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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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[Redacted]

FILE:

[Redacted]

Office: SACRAMENTO, CA

Date: **APR 21 2009**

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).

John F. Grissom,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Acting Field Office Director, Sacramento, 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 Mexico who, on February 9, 1991, was placed into immigration proceedings after entering the United States without inspection. On March 12, 1992, the immigration judge granted the applicant voluntary departure until August 1, 1992. The applicant failed to surrender for removal or depart the United States, thereby changing the voluntary departure to a final order of removal. On December 10, 1992, the applicant was removed from the United States and returned to Mexico. The applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on May 5, 1994. On June 7, 1994, the applicant was granted voluntary departure to Mexico. The applicant again reentered the United States without a lawful admission or parole and without permission to reapply for admission on June 21, 1994. On September 28, 1996, the applicant filed the Form I-212, indicating that he resided in the United States. The applicant was granted voluntary departure until January 2, 1997. The record reflects that the applicant failed to depart the United States. On June 9, 2006, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Sacramento, California field office. The applicant testified that he had last entered the United States without inspection in 1994. The record reflects that the applicant obtained a Mexican passport in Colima, Mexico on July 1, 2004. There is no evidence in the record to establish that the applicant reentered the United States legally in 2004 after obtaining his passport in Mexico. The applicant is inadmissible under section 212(a)(9)(A)(ii) of 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen spouse and children.

The acting field officer director determined that the applicant did not warrant a favorable exercise of discretion. *See Field Officer Director's Decision*, dated July 27, 2007.

On appeal, counsel contends that the applicant is not subject to the stricter provisions enacted under the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. 104-208, 110 Stat. 3009 (1996), because he reentered the United States prior to April 1, 1997, the date on which those provisions were enacted.<sup>1</sup> Counsel contends that the applicant warrants a favorable exercise of discretion. Counsel contends that the applicant did not commit fraud in testifying that he did not travel to Mexico in order to obtain his Mexican passport because the applicant did not depart the United States in order to obtain his Mexican passport in 2004.<sup>2</sup> *See Counsel's Brief*, dated September 26, 2007. In support of her contentions, counsel only submits the referenced brief.

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<sup>1</sup> The AAO notes that, as explained above, the applicant illegally reentered the United States after obtaining his Mexican passport in Colima, Mexico in 2004.

<sup>2</sup> The AAO notes that, as discussed in this office's Notice of Intent to Deny (NOID), the applicant's presence in Mexico was required in order for him to obtain the Mexican passport issued to him by Mexican authorities in Colima, Mexico. As such, the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to obtain immigration benefits by fraud or willful misrepresentation by concealing his travel to Mexico in 2004.

On March 9, 2009, the AAO issued a notice to the applicant and counsel informing the parties that it was this office's intent to dismiss the applicant's appeal based upon evidence establishing further unfavorable factors in the applicant's case, such as the applicant's attempt to obtain immigration benefits by fraud or willful misrepresentation of a material fact and his inadmissibility pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(C)(i) of the Act, 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(9)(C). *See AAO's NOID*, dated March 9, 2009. The applicant and counsel were granted fifteen days to provide evidence to overcome, fully and persuasively, these findings. The applicant and counsel failed to respond to the AAO's NOID, therefore, the record is considered complete. 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.-

- (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 on a 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 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 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 in 2004, less than ten years ago, he has not remained outside the United States since that departure and he is currently present in the United States. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

Additionally, the AAO finds that, in light of the applicant's repeated violations of the immigration laws, he would not warrant a favorable exercise of discretion.

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 (9<sup>th</sup> 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.