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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

PUBLIC COPY



#14

FILE: [REDACTED] Office: SALT LAKE CITY, UT

Date: OCT 04 2010

IN RE: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States After
Deportation or Removal

ON BEHALF OF PETITIONER:

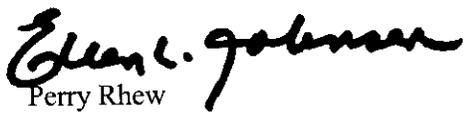


INSTRUCTIONS:

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, with a fee of \$585. 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 application was denied by the Field Office Director, Salt Lake City, Utah, and 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 was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (The Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having sought admission to the United States by fraud or willful misrepresentation of a material fact on January 14, 1997. She was ordered excluded by an immigration judge on January 21, 1997 and was deported on that date. The applicant reentered the United States without inspection in about April 1998 and was later found to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for seeking admission within ten years of her deportation on January 21, 1997. The applicant is the spouse of a Lawful Permanent Resident and the beneficiary of an approved Petition for Alien Relative. She seeks permission to reapply for admission after deportation or removal pursuant to 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 with her husband and children.

The field office director concluded that the applicant was ineligible to seek permission to reapply for admission because she is inadmissible under sections 212(a)(9)(C)(i) and 212(a)(9)(A)(ii) of the Act and is also subject to reinstatement of removal pursuant to section 241(a)(5) of the Act. The application was denied accordingly. See *Decision of the Field Office Director* dated February 7, 2008.

On appeal, counsel for the applicant asserts that U.S. Citizenship and Immigration Services (USCIS) erred in determining that the applicant is precluded from seeking permission to reapply for admission because she remains in the United States and that such a decision constitutes an abuse of discretion. See *Notice of Appeal to the AAO (Form I-290B)*. Counsel states that the applicant may be subject to reinstatement of prior deportation under section 241(a)(5) of the Act, but relies on the decision of the U.S. Supreme Court in *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 2433 (2005), to support a claim that she is not precluded from seeking permission to reapply for admission after deportation. *Brief in Support of Appeal* at 14. Counsel further contends that the applicant may apply for adjustment of status under section 245(i) of the Act and is not barred from this relief because she is inadmissible under section 212(a)(9)(C)(i)(I) of the Act and relies on the decision of the Tenth Circuit Court of Appeals in *Padilla Caldera v. Gonzales*, 453 F.3d 1237 (10th Cir. 2006) to support this claim. *Brief* at 16-17.

Section 212(a)(9)(A) of the Act provides, 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 5 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 Attorney General has consented to the alien's reapplying for admission.

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 has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty;
and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless the alien has been 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 *and* 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 21, 1997 when she was removed. The applicant reentered the United States without inspection on a date that is not specified on the record, but based on statements made in her affidavit, the illegal reentry occurred in about April 1998.¹ As such, the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act. The applicant is currently residing in the United States and since she did not remain outside the United States for 10 years after her last departure, she is statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her application for permission to reapply for admission pursuant to section 212(a)(9)(A)(iii) of the Act.

The AAO takes note of the preliminary injunction that had been entered against the ability of DHS to follow *Matter of Torres-Garcia*. *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 issued January 23, 2009. 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, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of Torres-Garcia*.

In proceedings for application for permission to reapply for admission after deportation or removal pursuant to section 212(a)(9)(A)(iii) of the Act, the burden of proving eligibility remains entirely

¹ The applicant states that she reentered the United States partly because her husband had been seriously injured in an accident in February 1998, but medical records for the applicant's husband indicate that the accident occurred in April 1998. *See Affidavit of* [REDACTED] dated November 29, 2002.

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with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.