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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: CHICAGO, IL

Date: JUN 16 2009

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:

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 District Director, Chicago, Illinois, 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 China who, on March 27, 1996, appeared at the San Francisco International Airport. The applicant presented a B-1 visa and a U.S. training letter. The applicant was placed into secondary inspections. During secondary inspections it was discovered that the B-1 visa had been obtained fraudulently and that the training letter presented at the port of entry to support the applicant's entry into the United States was a fraudulent document.¹ On the same day, the applicant was placed into immigration proceedings for being inadmissible under 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 May 6, 1996, the immigration judge ordered the applicant removed from the United States. On May 7, 1996, the applicant was removed from the United States and returned to China.²

On January 13, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Worker (Form I-140) filed on the applicant's behalf by New Shun Shing International Trading Co. On September 26, 2006, the Form I-140 was approved. On January 31, 2007, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Chicago, Illinois District Office. The applicant testified that he had last entered the United States without inspection in March 1999. On May 24, 2007, the Form I-485 was denied. On June 25, 2007, 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)(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 Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States, adjust his status and to provide care for his a US citizen son.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision*, dated June 27, 2008.

¹ The AAO notes that counsel contends that the applicant was pressured into admitting that he had come to the U.S. seeking employment and that the immigration officers alleged that he provided incorrect documentation required for admission to the United States, which may have only been a misunderstanding. The record reflects that immigration officers verified that the documentation presented by the applicant at the port of entry and to support the application for the B-1 visa were fraudulent by telephonically confirming with the purported signator that the documentation was fraudulent and that the employer had never heard of the applicant. The record contains a sworn statement by the applicant in which he states that he sought entry into the United States for asylum purposes and that he was aware that he was obtaining a fraudulently obtained visa based on his assertion that he would be training with a U.S. company and that he had been coached on what to say to immigration officers at the U.S. Embassy and at the port of entry.

² The AAO notes that counsel contends the applicant was not removed from the United States and left the United States of his own accord. The record, however, reflects that an order of removal was issued by the immigration judge while the applicant appeared before him and that the applicant was physically removed from the United States by immigration officers.

On appeal, counsel contends that the applicant has shown he merits a favorable decision. *See Attachment to Form I-290B*, dated July 23, 2008. In support of her contentions, counsel submits the referenced attachment to Form I-290B, an affidavit from the applicant and copies of documentation previously provided. 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 USCIS has consented to the applicant's reapplying for admission. In the present matter, while the applicant's last departure from the United States occurred on May 7, 1996, more than ten years ago, he has not remained outside the United States since his last departure and he is currently present in the United States.³ The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

³ The AAO notes that, even if an applicant had remained outside the United States for the required period of inadmissibility under his or her removal order, if he or she reenters the United States illegally at any time after April 1, 1997, he or she becomes inadmissible under section 212(a)(9)(C)(i) of the Act. In order to avoid inadmissibility under section 212(a)(9)(C)(i) of the Act, an applicant must be subsequently lawfully admitted to the United States.

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 (9th 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.