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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

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FILE:

Office: SAN BERNARDINO, CA

Date: **OCT 22 2009**

IN RE:

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

Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Bernardino, 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 December 4, 1997, appeared at the San Ysidro, California port of entry. The applicant presented a lawful permanent resident card bearing the name "[REDACTED]". The applicant was placed into secondary inspection. The applicant admitted that she was not the true owner of the document and 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)(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 December 6, 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 May 12, 2008, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360). The applicant indicated that she reentered the United States without inspection in December 1997. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and a Form I-212, indicating that she resided in the United States. On June 30, 2009, the Form I-601 was approved. On the same day, the Form I-485 was denied. The applicant is inadmissible under sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(i) and 212(a)(9)(C)(iii). 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) and a waiver under section 212(a)(9)(C)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(iii) in order to remain in the United States and reside with her two U.S. citizen children.

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 June 30, 2009.

On appeal, counsel contends that the field office director erred in retroactively applying *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2004). Counsel contends that the field office director erred in failing to refer the applicant's case to U.S. Immigration and Customs Enforcement (U.S.I.C.E.) for review in regard to reinstatement prior to adjudicating the applicant's Form I-212, as dictated by a USCIS Memorandum.<sup>1</sup> *See Counsel's Brief*, received August 24, 2009. In support of his contentions,

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<sup>1</sup> As discussed below, *Gonzales II* and the statute clearly dictate that an applicant's Form I-212 should be denied if he or she has not remained outside the United States for a period of ten years. USCIS Memorandum is merely guidance for adjudicators and the field office director did not err in following the letter of the law. The applicant's prior removal order

counsel submits only the referenced brief. 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 of Homeland Security] 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

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may be reinstated at a later date. The AAO notes that, as of October 30, 2008, VAWA applicants who are inadmissible under section 212(a)(9)(C)(i) of the Act and require a waiver under section 212(a)(9)(C)(iii) of the Act must file a Form I-601 to apply for such a waiver. If a VAWA applicant is also inadmissible pursuant to section 212(a)(9)(A) of the Act, the VAWA applicant will also still be required to file a Form I-212 in conjunction with the Form I-601. If a VAWA applicant cannot meet the requirements for the waiver, the Form I-601 must be denied for failure to meet the requirements of 212(a)(9)(C)(iii) of the Act, even he or she is eligible for waivers of other grounds of inadmissibility.

(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.

(iii) Waiver

The [Secretary], in the [Secretary's] discretion, may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

- (1) the alien's battering or subjection to extreme cruelty; and
- (2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The AAO notes that a waiver to inadmissibility under section 212(a)(9)(C)(i) of the Act 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. Since the applicant has an approved Form I-360, the applicant is classified as a battered spouse; however, the record must also reflect that removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States, is connected to the applicant's subjection to battery or extreme cruelty. The record reflects that the applicant's Form I-360 was approved based on her abuse at the hands of her now ex-spouse. The applicant admits in her statement in support of the Form I-360 that she that she did not meet her now ex-husband until June 2001, after her attempted entry into United States, removal and reentry into the United States. The applicant, therefore, does not meet the requirements for a waiver based on her classification as a battered spouse under section 204 of the Act.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act and does not meet the requirements for a waiver under section 212(a)(9)(C)(iii) 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. While the applicant's last departure from the United States occurred on December 6, 1997, more than ten years ago, she has not remained outside

the United States since that departure and she is currently in the United States.<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*.

On appeal, counsel contends that the Ninth Circuit's decision in *Gonzales v. DHS* is retroactively applied and that the Ninth Circuit's *Perez-Gonzalez v. Ashcroft* decision should be applied in the applicant's case because her Form I-212 was filed while the decision was still good law. Counsel contends that the new rule directly contravenes the standing rule in the Ninth Circuit and that under the *Montgomery Ward & Co. v. FTC*, 691 F. 2d 1322 (9<sup>th</sup> Cir. 1982), five-factor test USCIS's application of the *Gonzales v. DHS* decision has an "impermissibly retroactive" effect.

The Ninth Circuit, in deferring to the BIA's decision in *Matter of Torres-Garcia*, found that the BIA's findings were reasonable and that the statute is unambiguous and unchanged since its promulgation. While the Ninth Circuit found that its decision in *Perez-Gonzalez v. Ashcroft* was based on a finding of statutory ambiguity that left room for agency discretion, the court also found that the issue might have been resolved under the first step of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 87, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), by examining the text of the relevant statutes and their legislative histories. The court concluded that, by declining to adhere to the plain language of the inadmissibility provision and instead falling back on the regulations, *Perez Gonzalez* did not find the inadmissibility provision or the statutory scheme to be unambiguous. It is on this basis that the court found that it was not bound by the decision in *Perez Gonzalez* and must defer to *Torres Garcia*, while, at the same time, finding that the statute itself is unambiguous. In *Matter of Torres-Garcia*, the BIA found that 8 C.F.R. § 212.2 was not promulgated to implement the current section 212(a)(9) of the Act and that the very concept of retroactive permission to reapply for admission, i.e., permission requested after unlawful reentry, contradicts the clear language of section 212(a)(9)(C) of the Act, which in its own right makes unlawful reentry after removal a ground of inadmissibility that can only be waived by the passage of at least ten years. The BIA found that the *Perez-Gonzalez v. Ashcroft* decision contradicts the clear language of the statute and the legislative policy underlying the statute in general. The statute clearly states that an alien who has been ordered removed and reenters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking

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<sup>2</sup> The applicant will be required to submit evidence establishing that she is currently outside the United States and has remained outside the United States for period of ten years when she becomes eligible to apply for permission to reapply for admission.

admission more than ten years after the date of the alien's last departure from the United States, if, the applicant receives permission to reapply for admission prior to reentering the United States.<sup>3</sup> Since the statute is unambiguous and has been in effect since April 1, 1997, counsel's contention that the correct application of the statute is impermissibly retroactive is unfounded since the applicant's removal, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she is eligible for the benefit sought. The applicant in the instant case does not qualify for an exception or waiver 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>3</sup> The AAO notes that the reentry after obtaining permission to reapply for admission must be a lawful admission to the United States; otherwise, the applicant has again illegally reentered the United States after having been removed and renewed his or her inadmissibility under section 212(a)(9)(C) of the Act.