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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

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U.S. Citizenship
and Immigration
Services

H4

FILE:

Office: PHOENIX, AZ

Date:

SEP 08 2009

AND
(RELATE)

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:

Self-represented

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, Phoenix, Arizona, 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 January 9, 2007, appeared at the San Luis, Arizona port of entry. The applicant presented her Mexican passport containing a U.S. nonimmigrant visa. The applicant was placed into secondary inspections. In secondary inspections, it was discovered that the applicant had been previously voluntarily returned to Mexico in 2004 and 2006. On those occasions, the applicant provided false identities to the immigration officers apprehending her. The applicant testified that she had resided in Yuma, Arizona for the past six years. She admitted that she had been employed in the United States and that she did not have documentation permitting her to reside or work in the United States. The applicant admitted that she had obtained a false lawful permanent resident card and social security card in order to work in the United States. The applicant admitted that she was aware that it was against the law to reside and work in the United States without proper authorization. The record reflects that the applicant was apprehended and returned to Mexico on March 20, 2004, and again on November 20, 2006. The applicant reentered the United States without inspection after each occasion. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant without valid documentation. On January 9, 2007, 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 October 30, 2008, the applicant filed the Form I-212, indicating that she resided in Mexico. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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) in order to reside in the United States with her U.S. citizen fiancé and two U.S. citizen children.

The field office director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated April 8, 2009.

On appeal, the applicant's fiancé contends that the applicant's entry was denied under the wrong A-number.¹ The applicant's fiancé contends that the applicant has a home in San Luis, Sonora, Mexico, where she has abided by the visa timeline for visitation.² The applicant's fiancé contends that the applicant's visa was valid at the time she sought to enter the United States.³ The applicant's fiancé contends that the applicant's denial has created a hardship for her family. *See Form I-290B*, dated April 21 to 2009. In support of his contentions, the applicant's fiancé submits the Form I-290B, property records, Spanish records which are not translated, documentation which appears to be

¹ The AAO finds that the applicant's correct A-numbers are the ones listed on this decision and any documentation issued reflecting a different A-number is incorrect. All of the applicant's files have been consolidated under [REDACTED]

² As discussed below, the record reflects that the applicant has overstayed her non-immigrant admissions and illegally entered the United States without inspection on a number of occasions.

³ The AAO notes that, pursuant to section 222(g) of the Act, the applicant's visa was invalid because she had previously remained in the United States past her authorized stay.

related to a fiancée visa and copies of documentation already in the record.⁴ 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

⁴ The AAO notes that, while the applicant's fiancé submits documentation appearing to be related to a fiancé visa petition, there is no evidence to establish that the applicant's fiancé has actually filed a visa petition on behalf of the applicant.

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 record reflects that the applicant accrued unlawful presence in the United States from November 17, 1998, the date on which her nonimmigrant visitor status expired, until March 20, 2004, the date on which she was voluntarily returned to Mexico. The applicant also accrued unlawful presence in the United States from the date on which she illegally reentered the United States after having been voluntarily removed on March 20, 2004, until November 20, 2006, the date on which she was again voluntarily removed from the United States. Accordingly, the applicant has illegally reentered the United States after having accrued more than one year of the unlawful presence in the United States.⁵

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.

⁵ The AAO notes that the applicant freely admitted that she had resided in Yuma, Arizona since 2001. Documentation in regard to her testimony and voluntary returned to Mexico would be available to the applicant upon filing a Freedom of Information Act Request (FOIA).

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 January 9, 2007, less than ten years ago.⁶ 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 (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*. *Also See Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).

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 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.

⁶ The applicant will be required to provide proof of her residence outside the United States for a period of ten years at the time she is eligible to apply for permission to reapply for admission.