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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

Hy

FILE: [REDACTED] Office: FRESNO, CA

Date: **NOV 10 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)

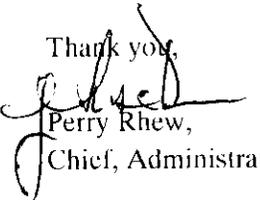
ON BEHALF OF APPLICANT:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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, Fresno, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion to reopen or reconsider will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on January 26, 1996, appeared at the San Ysidro, California port of entry. The applicant presented an I-186 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 failed to provide her true identity to immigration officers. On January 26, 1996, the applicant was placed into immigration proceedings for attempting to enter the United States by fraud. On February 1, 1996, the immigration judge ordered the applicant removed from the United States. On the same day, the applicant was removed from the United States and returned to Mexico under the name "Eva Osegueda-Quintero."

On March 6, 2006, 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 applicant indicated that she had reentered the United States without inspection in March 1996. 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. On August 14, 2009, the Form I-485 and Form I-601 were denied. 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 lawful permanent resident spouse and three U.S. citizen stepchildren.

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 August 14, 2009.

On appeal, counsel contended that the decision in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), was on appeal and the field office director's denial of the applicant's Form I-212 was premature.<sup>1</sup> Counsel contended 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 (9<sup>th</sup> Cir.

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<sup>1</sup> The AAO notes that 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 [REDACTED], 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. Furthermore, retroactivity arguments on appeal [REDACTED] mirror retroactivity arguments dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9<sup>th</sup> Cir. 2010).

2004). See *Counsel's Brief*, dated August 18, 2009. In support of her contentions, counsel submitted only the referenced brief.

On March 15, 2010, the AAO dismissed the applicant's appeal because 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. The AAO found that, since the field office director found the applicant to be ineligible for a waiver of inadmissibility under section 212(i) of the Act and the applicant failed to file an appeal of that decision, 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. *Decision of AAO*, dated March 15, 2009.

In the motion to reconsider, counsel contends that the field office director incorrectly applied *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), to the applicant because it is impermissibly retroactive and the applicant relied upon *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004).<sup>2</sup> Counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because the applicant reentered the United States prior to April 1, 1997, the date on which section 212(a)(9)(C) of the Act was enacted. Counsel disagrees with the AAO's interpretation of *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964). See *Counsel's Brief*, dated November 15, 2009. In support of her motion to reconsider, counsel submits the referenced brief and copy of memoranda. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- a. The requested evidence was not material to the issue of eligibility;
- b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

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<sup>2</sup> The AAO has already dismissed counsel's argument in its prior decision.

*(3) Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of the motion to reopen, counsel fails to identify any new facts to form the basis of a motion to reopen.

In support of the motion to reconsider, counsel contends that the applicant is not inadmissible pursuant to section 212(a)(9)(C) of the Act because the applicant reentered the United States prior to April 1, 1997, the date on which section 212(a)(9)(C) of the Act was enacted. Counsel states that she disagrees with the AAO's interpretation of *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) because the applicant in *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964) was not eligible for the benefit sought altogether, whereas, in this case, the applicant is statutorily eligible to adjust status but for the denial of the Form I-212.

While the AAO finds that the applicant is indeed not inadmissible pursuant to section 212(a)(9)(C) of the Act because her reentry into the United States occurred prior to April 1, 1997, the fact remains that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act and requires a waiver under section 212(i) of the Act. The record reflects that the applicant failed to either appeal or reopen the Form I-601 or Form I-485 which were denied by the field office director. The AAO does not have jurisdiction over the field office director's reasons for denying the Form I-485 or Form I-601 because it does not have jurisdiction over the applicant's Form I-485 and the applicant failed to file an appeal the denial of the Form I-601. While counsel contends that the applicant is statutorily eligible for adjustment of status but for the denial of the Form I-212, the applicant still requires approval of the Form I-601. As such, the applicant is mandatorily inadmissible under another section of the Act, section 212(a)(6)(C)(i) of the Act, and no purpose would be served in adjudicating the Form I-212.

The AAO finds that counsel has failed to identify the reasons for reconsideration supported by pertinent decisions to establish that the AAO's decision was based on an incorrect application of law. Simply stating that counsel disagrees with the AAO interpretation of a precedent case is insufficient.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reopen or reconsider meet the requirements of a motion to reopen or a motion to reconsider. Accordingly, the motion to reopen or reconsider is dismissed pursuant to 8 C.F.R. § 103.5(a)(4) for failing to meet applicable requirements, and the order dismissing the appeal is affirmed.

**ORDER:** The motion to reopen or reconsider is dismissed. The order dismissing the appeal, dated March 15, 2010, is affirmed.