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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: SACRAMENTO, CA Date: MAR 1 0 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 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, Sacramento, 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 who, on September 13, 1997, appeared at the Calexico, California port of entry. The applicant presented an I-586 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 she did not have valid documentation to enter the United States. 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 September 13, 1997, 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).

On May 28, 2007, 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 lawful permanent resident spouse. The Form I-485 indicates that the applicant last entered the United States without inspection in 1997. During an interview in regard to the Form I-485 the applicant testified that she had reentered the United States without inspection five days after she had been removed. On August 23, 2007, the Form I-485 was denied. On September 26, 2007, the applicant filed a Form I-212, indicating that she resided in the United States, along with a motion to reopen the Form I-485. On June 22, 2009, the motion to reopen the Form I-485 and the Form I-212 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). 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 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 June 22, 2009.

On appeal, counsel contends that the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal and the applicant's decision should be held in abeyance.[1] Counsel contends that the applicant's Form I-485 and Form I-212 should have been adjudicated under the law applicable at the time, *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004).[2] Counsel contends that it would be fundamentally unfair and impermissibly retroactive to apply *Gonzales v. DHS*

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[1] 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.

[2] The AAO notes that the field office director correctly held the decision in the applicant's case due to an injunction issued by the Ninth Circuit.

(*Gonzales II*), 508 F.3d 1227 (9th 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 (9th Cir. 2004) and incorporates the arguments set forth in the opening brief of *Gonzales II*. *See Counsel's Brief,* dated August 14, 2009. In support of her contentions, counsel submits the referenced brief and a copy of the opening brief in *Gonzales II*. 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 of an 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-
>
> (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.

The AAO notes that a waiver to the 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); *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 September 13, 1997, more than ten years ago, she has not remained outside the United States since that departure and she is currently in the United States.[3] The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

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[3] 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.

On appeal, counsel contends that it would be fundamentally unfair and impermissibly retroactive to deny the applicant's Form I-212 because of her reliance on *Perez-Gonzalez.*

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 to reentering the United States.[4] *See Matter of Torres-Garcia, Supra.; Matter of Briones, Supra.; and Matter of Diaz and Lopez, Supra.*

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) 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.

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[4] 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.