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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: PORTLAND, OR

Date:

APR 08 2010

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).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Acting Field Office Director, Portland, Oregon, 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 August 8, 1988, was admitted to the United States as a nonimmigrant visitor. The applicant remained in the United States past his authorized stay, which expired on August 22, 1988. On March 22, 1990, the applicant was placed into immigration proceedings for having remained in the United States past his authorized stay. On August 13, 1990, the immigration judge granted the applicant voluntary departure until June 15, 1991. The applicant failed to surrender for removal or depart from the United States, thereby changing the voluntary departure to a final order of removal.

On December 30, 1996, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) claiming that it was based on his father's adjustment of status to lawful permanent residence; however, the record does not contain evidence to establish that the applicant was the beneficiary of an approved immigrant petition or could derive lawful permanent resident status from his father's approved immigrant petition.¹ On February 11, 1998, the applicant was removed from the United States and returned to Mexico.

The applicant entered the United States without inspection or parole on an unknown date, but prior to May 23, 1998, the date on which he married his U.S. citizen spouse in Phoenix, Arizona. On June 16, 2000, the applicant and his spouse attended an appointment at the U.S. Consulate in Mexico. On October 27, 2006, the applicant filed a second Form I-485, based on an approved Form I-130 filed on his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant last entered the United States without inspection in August 2000. 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 February 1, 2007, the Form I-601 was withdrawn. On July 10, 2009, the Form I-485 was denied. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (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 remain in the United States and reside with his U.S. citizen spouse and two U.S. citizen children.

The acting 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 acting 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 acting field office director denied the Form I-212 accordingly. *See Acting Field Office Director's Decision*, dated July 10, 2009.

On appeal, counsel contends that it would be impermissibly retroactive and fundamentally unfair to apply *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-*

¹ The AAO notes that the applicant's removal from the United State in 1998 automatically terminated the Form I-485. The Form I-485 was subsequently administratively closed on July 13, 2006.

Gonzalez v. Ashcroft, 379 F.3d 783 (9th Cir. 2004). See *Counsel's Brief*, dated September 4, 2009. In support of her 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 of an 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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security 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—

(I) the alien's battering or subjection to extreme cruelty; and

(II) 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 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); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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. The applicant's last departure from the United States occurred in June, 2000, less than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.² The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that it would be impermissibly retroactive and fundamentally unfair to deny the applicant's Form I-212 because of his reliance on *Perez-Gonzalez*.

² 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.

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, therefore, 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. The Ninth Circuit 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 found that it must defer to *Torres-Garcia* and 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, counsel's contention that the correct application of the statute is impermissibly retroactive and fundamentally unfair is unfounded since the applicant's removal, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment.

Finally, the statute and case law 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.³ *Matter of Torres-Garcia, Supra.*; *Matter of Briones, Supra.*; and *Matter of Diaz and Lopez, Supra.*

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 a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) 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.

³ 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.