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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: LOS ANGELES, CA Date: FEB 22 2011

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 $630. 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 Field Office Director, Los Angeles, California, 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 reopen and reconsider. The motion to reopen and reconsider will be denied.

The applicant is a native and citizen of Mexico who, on December 1, 1997, appeared at the San Ysidro, California port of entry. The applicant made an oral claim to U.S. citizenship. The applicant was placed into secondary inspection. The applicant admitted that she was not a U.S. citizen, had no claim to U.S. citizenship and that she did not have valid documentation to enter the United States. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(ii) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 112(a)(6)(C)(ii) and 1182(a)(7)(A)(i)(I), for making a false claim to U.S. citizenship and for being an immigrant without valid documentation. On December 4, 1997, 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 June 12, 2005, 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 the applicant's behalf by the applicant's lawful permanent resident spouse. On July 26, 2007, the applicant filed the Form I-212, indicating that she resided in the United States. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her lawful permanent resident spouse.

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 she 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 August 8, 2009.

On appeal, counsel contended 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 contended that it has been more than ten years since the applicant's last departure and she is eligible for *nunc pro tunc* permission to reapply for admission. Counsel contends that the applicant can satisfy the extreme hardship requirement for the I-212 waiver.[1] *See Counsel's Brief,* dated September 30, 2009. In support of his contentions, counsel submitted the referenced brief, employment verification, identity documents of family members and recommendation letters.

[1] The AAO notes that extreme hardship is not a requirement for granting permission to reapply for admission; however, hardships to the applicant and his or her family members may be considered favorable factors to be considered in determining whether an applicant warrants a favorable exercise of discretion.

The AAO dismissed the applicant's appeal because she 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 she has not remained outside the United States for the required ten years. The AAO also determined that the applicant is inadmissible under the provisions of section 212(a)(6)(C)(ii) of the Act and no waiver is available. *Decision of AAO,* dated August 16, 2010.

In the motion to reopen and reconsider, counsel submits a brief setting forth the same, identical arguments he set forth in his appeal and he 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.[2] *See Brief in Support of Motion to Reconsider*, dated September 13, 2010. In support of his motion to reopen and reconsider, counsel submits the referenced brief and a copy of the applicant's current employment authorization approval notice. 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:

> (2) *Requirements for motion to reopen.*
> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:
>
> a. The requested evidence was not material to the issue of eligibility;
> b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
> c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.
>
> (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

[2] As discussed in the AAO's decision, 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 *Gonzalez*, the Ninth Circuit denied the plaintiff's application for an injunction on February 6, 2009, finding that the plaintiffs were unlikely to be successful on appeal.

> 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.

In support of the motion to reconsider, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007). As discussed in the AAO decision, the retroactivity arguments set forth by counsel in the motion to reopen and reconsider and on appeal in *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010). 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. The record clearly establishes that the applicant is currently present in the United States. Therefore, it is not possible for the applicant to prove that she is eligible to apply for permission to reapply for admission at this time. As discussed in its prior decision, the AAO finds that the applicant is *ineligible* to apply for permission to reapply for admission because she 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.

Finally, counsel fails to address the applicant's permanent ground of inadmissibility under section 212(a)(6)(C)(ii) of the Act.

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 reopen and reconsider meet the requirements of a motion to reopen and reconsider. Accordingly, the motion to reopen and reconsider is dismissed and the order dismissing the appeal is affirmed.

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