunc* adjudication of the Form I-212. Counsel also contends that the acting field office director erred in denying the applicant's Form I-212 in light of the Tenth Circuit Court of Appeals (Tenth Circuit) decision in *Padilla-Caldera v. Gonzalez*, 453 F.3d 1237 (10th Cir. 2006). *See Counsel's Brief*, dated October 6, 2009. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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.

(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 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 in April 1998, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.¹ The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Counsel contends that the applicant is eligible for permission to reapply for admission., and that it would be impermissibly retroactive to deny the applicant's Form I-212 because of his reliance on *Perez-Gonzalez*.

The applicant's Form I-212 was pending 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.

Counsel's retroactivity arguments before the AAO 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.

In *Gonzales II*, 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 having been unlawfully present in the United States for an aggregate period of more than one year 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

¹ The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for a period of ten years when he becomes eligible to apply for permission to reapply for admission.

since April 1, 1997, counsel's contention that the correct application of the statute is impermissibly retroactive is unfounded since the applicant's departure, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment. Alternately counsel contends that the acting field office director erred in denying the applicant's Form I-212 in light of the Tenth Circuit Court of Appeals (Tenth Circuit) decision in *Padilla-Caldera v. Gonzalez*, 453 F. 3d 1237 (10th Cir. 2006).²

Finally, the statute and case law clearly states that an alien who makes unlawful reentry after having been unlawfully present in the United States for an aggregate period of more than one year may seek an exception to permanent 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.*; *Matter of Briones, Supra.*; *Matter of Diaz and Lopez, Supra.*; *Morales-Izquierdo, 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) and (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.

² Counsel's contentions are unpersuasive. The Tenth Circuit has recently called into question whether *Padilla-Caldera* is still good law in light of BIA case law. See *Herrera-Castillo v. Holder*, 573 F.3d 1004(10th Cir. July 27, 2009). Additionally, the case law to which counsel refers is precedent in the Tenth Circuit and the applicant resides within the Ninth Circuit.

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 and renewed his or her inadmissibility under section 212(a)(9)(C) of the Act.