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U.S. Department of Homeland Security  
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:



Office: FRESNO, CALIFORNIA

Date: FEB 23 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)

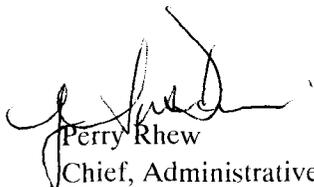
ON BEHALF OF APPLICANT:



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).

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Fresno, California, 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 The field office director's decision will be withdrawn.

The applicant is a native and citizen of Guatemala who, on November 8, 1993, filed a Request for Asylum in the United States (Form I-589). On September 20, 1994, the applicant's Form I-589 was referred to an immigration judge and she was placed into immigration proceedings for having entered the United States without inspection on August 11, 1991. On January 15, 1997, the immigration judge granted the applicant voluntary departure until January 14, 1998.

On October 24, 2006, immigration officers apprehended the applicant. On the same day, the applicant was placed into immigration proceedings. On May 2, 2007, the applicant filed the Form I-212, indicating that she resided in the United States. On June 1, 2008, 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 her behalf by her naturalized U.S. citizen spouse. On May 7, 2008, the immigration proceedings against the applicant were terminated. During an interview in regard to the Form I-485, the applicant admitted that she had reentered the United States without inspection in March 1998. On July 20, 2009, the Form I-485 was denied. The field office director determined that the applicant is inadmissible under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii). 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 naturalized U.S. citizen spouse, four lawful permanent resident adult children and one naturalized U.S. citizen adult child.

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 she 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 July 20, 2009.

On appeal, counsel contends that the decision in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), is on appeal and that no decision should be taken until the case has been decided.<sup>1</sup> Counsel alternatively contends that it has been more than ten years since the applicant's last departure from the United States and that she is eligible for *nunc pro tunc* permission to reapply for admission.<sup>2</sup> See *Form I-290B*, dated August 18, 2009. In support of his contentions, counsel submits

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<sup>1</sup> The restraining order preventing USCIS from denying an applicant's Form I-212 because he or she has not remained outside the United States for a period of ten years, expired on February 6, 2009. While counsel contends that USCIS' denial of the applicant's Form I-212 is premature because a further appeal has been filed in *Gonzalez*, the Ninth Circuit denied the plaintiffs' application for an injunction on February 6, 2009, finding that the plaintiffs were unlikely to be successful on appeal.

<sup>2</sup> The statute clearly states that an alien who has been ordered removed and then enters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking admission

only the referenced Form I-290B and copies of documentation already in the record. 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-

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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.<sup>2</sup> See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006) (citing *Berrum-Garcia v. Comfort*, 390 F. 3d 1158 (10<sup>th</sup> Cir. 2004)); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007; and *Matter of Diaz and Lopez*, 25 I&N Dec. 188.

(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.

(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—

- (1) the alien's battering or subsection to extreme cruelty; and
- (2) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record reflects that, on October 24, 2006, when immigration officers apprehended the applicant she presented her Guatemalan passport containing a Guatemalan entry stamp reflecting that she had reentered Guatemala on January 14, 1998. The applicant was also in possession of an airline ticket stub reflecting her departure from the United States on January 14, 1998. As such, the applicant complied with the immigration judge's order of voluntary departure and the voluntary departure order did not convert to an order of removal. There is no evidence that the applicant has been ordered removed from the United States at any other time. Furthermore, the record reflects that, while the applicant was present in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until January 14, 1998, the applicant did not accrue unlawful presence during this period of time because she was granted voluntary departure by an immigration judge and departed prior to the expiration of her voluntary departure period. Accordingly, the record does not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A) or 212(a)(9)(C) of the Act.

The AAO therefore finds that the applicant is currently not required to apply for permission to reapply for admission to the United States because there is no evidence in the record that the applicant has ever been removed from the United States or departed the United States while an order of removal was outstanding. Since the applicant does not require permission to reapply for

admission, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 and remands the matter for the director to reopen the applicant's Form I-485 on a service motion for entry of a new decision, as the applicant's adjustment of status application was denied based upon the denial of the Form I-212.

**ORDER:** The field office director's decision is withdrawn. The matter is remanded to the field office director to reopen the applicant's Form I-485 on a service motion for its continued processing.