

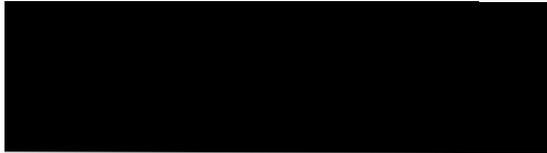
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: DALLAS, TX
(RELATES)

Date:

SEP 17 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 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 Mexico who, on July 17, 1989, was admitted to the United States as a lawful permanent resident. On March 1, 1990, the applicant was convicted of possession of a prohibited weapon. The applicant was sentenced to twelve months of probation. On May 14, 1990, the applicant was convicted of burglary of a vehicle, a third degree felony. The applicant was sentenced to four years in jail that was probated. On January 8, 1998, the applicant pled guilty to and was convicted of driving under the influence on three or more occasions. The applicant was sentenced to three years in jail and three years probation. On October 30, 1998, the applicant was placed into immigration proceedings as a lawful permanent resident who has been convicted of an aggravated felony, specifically a crime of violence. On January 4, 1999, immigration charges against the applicant were amended to include having been convicted of a crime involving moral turpitude within five years after admission for which a sentence of one year or longer may be imposed. On January 25, 1999, the immigration judge ordered the applicant removed from the United States. On March 10, 1999, the applicant was removed from the United States and returned to Mexico.

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 September 27, 2000, the date on which his marriage license was issued in Laredo, Texas. On February 13, 2002, the applicant filed a Form I-212, indicating that he resided in Mexico. On October 22, 2003, the Form I-212 was denied. On August 9, 2007, the applicant filed a second Form I-212, indicating that correspondence should be sent to a post office box in Dallas, Texas. 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 with his U.S. citizen spouse and U.S. citizen child.

The field office director determined that the applicant is inadmissible under section 212(a)(2)(B) of the Act, 8 U.S.C. § 1182(a)(2)(B), for having been convicted of two or more offenses for which the aggregate sentences to confinement was five years or more. The field office director determined that the applicant has been convicted of an aggravated felony, specifically a theft or burglary offense for which the term of imprisonment is at least one year. 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 14, 2008.

On appeal, counsel contends that the field office director's decision is unclear as to whether it was made on the basis of discretion or on the interpretation of the applicant's criminal history including an aggravated felony.¹ Counsel contends that the applicant's conviction for burglary of a vehicle is

¹ The AAO notes that the field office director clearly made a full decision not only based on the applicant's criminal history but also on all the other factors in the applicant's case, indicating that the field office director made a decision that was based on discretion.

not an aggravated felony.² Counsel contends that the respondent should not have been removed from the United States and is therefore not subject to section 212(a)(9)(A)(ii) of the Act.³ Counsel contends that the applicant has not made any attempt to reenter the United States without authorization, has not committed any further criminal offenses and has significant equities which warrant a favorable exercise of discretion.⁴ See *Counsel's Brief*, dated June 16, 2008. In support of his contentions, counsel submits the referenced brief and copies of documentation already in the record. 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

² The AAO concedes that the applicant's conviction for burglary of a vehicle is not necessarily an aggravated felony as a "burglary offense" within the definition of an aggravated felony set forth in section 101(a)(43)(G) of the Act, as held in the Board of Immigration Appeals (BIA) case *In Re Perez*, 22 I & N Dec. 1325 (BIA, 2000); however, the applicant's conviction for burglary of a vehicle may qualify as an aggravated felony as a "theft offense" under section 101(a)(43)(G) of the Act. Section 30.04 of the Texas Penal Code provides in pertinent part that burglary of a vehicle occurs when a person breaks or enters into a vehicle with the intent to commit any felony or *theft*. While the record contains the applicant's plea agreement, the applicant has failed to provide the indictment in his case, which would provide the bases for the applicant's plea agreement. It is the applicant's burden of proof to establish that he is admissible to the United States and, as such, it would be the applicant's burden to provide the indictment in order to prove that he has not committed or attempted to commit a "theft offense." The AAO finds that if the applicant's indictment reflects that he intended to commit theft in his burglary of a vehicle, the applicant's burglary of a vehicle conviction is a crime involving moral turpitude and he is ineligible for consideration of a waiver because he is a lawful permanent resident convicted of an aggravated felony. The AAO notes that the applicant's conviction for felony driving under the influence is no longer considered to be an aggravated felony.

³ The AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 1999 and is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, is eligible for permission to reapply for admission.

⁴ The AAO find counsel's contention that the applicant has not illegally reentered the United States to be unpersuasive. While counsel contended that, in order to not commit any further violations of law, the applicant was married on the international bridge at Laredo, Texas, the applicant's marriage license and certificate do not reflect this fact. Under Texas law both the applicant and his spouse had to appear in person before the Webb county clerk in order to obtain the marriage license. Additionally, the justice of the peace performing the marriage ceremony would be unable to solemnize the rights of matrimony if the ceremony did not occur within the County of Webb, i.e. in the United States. While there is a provision for a proxy marriage in the State of Texas, counsel and the applicant do not indicate that the marriage occurred by proxy. Moreover, a marriage license and certificate would reflect that the marriage occurred by proxy. The AAO, therefore finds that the applicant had to reenter the United States in order to obtain the marriage license and to solemnize the marriage. The AAO also notes that, even if the applicant can prove that he obtained a marriage license by proxy and that the marriage ceremony took place on the international bridge, in order for the marriage to be legitimate it had to occur on the U.S. side of the international bridge and, therefore, the applicant had to be present on U.S. soil without inspection, even if he did not attempt to or pass through the inspection area.

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-
 - (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 March 10, 1999, if the applicant has not left the United States since his reentry, or after October 5, 2000, less than ten years ago.⁵ 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*.

⁵ The applicant will be required to provide evidence establishing that he has resided outside the United States for a period of ten years at the time he becomes eligible to apply for permission to reapply for admission.

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.