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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H4

[redacted]

FILE: [redacted] Office: [redacted] Date: MAR 08 2011

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, with a fee of $630. 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, [redacted] 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) subsequently dismissed an appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be dismissed. The application will remain denied.

The applicant is a native and citizen of [redacted] who, on August 26, 1999, was convicted of unlawful sexual intercourse with a minor. The applicant was sentenced to 220 days in jail and a fine. On October 25, 1999, the applicant was issued an administrative removal order under section 238(b) of the Immigration and Nationality Act (the Act) for having been convicted of an aggravated felony. On January 6, 2000, the applicant was removed from the United States and returned to [redacted]

On January 8, 2000, the applicant appeared at the [redacted] port of entry. The applicant presented a lawful permanent resident card bearing the name [redacted] The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he did not have valid documentation to enter the United States. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and for being an immigrant without valid documentation. On January 8, 2000, 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).

On July 1, 2007, 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 his behalf by his lawful permanent resident spouse. The Form I-485 indicates that the applicant reentered the United States without inspection on January 12, 2000. On July 1, 2007, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that he continued to reside in the United States. On June 24, 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), 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 reside in the United States with his lawful permanent resident 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)(II) of the Act, for illegally reentering the United States after having been removed from the United States. 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 June 24, 2009.

On appeal, counsel contended that the field office director erred in retroactively applying *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). *See Counsel's Brief,* dated August 18, 2009. In support of his contentions, counsel submitted only the referenced brief.

In the motion to reconsider, counsel submits a brief setting forth the same, identical arguments he set forth in his appeal, including an argument that the applicant is eligible for *nunc pro tunc* permission to reapply for admission and he contends that the applicant's case should be held in abeyance since the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal.[1] *See Brief in Support of Motion to Reconsider*, dated February 22, 2010. In support of his motion to reconsider, counsel submits the referenced brief and a copy of the *Gonzales II* Ninth Circuit docket. 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.

In support of the motion to reconsider, counsel contends that it would be impermissibly retroactive to apply *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), that the applicant is eligible for *nunc pro tunc* permission to reapply for admission and that the applicant's case should be held in abeyance since the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal. As discussed in the AAO decision, the retroactivity arguments set forth by counsel in the motion to reconsider and on appeal in *Gonzales II* mirror retroactivity arguments already dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010).

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. 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 he is eligible to apply for permission to reapply for admission at this time. As discussed in its prior

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[1] As discussed in the AAO's decision, relevant case law holds that the very concept of retroactive or *nunc pro tunc* 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. As discussed in the AAO's decision, 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 *Gonzales II*, 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, 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.

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. 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.