**U.S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
*Office of Administrative Appeals,* MS 2090
Washington, DC 20529-2090

**identifying data deleted to prevent clearly unwarranted invasion of personal privacy**

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: FRESNO, CA Date: JAN 0 6 2010

RELATES)

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:

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, 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 appeal will be dismissed.

The applicant is a native and citizen of Mexico whose lawful permanent resident spouse, on April 30, 2001, filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On January 16, 2005, the applicant appeared at the Nogales, Arizona port of entry. The applicant presented a DSP-150 border crossing card bearing the name "[redacted]" The applicant was placed into secondary inspection. The applicant admitted that she was not the true owner of the document and that she did not have valid documentation to enter the United States. The applicant admitted that she knew that it was illegal to attempt to enter the United States with the document. The applicant failed to provide her 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 16, 2005, 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 June 20, 2007, the Form I-130 was approved. On August 17, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. 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 she resided in the United States. The Form I-485 indicates that the applicant reentered the United States without inspection on January 17, 2005. On July 7, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). 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 reside in the United States with her lawful permanent resident spouse and two U.S. citizen children.

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 7, 2009.

On appeal, counsel contends that the field office director erred in finding the applicant inadmissible under section 212(a)(9)(C) of the Act when she is also inadmissible pursuant to section 212(a)(9)(A) of the Act. Counsel contends that the field office director erred in finding the applicant ineligible to apply for permission to reapply for admission because the applicant, despite having entered the United States without inspection after having been removed, should be permitted to seek permission to reapply for admission because she is eligible to apply for adjustment of status under section 245(i) of the Act. Counsel contends that section 245(i) of the Act should trump the requirements of section 212(a)(9)(C)(ii) of the Act mandating that an applicant reside outside the United States for a period of ten years after his or her last departure. Counsel contends that the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal and that the applicant is entitled to a final

resolution of that appeal.[1] Counsel contends that the field office director erred in retroactively applying *Gonzales v. DHS* (*Gonzales II*), 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 (9th Cir. 2004). *See Counsel's Brief,* dated July 30, 2009. In support of her contentions, counsel submits only the referenced brief 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.-
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> > (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.
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> > (ii) Other aliens.-Any alien not described in clause (i) who-
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> > > (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.
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> . . . .
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> (C) Aliens unlawfully present after previous immigration violations.-
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> > (i) In general.-Any alien who-

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[1] As discussed below, 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 plaintiff's application for an injunction on February 6, 2009, finding that the plaintiffs were unlikely to be successful on appeal.

> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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.

Counsel contends that the field office director erroneously denied the applicant's Form I-212 under section 212(a)(9)(C) of the Act and that the appropriate section under which the applicant's Form I-212 should have been adjudicated is section 212(a)(9)(A) of the Act. While counsel contends that the two sections of law conflict, the AAO finds that the two grounds of inadmissibility are not mutually exclusive and an applicant may be inadmissible under both section 212(a)(9)(A) and 212(a)(9)(C) of the Act. Accordingly, the AAO finds that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(A)(i) and 212(a)(9)(C) of the Act.

The AAO notes that a waiver to 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). 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. In the present matter, the applicant's last departure from the United States occurred on January 16, 2005, less than ten years ago, she has not remained outside the United States for the required ten years and she is currently present in the United States. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.[2]

On appeal, counsel contends that the decision in *Gonzalez II* should not be applied retroactively to the applicant's case and that the field office director should have looked to *St. Cyr* for guidance in waiting to apply this decision to pending applications. Counsel contends that *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) should not apply to the applicant's case because the applicant, the same as the applicant in *St. Cyr*, relied upon a decision, *Perez-Gonzalez,* that was current and was the law at the time he applied for an immigration benefit. Counsel contends that the regulations in regard to permission to reapply for admission permit the applicant to file an application from inside the United States. Counsel also contends that section 245(i) of the Act should override the application of section 212(a)(9)(C) of the Act under the principle of *lex posteriori derogate legi priori.*

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 fundamentally unfair and impermissibly retroactive 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 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

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[2] The applicant will be required to submit evidence establishing that she is currently outside the United States and has remained outside the United States for period of ten years when she becomes eligible to apply for permission to reapply for admission.

to reentering the United States.[3] Additionally, the BIA in *Torres-Garcia* clearly quotes the Tenth Circuit's holding that "as a result of having illegally reentered after previously been formally removed, [they] are by default in admissible 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 (10th Cir. 2004).

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she 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) 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.