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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  
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Services

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[REDACTED]

H4

FILE:

Office: DALLAS, TX

Date:

JUL 16 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)

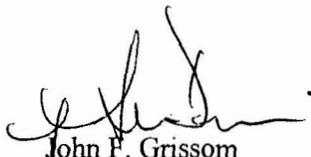
ON BEHALF OF APPLICANT:

[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 Field Office Director, Dallas, Texas, 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 Honduras who, on December 28, 2000, appeared at the **Brownsville, Texas port** of entry. The applicant presented a border crossing card bearing the name [REDACTED]. The applicant was placed into secondary inspections. The applicant admitted that he was not the true owner of the document and that he did not have documentation to enter the United States. The applicant admitted that he was aware that it was illegal to enter the United States with the documentation he presented. The applicant failed to provide his true identity to immigration officers and claimed to be a citizen of Mexico. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On December 29, 2000, the applicant was convicted of attempting to gain the illegal entry into the United States by fraud in violation of 8 U.S.C. § 1325(a)(3). The applicant was sentenced to ninety days in jail and three years of probation. The applicant's sentence was suspended. On December 29, 2000, 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].

On August 19, 2002, officers apprehended the applicant as he was traveling as a passenger in a car. The applicant admitted that he had entered the United States without inspection on January 10, 2001. On August 19, 2002, the applicant was placed into immigration proceedings. On December 9, 2002, the immigration judge ordered the applicant removed from the United States *in absentia*. On May 5, 2003, the applicant filed a motion to reopen, which was returned for failure to serve. On December 23, 2003, the applicant re-filed the motion to reopen. On March 26, 2004, the motion to reopen was denied. The applicant appealed to the Board of Immigration Appeals (BIA). On March 10, 2005, the BIA affirmed the denial of the motion to reopen. On December 3, 2005, the applicant departed the United States while an order of removal was outstanding and returned to Honduras.

On March 30, 2006, the applicant filed the Form I-212, indicating that he resided in Honduras. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i), for a period of twenty years. 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 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 he 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 September 6, 2007.

On appeal, counsel contends that the applicant be granted a *nunc pro tunc* permission to reapply for admission.<sup>1</sup> See *Letter Accompanying Form I-290B*, dated November 2, 2007. In support of his contentions, counsel submits only the referenced letter. 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. [Emphasis added]

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.-Any alien who-

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<sup>1</sup> The AAO notes that counsel contends that the applicant did not accrue unlawful presence while he was in immigration proceedings and on appeal; however, the AAO finds that the applicant did accrue unlawful presence during this time, since the record fails to establish that the applicant had filed any application which would have stopped the accrual of unlawful presence. Furthermore, in the applicant's case, this accrual of unlawful presence is not the basis for the field office director's finding of inadmissibility under section 212(a)(9)(C)(i) of the Act. The applicant was removed from the United States in 2000 and reentered the United States without inspection in 2001, rendering him inadmissible under section 212(a)(9)(C)(i) of the Act and, as discussed below, he is ineligible to file for permission to reapply for admission.

(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 on December 3, 2005, less than ten years ago.<sup>2</sup> The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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.

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<sup>2</sup> The AAO notes that the applicant must prove that he has resided outside the United States for the full ten-year period when he reapplies for permission to reapply for admission when he becomes eligible. The AAO also notes that the applicant will be required to concurrently file an Application for Waiver of Inadmissibility (Form I-601) in order to seek a waiver under section 212(i) of the Act, 8 U.S.C. § 1182(i), for his attempted entry into the United States by fraud in 2000. These applications must be filed with the U.S. Consulate having jurisdiction over the applicant's foreign address.