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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: SAN DIEGO, CA

Date **OCT 06 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:

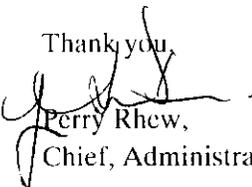
[REDACTED]

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 District Director, San Diego, 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 May 11, 1998, appeared at the San Ysidro California port of entry. The applicant made an oral claim to U.S. citizenship by claiming birth in Texas. The applicant was placed into secondary inspection. The applicant admitted that she had attempted to enter the United States by claiming to be a U.S. citizen. The applicant admitted that she was not a U.S. citizen and that she did not have valid documentation to enter the United States. The applicant failed to provide her true identity to immigration officers by altering her name and date of birth. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(ii) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(ii) and 1182(a)(7)(A)(i)(I), for making a false claim to U.S. citizenship and for being an immigrant without valid documentation. On May 12, 1998, 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 September 26, 2007, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) as a derivative on an approved *Immigrant Petition for Alien Worker* (Form I-140) filed on her spouse's behalf by [REDACTED]. The Form I-485 indicates that the applicant entered the United States without inspection on May 10, 1998. The Form I-485 indicates that the applicant had never been removed from the United States. During an interview in regard to the Form I-485 the applicant stated that she did not remember what occurred at the port of entry. On June 26, 2009, the Form I-485 was denied. On July 29, 2009, the applicant filed the Form I-212, indicating that she continued to reside in the United States and a motion to reopen the Form I-485. On December 17, 2009, the motion to reopen the Form I-485 was denied. The applicant is inadmissible under 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 remain in the United States and reside with her three U.S. citizen children.¹

The district 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 district 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 district director determined that the applicant is inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act and that no waiver is available. The district director denied the Form I-212 accordingly. *See District Director's Decision*, dated December 17, 2009.

On appeal, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS (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). Counsel contends that it has been more than ten years since the applicant's last departure from the United States and she is eligible for *nunc pro tunc* permission to reapply for admission. Counsel contends that the applicant is not inadmissible pursuant to section

¹ The AAO notes that the applicant's spouse's application for adjustment of status is still pending.

212(a)(6)(C)(ii) of the Act. *See Counsel's Brief*, dated August 4, 2009. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

Section 212(a)(6)(C) of the Act provides, in pertinent part:

(ii) Falsely claiming citizenship. –

i. In General –

Any alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under this Act . . . is inadmissible.

ii. Exception-

In the case of an alien making a representation described in subclause (I), if each natural parents of the alien . . . is or was a citizen (whether by birth or naturalization), the alien permanently resided in the United States prior to attaining the age of 16, and the alien reasonably believed at the time of making such representation that he or she was a citizen, the alien shall not be considered to be inadmissible under any provision of this subsection based on such representation.

On appeal, counsel contends that the applicant reiterates and continues to assert that she never stated or implied that she was a U.S. citizen when she presented a Texas driver's license at the port of entry. Counsel contends that the applicant only presented the document to prove her residence in the United States. Counsel contends that the applicant has not been presented with evidence to substantiate the claim that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The AAO finds that the documentation in the record establishes that the applicant knew she was making a false claim to U.S. citizenship in order to attempt to enter the United States. The AAO also finds that counsel's contention that the applicant only presented a driver's license as proof of her residence in the United States is contradicted by the record, which establishes that the applicant admitted that she had claimed to be a U.S. citizen and was aware that she did not have a right or valid documentation to enter the United States. Moreover, the record reflects that the applicant did not present any documentation to support her oral claim that she was a U.S. citizen. The AAO notes that the applicant was served with documentation informing her that she was being removed from the United States on May 12, 1998, including her statement in regard to her attempt to enter the United States. If the applicant has lost this documentation she may request a copy of it by filing a Freedom of Information Act Request (FOIA). Counsel has failed to make a proper inquiry in order to obtain such documentation.

Counsel also contends that the applicant timely retracted her presentation of the Texas driver's license and the claim does not render her inadmissible pursuant to section 212(a)(6)(C)(ii) of the

Act. A timely retraction has been found only in cases where applicants used fraudulent documents *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N 33 (BIA 1984). Counsel contends that the applicant made a timely retraction of her claim to U.S. citizenship and refers to the guidance set forth by the State Department in its 9 FAM Sec. 40.63 Note 4.6, which indicates that a timely retraction would serve to purge a misrepresentation. The AAO notes that 9 FAM Sec. 40.63 Note 4.6, as cited by counsel, relates to misrepresentations under section 212(a)(6)(C)(i), not false claims to U.S. citizenship under section 212(a)(6)(C)(ii) of the Act, the section under which the applicant is inadmissible. The guidance relating to section 212(a)(6)(C)(ii) of the Act, found in 9 FAM Sec. 40.63 Note 11, makes no reference to timely retractions, only that a false claim to U.S. citizenship must have been properly categorized. In any event, in the instant case, the applicant retracted her claim to be a U.S. citizen only after having been placed into secondary inspection by immigration officials. Moreover, the record reflects that the applicant did not present any documentation to immigration officers and the applicant continued to conceal her true identity by providing an alternate date of birth and a variation on her true name.

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 May 12, 1998, more than ten years ago, she has

not remained outside the United States since that departure and she is currently in the United States.² The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that it would be impermissibly retroactive to deny the applicant's Form I-212 because of her reliance on *Perez-Gonzalez*. Counsel contends that it has been more than ten years since the applicant's last departure from the United States and she is eligible for *nunc pro tunc* permission to reapply for admission.

The applicant's Form I-212 was filed after an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia* had been vacated and the decision in *Gonzales II* 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.

Counsel's retroactivity arguments before the AAO mirror retroactivity arguments dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 [REDACTED] (9th Cir. 2010). The Ninth Circuit, in *Morales-Izquierdo*, found that *Gonzales II* is a judicial interpretation of a federal statute, which places the decision on a fundamentally different plane from the body of retroactivity jurisprudence upon which counsel relies and that new judicial decisions interpreting old statutes have long been applied retroactively to all cases open on direct review, regardless of whether the events predate or postdate the statute-interpreting decision. *Morales-Izquierdo* at 10, 12. 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.

In *Gonzales II*, 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 impermissibly

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.

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 and case law 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.³ *Matter of Torres-Garcia, Supra.*; *Matter of Briones, Supra.*; *Matter of Diaz and Lopez, Supra.*; *Morales-Izquierdo, 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. The applicant is inadmissible under the provisions of section 212(a)(6)(C)(ii) of the Act and no waiver is available. Therefore, 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. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212 and the applicant is otherwise statutorily inadmissible to the United States. 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.