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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

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FILE:

Office: CHICAGO, IL

Date:

OCT 18 2010

IN RE:

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 Khew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Chicago, Illinois, 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 reconsider. The motion to reconsider will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of [REDACTED] who, on June 6, 1997, was placed into immigration proceedings after having entered the United States without inspection. The applicant failed to provide his true identity to immigration officers. On June 17, 1997, the immigration judge denied the applicant's application for voluntary departure and ordered him removed. On June 17, 1997, the applicant was removed from the United States and returned to [REDACTED] under the name "[REDACTED]"

On June 24, 1997, the applicant was again placed into immigration proceedings after he entered the United States without inspection. The applicant again failed to provide his true identity to immigration officers. On June 27, 1997, the immigration judge denied the applicant's application for voluntary departure and ordered him removed. On June 27, 1997, the applicant was removed from the United States and returned to [REDACTED] under the name [REDACTED].

On February 16, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on a Petition for Alien Relative (Form I-130) filed on his behalf by his U.S. citizen spouse. The Form I-485 indicates that the applicant reentered the United States without inspection in April of 1998 or 1999. The applicant subsequently traveled between [REDACTED] and United States utilizing a B-1/B-2 nonimmigrant visa, until it was revoked.¹ The applicant last left the United States on October 7, 1999 and reentered the United States in October 1999 without inspection. On February 16, 2001, the applicant filed the Form I-212 indicating that he resided in the United States. The applicant is inadmissible under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), for a period of twenty years. He 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 his naturalized U.S. citizen 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 did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated September 11, 2007.

On appeal, counsel contended that the field office director erred in denying the applicant's Form I-212 in light of the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). *See Counsel's Brief*, dated November 9, 2007. In support of his contentions, counsel submitted only the referenced brief, copies of legal memorandum and copies of documentation previously provided.

¹ The AAO notes that, in order for the applicant to be issued the visa, he concealed his prior removal orders under the name [REDACTED] and thus obtained a visa by fraud. The applicant is, therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i).

On May 6, 2009, the AAO dismissed the applicant's appeal because he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and is not eligible to apply for permission to reapply for admission because he has not remained outside the United States for the required ten years. *Decision of AAO*, dated May 6, 2009.

In the motion to reconsider, counsel contends that the AAO did not comment on the policy or statutory conflict arguments raised by counsel on appeal. Counsel contends that the AAO's finding that the applicant would not warrant a favorable exercise of discretion in light of repeated immigration violations is illogical and ignores the fact that the waiver the applicant seeks is available to those with repeated immigration violations. Counsel contends that the plaintiff class in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007), filed a notice of appeal in the Ninth Circuit and the applicant should be afforded the opportunity for this appeal to be heard. See *Motion to Reconsider*, dated May 28, 2009. In support of his motion to reconsider, counsel submits only the referenced motion to reconsider. 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:

(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.

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.

In support of the motion to reconsider, counsel contends that the AAO did not comment on the policy or statutory conflict arguments raised by counsel on appeal. Counsel contends that the AAO's finding that the applicant would not warrant a favorable exercise of discretion in light of repeated immigration violations is illogical and ignores the fact that the waiver the applicant seeks is available

to those with repeated immigration violations. Counsel contends that the plaintiff class in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007), filed a notice of appeal in the Ninth Circuit and the applicant should be afforded the opportunity for this appeal to be heard.

While counsel contends that the AAO did not comment on the policy or statutory conflict arguments raised by counsel on appeal, the holding in *Gonzales II*, which was cited by the AAO, is binding and held that *Matter of Torres-Garcia* was to be applied in the Ninth Circuit despite the Ninth Circuit's previous holding in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) in regard to the conflicting policy and statutory arguments.

While counsel contends that the AAO's finding that the applicant would not warrant a favorable exercise of discretion in light of repeated immigration violations is illogical and ignores the fact that the waiver the applicant seeks is available to those with repeated immigration violations, the case law and the Act clearly reflect that repeated offenders like the applicant who illegally reenter the United States after having been removed are not eligible for permission to reapply for admission until they have been outside the United States for a period of ten years.

While counsel contends that the plaintiff class in *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007), filed a notice of appeal in the Ninth Circuit and the applicant should be afforded the opportunity for this appeal to be heard, the retroactivity arguments set forth on appeal in *Gonzales II* mirror retroactivity arguments dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (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, any contention that the correct application of the statute is 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 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.² *Matter of Torres-Garcia, Supra.*; *Matter of Briones, Supra.*; *Matter of Diaz and Lopez, Supra.*; *Morales-Izquierdo, Supra.*

The AAO finds that, when an applicant is statutorily *ineligible* to apply for permission to reapply for admission under section 212(a)(9)(C)(i) of the Act, he or she must apply for permission to reapply for admission from outside the United States and only after he or she has remained outside the United States for a period of ten years. An applicant will be required to show proof of residence outside the United States for the full ten-year period before he or she is eligible to file for permission to reapply for admission. As such, a motion to reopen or reconsider would only warrant reopening of an applicant's case if it is established that the applicant is currently outside the United States **and** that he or she has been outside the United States for the past ten years. The record clearly establishes that the applicant is currently present in the United States. The AAO, therefore, finds that it is not possible for the applicant to be able to prove that she is eligible to apply for permission to reapply for admission at this time. The AAO cannot grant an applicant's Form I-212 if he or she is ineligible. As discussed in its prior decision, the AAO finds that the applicant is *ineligible* to apply for permission to reapply for admission because he is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act and has not remained outside the United States for the required ten years.

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 reconsider meet the requirements of a motion to reconsider at 8 C.F.R. § 103.5(a)(3). Accordingly, the motion to reconsider is dismissed pursuant to 8 C.F.R. § 103.5(a)(4) and the order dismissing the appeal is affirmed.

ORDER: The motion to reconsider is dismissed. The order dismissing the appeal will be affirmed.

² 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.