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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

[redacted]

H4

Date: MAY 05 2011 Office: FRESNO, CA FILE: [redacted]

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, Fresno, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). The Administrative Appeals Office (AAO) dismissed a subsequent appeal and affirmed its determinations in a decision on the applicant's motion to reopen or reconsider. The matter is now before the AAO on a second motion to reopen or reconsider. The motion will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Mexico who, on June 2, 1997, appeared at the San Ysidro, California port of entry. The applicant presented an I-586 border crossing card belonging to another individual. 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 section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for attempting to enter the United States by fraud. On June 4, 1997, 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 February 4, 2008, 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 naturalized U.S. citizen 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. The Form I-485 indicates that the applicant reentered the United States without inspection on April 20, 1998. On July 9, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). 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 naturalized U.S. citizen 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 9, 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). Counsel contended that it has been more than ten years since the applicant's last departure from the United States and he is eligible to apply for permission to reapply for admission. *See Counsel's Brief,* dated August 21, 2009. In support of his contentions, counsel submitted only the referenced brief.

On March 24, 2009, the AAO dismissed the applicant's appeal because the applicant was 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 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 March 24, 2009.

In the first motion to reconsider, counsel contended that the applicant was eligible for *nunc pro tunc* permission to reapply for admission because it would cure the applicant's inadmissibility grounds and the applicant would be able to adjust status under section 245(i) of the Act. Counsel contended that the applicant's case should have been held in abeyance because the decision in *Gonzales II* is on appeal.[1] *See Brief in Support of Motion to Reconsider*, dated April 19, 2010. In support of his motion to reconsider, counsel submitted the referenced brief and a copy of the docket for *Gonzales II*.

In the second motion to reconsider, counsel submits a brief setting forth the same, identical arguments he set forth in his appeal and first motion to reopen and reconsider. *See Brief in Support of Motion to Reconsider*, dated December 10, 2010. In support of his motion to reconsider, counsel submits the referenced brief and copies of documentation already in the record. 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 record reflects that counsel has failed to state the new facts to be provided in the reopened proceeding or provide affidavits or other documentary evidence to support a motion to reopen. The applicant's motion does not meet the requirements of a motion to reopen.

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 AAO's decision was based on an incorrect application of law or Service policy.

The regulation at 8 C.F.R. § 103.5(a)(4) states further that a motion that does not meet applicable requirements shall be dismissed.

The applicant has not presented any new facts in his second motion, or provided any evidence or argument to establish that our prior decisions were based upon an incorrect application of law or policy. On second motion, counsel submits evidence and arguments that are already part of the record, and which we adequately addressed both in our decision on the appeal and the subsequent decision on the first motion. Accordingly, the motion to reopen or reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion is dismissed. The order dismissing the appeal is affirmed and the application remains denied.

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[1] 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's 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. Moreover, the retroactivity arguments 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).