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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: FRESNO, CA Date: MAR 15 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)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

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, Fresno, California, 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 AAO granted the applicant's first motion to reopen and reconsider and affirmed its prior decision to dismiss the appeal.[1] The matter is now before the AAO on a second motion to reopen and reconsider. The motion to reopen and reconsider will be dismissed.

The applicant is a native and citizen of Mexico who, on July 27, 2007, 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. On the same day, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that he resided in the United States. During an interview in regard to the Form I-485 the applicant testified that he first entered the United States without inspection in January 2000 and remained in the United States until December 2003. The applicant testified that he then reentered the United States without inspection in January 2004. On July 2, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Immigration and Nationality Act (the Act) 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having illegally reentered the United States after accruing more than one year of unlawful presence in the United States. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with his lawful permanent resident spouse and U.S. citizen child.

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). 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 July 2, 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 21, 2009. In support of his contentions, counsel submitted only the referenced brief.

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 for failing to remain outside of the United States for the required ten years. *Decision of AAO,* dated March 24, 2010.

In the first motion to reopen and reconsider, counsel contended that the decision in *Gonzales v. DHS* (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007), is on appeal, and thus the AAO should have held the applicant's appeal in abeyance pending the Ninth Circuit Court of Appeals' (Ninth Circuit)

[1] Counsel claims that the AAO's decision to grant the motion was ambiguous in that the motion was approved but the AAO ultimately upheld its prior decision dismissing the appeal. The AAO notes that a grant of a motion signifies only that it meets the requirements of a motion under 8 C.F.R. § 103.5(a)(2) or (3), not that the applicant's evidence was sufficient to overturn the stated reasons for denying the application.

determination; and the applicant satisfies the circumstances set forth by the BIA to grant *nunc pro tunc* permission to reapply for permission to reenter the United States, as he is eligible for adjustment of status based on an approved Petition for Alien Relative (Form I-130) filed on his behalf by his lawful permanent resident spouse. *See Counsel's Brief,* dated April 19, 2010. In support of his contentions, counsel submitted the referenced brief and copies of the Ninth Circuit's General Docket for [redacted]

In the second motion to reopen and reconsider, counsel submits a brief setting forth the same, identical arguments he set forth in his appeal and the previous motion to reopen and reconsider.[2] *See Brief in Support of Motion to Reconsider*, dated December 10, 2010. In support of his motion to reopen and reconsider, counsel submits the referenced brief and copies of the Ninth Circuit's General Docket for Case No. 09-35174. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a)(2) provides that a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. The regulation at 8 C.F.R. §103.5(a)(3) provides that 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 U.S. Citizenship and Immigration Services (USCIS) 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.

The applicant's motion must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4) because it does not meet the requirements of a motion to reopen or reconsider. The applicant has not introduced any new facts into the record or established that the prior decisions were based upon an incorrect application of law or USCIS policy. As discussed in the AAO's previous decisions, an applicant who is inadmissible under section 212(a)(9)(C)(i) of the Act may apply for permission to reapply for admission only from outside the United States and only after he 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 and has never spent the required ten years outside of the United States prior to submitting his application for permission to reapply for admission. Accordingly, the applicant is ineligible to apply for permission to reapply for admission at this time, and the order dismissing the appeal is affirmed.

ORDER: The motion is dismissed. The order dismissing the appeal is affirmed.

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[2] 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 *Gonzalez*, the Ninth Circuit denied the plaintiff's application for an injunction on February 6, 2009, finding that the plaintiffs were unlikely to be successful on appeal.