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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

PUBLIC COPY

[REDACTED]

FILE:

Office: FRESNO, CA

Date:

SEP 23 2009

AND
(RELATE)

IN RE:

[REDACTED]

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)

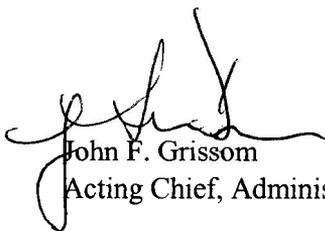
ON BEHALF OF APPLICANT:

[REDACTED]

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, Fresno, 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 May 21, 1999, appeared at the San Ysidro, California port of entry. The applicant presented an I-586 border crossing card bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he did not have valid documentation to enter the United States. The applicant admitted that he had previously lived in the United States for five years prior to his attempted reentry. The applicant failed to provide his true identity to immigration officers. 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 being an immigrant without valid documentation. On May 22, 1999, 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) under the name “[REDACTED]” [REDACTED].

On October 9, 2000, the applicant married his then lawful permanent resident spouse in San Marcos, California. On February 7, 2001, the applicant’s spouse filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on January 27, 2005. On June 17, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. During an interview in regard to the Form I-485, the applicant testified that he had entered the United States without inspection in 1997 and denied ever being removed from the United States or having committed fraud. On September 11, 2006, the Form I-485 was denied. On May 31, 2007, the applicant filed a second Form I-485. The applicant indicated that he had reentered the United States without inspection in 1999. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that he continued to reside in the United States. On June 17, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 now naturalized U.S. citizen spouse and 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 he 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 17, 2009.

On appeal, counsel contends that the field office director erred in retroactively applying *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th 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 (9th Cir. 2004). *See Counsel’s Brief*, dated August 10, 2009. In support of his contentions, 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

(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. While the applicant's last departure from the United States occurred on May 22, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.¹ 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

¹ The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.

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 his Form I-212 was filed while the decision was still good law. Counsel contends that to apply *Matter of Torres-Garcia* would be equivalent to introducing a new rule which is directly contradictory of the previous rule. Counsel contends that it would result in manifest injustice to the applicant to deny the applicant's Form I-212 because of his reliance on *Perez-Gonzalez*. Counsel contends that 8 C.F.R. § 212.2(e) specifically permits an alien to obtain a *nunc pro tunc* permission to reapply for admission that would cure the applicant's prior unlawful reentry into the United States. Finally, counsel contends that the applicant is not required to apply for permission to reapply for admission from outside the United States and that it has been more than ten years since his last departure from the United States.

The AAO notes that the applicant's Form I-212 was filed while an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia* had been issued. The AAO finds that in filing the Form I-212 under such circumstances, counsel's contention that the applicant reasonably relied upon the Ninth Circuit's *Perez-Gonzalez v. Ashcroft* decision is illogical.

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. 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. 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.

The statute clearly states that an alien who has been ordered removed and he enters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking 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.² Additionally, the BIA in *Torres-Garcia* clearly quotes the Tenth Circuit's holding that "as a result of having illegally reentered after previously been formally removed, [they] are by default inadmissible for life [and their] disability may be waived only after the alien has been outside the United States for ten years." *Berrum-Garcia v. Comfort*, 390 F. 3d 1158 (10th Cir. 2004).

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.

² 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.