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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

#4

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 26 2009

IN RE:

APPLICATION:

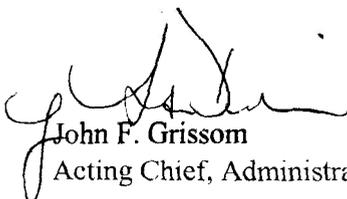
Application for Permission to Reapply for Admission into the United States after
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 Director, California Service Center 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 the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be denied. The AAO will *sua sponte* reopen the matter. The order dismissing the appeal will be affirmed and the application will be denied.

The applicant is a native and citizen of Guatemala who on August 17, 1999, was placed into immigration proceedings after entering the United States without inspection. On September 30, 2000, the applicant married his then lawful permanent resident spouse, [REDACTED]. On October 11, 2000, the immigration judge ordered the applicant removed *in absentia*. The applicant filed a motion to reopen with the immigration judge. On February 26, 2001, the immigration judge denied the applicant's motion to reopen. The applicant appealed to the Board of Immigration Appeals (BIA). On August 22, 2001, the BIA dismissed the applicant's appeal. The applicant filed a motion to reopen with the BIA. On April 11, 2002, the BIA denied the applicant's motion to reopen. On September 16, 2002, the applicant was removed from the United States and returned to Guatemala.

On August 5, 2004, [REDACTED] became a naturalized U.S. citizen. The record reflects that the applicant reentered the United States without a lawful admission or parole and without permission to reapply for admission, on an unknown date, but prior to August 31, 2004, the date on which he filed the Form I-212, indicating that he resided in the United States. In response to a request for further evidence, the applicant testified that he reentered the United States without inspection on December 30, 2002. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 remain in the United States and reside with his U.S. citizen spouse and child.

The 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 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 director denied the Form I-212 accordingly. *See Director's Decision*, dated February 16, 2005.

On June 6, 2006, the AAO dismissed the applicants appeal because the applicant was inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), the applicant had not remained outside the United States for the required ten years prior to seeking permission to reapply for admission, and no purpose would be served in the adjudication of the Form I-212. *Decision of AAO*, dated June 6, 2006.

In his motion to reopen or reconsider, counsel contends that the director's decision presupposed that the applicant's spouse was aware of the applicant's immigration case, the adverse factors were given too much weight in light of the assumption that the applicant's spouse was aware of the ramifications of the applicant's immigration situation, and that the applicant did not receive a proper response from the director as it applied to a previously submitted Form I-130, which precluded the applicant from

submitting additional documentation. *See Counsel's Motion to Reopen and Reconsider*, dated July 5, 2006.

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

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 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.

Counsel did not submit evidence or provide information regarding new facts to be provided upon a reopening of the applicant's case. The AAO, therefore, finds that counsel has not met the requirements for a motion to reopen.

Counsel did not state any incorrect applications of law or policy and did provide any pertinent precedent decisions to establish an incorrect application of law or policy by the director or the AAO. The AAO, therefore, finds that counsel has not met the requirements for a motion to reconsider.

The AAO dismissed the applicant's appeal on the basis of *Matter of Torres-Garcia*; 23 I&N Dec. 866 (BIA 2006). The AAO notes that, at the time counsel filed his motion, a preliminary injunction 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 AAO, therefore, reopens the matter *sua sponte*.

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*.

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 September 16, 2002, less than ten years ago, and he

has not remained outside the United States since that departure. 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.

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, while the AAO reopened the matter *sua sponte*, the order dismissing the appeal will be affirmed.

ORDER: The motion to reopen or reconsider is denied. The AAO reopens the matter *sua sponte*. The order dismissing the appeal will be affirmed.