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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**



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Date: **JUN 08 2011**

Office: PORTLAND, OR

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

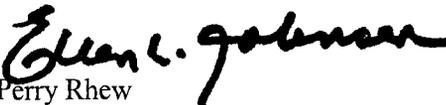


INSTRUCTIONS:

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, 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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, Portland, Oregon. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact in order to procure an immigration benefit. The record shows the applicant was removed from the United States on April 10, 2000. *Verification of Removal (Form I-296)*, dated April 10, 2000; *Order of Removal Under Section 236(b)(1) of the Act*, dated April 10, 2000. The record further shows, and the applicant concedes, that she entered the United States without inspection the day after her removal. *Declaration of Odilia Linares Gutierrez*, dated July 24, 2006. The applicant is married to a U.S. citizen and seeks permission to reenter the United States after her removal in order to reside with her husband and children in the United States.

The field office director found that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and that the applicant does not meet the exception to this ground of inadmissibility. The field office director further found that the applicant failed to establish that the positive factors in her case outweigh the negative factors. In addition, the field office director found that the applicant is also inadmissible pursuant to section 212(a)(6)(C)(i) of the Act and that her waiver application was denied. The field office director denied the application accordingly. *Decision of the Field Office Director*, dated February 24, 2009.

On appeal, counsel contends, *inter alia*, that the applicant is not barred from reentering the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act because at the time she filed her adjustment of status application, the controlling law at the time was *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), which permitted her to adjust her status under section 245(i) of the Act. Although counsel acknowledges that *Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), overruled *Perez-Gonzalez*, counsel contends that it would be unconstitutional for *Gonzales* to be applied to her case retroactively. *Brief in Support of I-290B Appeals* at 10, dated April 24, 2009.

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.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply 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. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Gonzales v. Dep't of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007). 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 the United States Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission.

The AAO finds counsel's contention that applying *Gonzales* would be unconstitutionally retroactive unpersuasive. The Ninth Circuit Court of Appeals has squarely addressed, and rejected, this argument. In *Morales-Izquierdo v. Dep't of Homeland Security*, 600 F.3d 1076, 1086 (9th Cir. 2010), the applicant "argue[d] that *Gonzales* - decided six years after [he] filed his first adjustment-of-status application and four years after his second - cannot be applied retroactively to make him ineligible for a waiver of inadmissibility. He argue[d] that under the law that was established in [the Ninth C]ircuit prior to *Gonzales* [*Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004)], a Form I-212 waiver could cure his inadmissibility, that he was eligible for such a waiver, and that [the Ninth Circuit's] prior law should apply to him." The court rejected the applicant's retroactivity argument, explicitly "hold[ing] that [the court's] decision in *Gonzales* applies 'retroactively' to Morales, and that he is ineligible for a Form I-212 waiver." *Morales-Izquierdo*, 600 F.3d 1076 at 1086, 1090 ("new judicial decisions interpreting

old statutes have long been applied retroactively to all cases open on direct review, ‘regardless of whether . . . events predate or postdate’ the statute-interpreting decision. . . . Courts have long interpreted ambiguous statutes to establish specific rules of law that have retroactive effect.’”) (citations omitted).

Therefore, *Gonzales* is controlling here. Because the applicant has not remained outside of the United States for ten years, she is statutorily ineligible to apply for permission to reapply for admission. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.