identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY

H4

[redacted]

FILE: [redacted] Office: FRESNO, CA Date: NOV 15 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)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

ON BEHALF OF APPLICANT:

[redacted]

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 again before the AAO on motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO, dated March 24, 2010, will be affirmed and the petition will be denied.

As the facts and procedural history have been adequately documented in the previous decision of the AAO, dated March 24, 2010, only certain facts will be repeated as necessary here. In this case, the applicant is a native and citizen of Mexico who, on July 27, 2007, 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 his behalf by his lawful permanent resident spouse. The applicant concurrently filed an Application for Waiver of Grounds of Inadmissibility (Form I-601), and the Form I-212, indicating that he resided in the United States. During an interview in regard to the Form I-485, the applicant indicated that he first entered the United States without inspection in January 2000, departed from the United States in December 2003, and reentered without inspection again in January 2004. On July 2, 2009, the Forms I-485, I-601, and I-212 were denied. The applicant is inadmissible pursuant to sections 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having illegally reentered the United States after accruing more than one year of unlawful presence in the United States. 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 reside in the United States with his lawful permanent resident spouse and U.S. citizen 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). 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 July 2, 2009. In its March 24, 2010 decision on appeal, the AAO dismissed the appeal because the applicant has not remained outside the United States for the required ten years since his last departure from the United States and thus he is currently statutorily ineligible to apply for permission to reapply for admission. *See AAO's Decision,* dated March 24, 2010.

On motion, counsel contends that the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal, and thus the AAO should have held the applicant's appeal in abeyance pending the Ninth Circuit Court of Appeals' (Ninth Circuit) determination. Counsel also contends that the applicant satisfies the circumstances set forth by the BIA to grant *nunc pro tunc* permission to reapply for permission to reenter the United States, as he is eligible for adjustment of status based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his lawful permanent resident spouse. *See Counsel's Brief,* dated April 19, 2010. In support of his contentions, counsel submits the referenced brief and copies of the Ninth Circuit's General Docket for Case No. [redacted]. 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]

Regarding counsel's retroactivity arguments, the AAO takes note of the preliminary injunction that had been entered against the ability of DHS to follow *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). *Gonzales 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 and 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, there was no judicial prohibition in force that precluded the director from applying the rule laid down in *Matter of Torres-Garcia* when denying the instant application regardless of when it was filed by the applicant.

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

Furthermore, in *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010), the Ninth Circuit held that applicants, even those eligible for adjustment of status under section 245(i) of the Act, are bound by *Gonzales II*, that *Gonzales II* is not impermissibly retroactive, and that a Form I-212 waiver cannot cure inadmissibility under section 212(a)(9)(C) of the Act until an applicant, while residing outside the United States, applies for and receives advance permission, but only after ten years have elapsed since the applicant's last departure from the United States. *Morales-Izquierdo* at 1, 12.

As noted by the director, 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, Supra*; *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* U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. The applicant's last departure from the United States occurred in December 2003, less than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.[2] 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 the exception or waiver 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 previous decision of the AAO, dated March 24, 2010, will be affirmed and the petition will be denied.

ORDER: The decision of the AAO, dated March 24, 2010, is affirmed.

[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.