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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: CHICAGO, IL

Date: DEC 17 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:

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 \$630. 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, Chicago, Illinois, 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, according to his sworn testimony before a Service officer on November 23, 2009 in conjunction with his adjustment of status application, entered the United States without inspection in 1995, and resided unlawfully until departing on or about June 1, 1999. The applicant stated further that he reentered the United States without inspection in December 1999, and has since resided unlawfully in the United States. A review of the record finds no evidence that the applicant was formally ordered removed or deported.

On July 2, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved Immigrant Petition for Alien Worker (Form I-140) filed on his behalf. On July 28, 2009, the applicant filed the Form I-212, indicating that he continued to reside in the United States. On February 4, 2010, the Forms I-485 and I-212 were denied. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I). He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his family. Counsel indicates that the applicant “has numerous family members who are residents or citizens of the United States, including his parents and siblings.”

The field office director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for illegally reentering the United States after having been unlawfully present in the United States for an aggregate period of more than one year. 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 February 4, 2010.

On appeal, counsel cites to the Seventh Circuit Court of Appeals (Seventh Circuit) decision, *Lemus-Losa v. Holder*, 576 F. 3d 752 (7th Cir. 2009), and states that “[t]he court has made it plain that, at least in the Seventh Circuit, § 245(i) trumps both the § 212(a)(9)(B) and § 212(a)(9)(C) bars.” Counsel also states: “Under the Seventh Circuit’s ruling, the Applicant should not have been classified as inadmissible under INA § 212(a)(9)(C)(i)(I). The proper ground of inadmissibility is INA § 212(a)(9)(B)(i)(II), and under controlling precedent the Applicant’s inadmissibility should have been waived under INA § 245(i).” In support of her contentions, counsel submits the referenced brief and a copy of the referenced court decision. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) of the Act states, in pertinent part:

(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.¹

The AAO notes that a waiver to the section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as VAWA self-petitioners 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. While the applicant's last departure from the United States occurred on or about June 1, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United

¹ There are no indications in the record that the applicant is a VAWA self-petitioner.

States.² 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*. *Gonzalez 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 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 applicant should not have been found inadmissible under section 212(a)(9)(C)(i)(I) of the Act in light of the Seventh Circuit's decision in *Lemus-Losa v. Holder*, 576 F. 3d 752 (7th Cir. 2009), and that this decision "trumps both the 212(a)(9)(B) and § 212(a)(9)(C) bars." Counsel's contentions are unpersuasive. The case to which counsel refers renders a decision in regard to inadmissibility under section 212(a)(9)(B)(i)(II) of the Act, while the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, and the decision clearly reflects that inadmissibility under this section requires that the applicant remain outside the United States for a period of ten years prior to applying for permission to reapply for admission. Counsel's contention that the applicant is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, not under section 212(a)(9)(C)(i)(I) of the Act, is also unpersuasive. The record clearly shows that the applicant entered the United States without being admitted or paroled on two occasions, the second of which occurred after he had accrued more than one year of unlawful presence in the United States. Thus, the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act. As such, counsel's contentions are unpersuasive and do not overcome the objections of the field office director. As discussed herein, the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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.

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 a period of ten years when he becomes eligible to apply for permission to reapply for admission.