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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

H4

FILE:

Office: SAN BERNARDINO, CA

Date: **APR 16 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, as required by 8 C.F.R. 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Bernardino, California denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected as untimely filed

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that the affected party must file the complete appeal within 30 days of service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b). The date of filing is not the date of mailing, but the date of actual receipt. *See* 8 C.F.R. § 103.2(a)(7)(i).

The record indicates that the field office director issued the decision on July 30, 2009.¹ It is noted that the field office director properly gave notice to the applicant that she had 30 days to file the appeal (33 days if mailed). U.S. Citizenship and Immigration Services (USCIS) received the appeal on September 4, 2009, or 36 days after the decision was issued. Accordingly, the appeal was untimely filed.

Neither the Immigration and Nationality Act nor the pertinent regulations grant the AAO or the field office director authority to extend the 33-day time limit for filing an appeal. As the appeal was untimely filed, the appeal must be rejected. Nevertheless, the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the untimely appeal does not meet the requirements of a motion to reopen or a motion to reconsider because counsel does not set forth new facts or establish that the field office director's decision was based on an incorrect application of law or policy. The AAO notes that, while counsel contends that the applicant is eligible for adjustment of status under section 245(i) of the Act, the applicant is *ineligible* for permission to reapply for admission under section 212(a)(9)(C)(ii) of the Act. Counsel contends that in light of the Tenth Circuit Court of Appeals (Tenth Circuit) decision in *Padilla-Caldera v. Gonzalez*, 453 F. 3d 1237 (10th Cir. 2006) because section 245(i) of the Act overcomes the applicant's inadmissibility under section 212(a)(9)(C) of the Act. 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

¹ The AAO notes that the field office director erred in granting the Form I-601 since the applicant is inadmissible pursuant to section 212(a)(9)(C) of the Act and is ineligible for permission to reapply for admission.

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. Counsel contends that it would be unfair to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007) retroactively to the applicant. 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. 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*. 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.² 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). The applicant is ineligible to apply for permission to reapply for admission and will be required to establish that she is applying from outside the United States and has remained outside the United States for a period of ten years prior to such application. Therefore, there is no requirement to treat the appeal as a motion under 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

As the appeal was untimely filed and does not qualify as a motion, the appeal must be rejected.

ORDER: The appeal is rejected.

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.