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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

[Redacted]

FILE: [Redacted]

Office: SEATTLE, WA

Date: **AUG 11 2010**

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:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Seattle, Washington, 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 January 2, 1999, appeared at the San Ysidro, California port of entry. The applicant presented a photo-altered Mexican passport containing a U.S. nonimmigrant visa 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 had no documentation to enter the United States. The applicant admitted that he knew it was illegal to attempt to enter the United States utilizing the document. The applicant failed to provide his true identity to immigration officers. The applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On January 3, 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].

On September 18, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant entered the United States without inspection in January 1999. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212. On September 1, 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 U.S. citizen spouse, two U.S. citizen children and one U.S. citizen stepchild.

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 September 1, 2009.

Counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 2004).<sup>1</sup> Counsel contends that legislative activity, such as the 2005 Violence Against Women's Act (VAWA), seems to support the stance that an alien retains the ability to waive a prior

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<sup>1</sup> Counsel's contention is unpersuasive. In 2007, the Ninth Circuit Court of Appeals (Ninth Circuit) found that the Ninth Circuit should defer to the Board of Immigration Appeals' (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). *See Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007). Furthermore, retroactivity arguments before the Ninth Circuit in regard to *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9<sup>th</sup> Cir. 2010).

deportation and adjust status.<sup>2</sup> Counsel contends that *Matter* ██████████ 24 I&N Dec. 355 (BIA 2007) did not address whether it should be applied in the Ninth Circuit and that *Acosta v. Gonzalez*, 439 F. 3d 550 (9<sup>th</sup> Cir. 2006) is still good law.<sup>3</sup> Counsel contends that it has been more than ten years since the applicant's last departure from the United States and she may apply for permission to reapply for admission from inside the United States and *nunc pro tunc*.<sup>4</sup> See *Counsel's Brief*, dated October 29, 2009. In support of her contentions, counsel submits the referenced brief, evidence of hardship and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

....

- (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to the United States of such immigrant alien would result in

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<sup>2</sup> Section 212(a)(9)(C)(iii) of the Act provides for the waiver of section 212(a)(9)(C)(i) of the Act in the case of a VAWA self-petitioner who can meet the requirements of such a waiver. The applicant is not a VAWA self-petitioner

<sup>3</sup> The AAO finds counsel's contention unpersuasive. The case law upon which *Acosta* was based has been overturned. See *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007) and *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10<sup>th</sup> Cir. Jul 27, 2009). Furthermore, the BIA has held that *Acosta* is no longer binding law and that *Matter* ██████████ 24 I&N Dec. 355 (BIA 2007) is applicable. See *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

<sup>4</sup> 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. An applicant must, therefore, apply from outside the United States and have resided outside the United States for at least ten years. *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). Additionally, case law holds 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 (10<sup>th</sup> Cir. 2004).

extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

In a separate proceeding, the field office director found the applicant inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and ineligible for a waiver pursuant to section 212(i) of the Act. See *Field Office Director's Decision on Form I-601*, September 1, 2009. The AAO subsequently dismissed an appeal of the denial of the Form I-601.

*Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

In that the field office director and the AAO have found the applicant to be ineligible for a waiver of inadmissibility under section 212(i) of the Act, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. Accordingly, the appeal of the field office director's denial of the Form I-212 will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.