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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
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Services**

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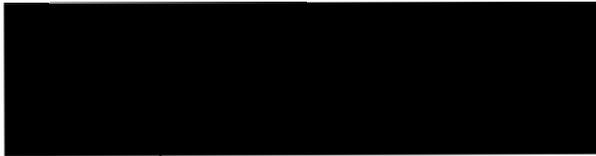


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:



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 a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion is dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on May 2, 2000, attempted to elude inspection at the Otay Mesa, California port of entry. The applicant was placed into secondary inspection. The applicant admitted that she did not have valid documentation to enter the United States. 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 May 2, 2000, 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 her maiden name "[REDACTED]"

On January 16, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) as the derivative of a Petition for Alien Worker (Form I-140) filed on behalf of her spouse. On March 24, 2003, the Form I-140 was approved. On October 18, 2004, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Los Angeles, California District Office. The applicant testified that she had reentered the United States without inspection in 2000. On October 19, 2004, the Form I-485 was denied. On October 21, 2004, the applicant's spouse became a lawful permanent resident. On November 9, 2005, the applicant filed the Form I-212, indicating that she continued to reside in the United States. 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 remain in the United States and reside with her lawful permanent resident spouse and U.S. citizen children.

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 she 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 April 28, 2006.

On March 11, 2009, the AAO dismissed the applicant's appeal because 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 and is not eligible to apply for permission to reapply for admission because she has not remained outside the United States for the required ten years. *Decision of AAO*, dated March 11, 2009.

In the motion to reconsider, counsel contends that *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), is the controlling case and permits an alien in a similar situation to the applicant to apply for *nunc pro tunc* permission to reapply for admission. Counsel contends that the AAO should seek fundamental fairness in its decision because this office has previously approved other applications for permission to reapply for admission that do not appear to be as "solid" as the applicant's case. Additionally, counsel contends that the field office director erred in denying the applicant's Form

I-212 in light of the Tenth Circuit Court of Appeals (Tenth Circuit) decision in *Padilla-Caldera v. Gonzalez*, 453 F. 3d 1237 (10th Cir. 2006). See *Brief Including Points and Authorities in Support of a Motion to Reconsideration or Motion to Reopen*, dated April 2, 2009. In support of his motion to reopen or reconsider, counsel submits the referenced brief and additional hardship documentation. 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.

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.

In support of the motion to reconsider, despite AAO's discussion of *Perez-Gonzalez* in its prior decision, counsel still contends that the case is controlling and permits an alien in a similar situation to the applicant to apply for *nunc pro tunc* permission to reapply for admission. Counsel's contention is unpersuasive. As discussed in the AAO's dismissal of the applicant's appeal, *Perez-Gonzalez* is no longer precedent and has been overturned.

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. The Ninth Circuit found that it is 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. Since the statute is unambiguous and has been in effect since April 1, 1997 and both *Matter of Torres-Garcia* and *Gonzales v. DHS* clearly state that the regulations are not applicable to inadmissibility under section 212(a)(9)(C) of the Act and *Gonzales v. DHS* clearly holds that *Perez-Gonzalez* has been overturned in favor of the holding in *Matter of Torres-Garcia*, counsel's contention that *Perez-Gonzalez* is applicable is unfounded. The statute clearly states that an alien who has been ordered removed and 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.¹ 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 in admissible 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).

¹ 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.

In support of the motion to reconsider, counsel contends that the AAO should seek fundamental fairness in its decision because this office has previously approved other applications for permission to reapply for admission that do not appear to be as “solid” as the applicant’s case. Counsel’s contention is not applicable to the applicant’s case. As discussed in the AAO’s prior decision and above, the applicant is not currently eligible to apply for permission to reapply for admission.² Furthermore, the cases to which counsel points are not cases involving inadmissibility under section 212(a)(9)(C) of the Act.³

In the motion to reconsider, counsel contends that the field office director erred in denying the applicant’s Form I-212 in light of the Tenth Circuit Court of Appeals (Tenth Circuit) decision in *Padilla-Caldera v. Gonzalez*, 453 F. 3d 1237 (10th Cir. 2006). Counsel’s contention is unpersuasive. Firstly, the case to which counsel refers renders a decision in regard to inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, while the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and the decision clearly reflects that inadmissibility under this section would result in the requirement that the applicant remain outside the United States for a period of ten years prior to applying for permission to reapply for admission. Secondly, the Tenth Circuit has recently called in to question whether *Padilla-Caldera* is still good law in light of BIA case law. See *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10th Cir. Jul 27, 2009). Thirdly, the case to which counsel refers is precedent in the Tenth Circuit and the applicant resides within the Ninth Circuit. As such, counsel’s contentions are unpersuasive and do not form a basis for a motion to reconsider.

Finally, in support of a motion to reopen, counsel submits additional documentation of hardship to family members to establish that the applicant warrants a favorable exercise of discretion. Even though counsel submits new documentation to support the motion to reopen, the applicant’s case does not warrant reopening because, as discussed in the AAO’s prior decision and above, the applicant is not eligible to apply for permission to reapply for admission and the AAO need not render a decision as to whether the applicant would warrant a favorable exercise of discretion if she were eligible to apply for permission to reapply for admission.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reopen and motion to reconsider meet the requirements of a motion to reopen or motion to reconsider. Accordingly, the motion to reopen or reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion to reopen or reconsider is dismissed. The order dismissing the appeal will be affirmed.

² The applicant will be required to provide evidence establishing that she is currently outside the United States and has been outside the United States for a period of ten years when she becomes eligible to apply for permission to reapply for admission.

³ The AAO notes that one of the cases cited by counsel involved an illegal reentry into the United States after having been removed; however, the applicant in that case was not inadmissible pursuant to section 212(a)(9)(C) of the Act because his reentry occurred prior to April 1, 1997, the date on which the provision was enacted.