

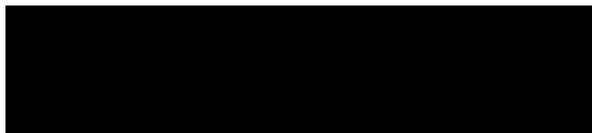
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date:

MAY 05 2011

Office: LOS ANGELES, CA

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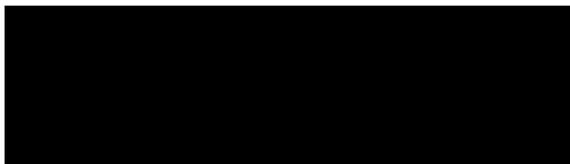
IN RE:



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, 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, Los Angeles, 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 and motion to reconsider. The matter is now before the AAO on a second 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 Mexico who, on January 10, 1998, appeared at the San Ysidro, California port of entry. The applicant presented a U.S. Birth Certificate bearing the name "Brenda Josefina Rosales." The applicant was placed into secondary inspection. The applicant admitted that she was not the true owner of the document and that she had no documentation to enter the United States. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(ii) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(ii) and 1182(a)(7)(A)(i)(I), for making a false claim to U.S. citizenship and for being an immigrant without documentation. On January 12, 1998, 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) under her maiden name.

The applicant reentered the United States without parole or admission on an unknown date, but prior to June 12, 1999, the date on which she married her lawful permanent resident spouse in San Fernando, California. On July 10, 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 her behalf by her lawful permanent resident spouse. The Form I-485 indicates that the applicant last entered the United States without inspection on July 1, 1994. During an interview in regard to the Form I-485, the applicant stated that she had last entered the United States on July 1, 1994, and denied having been previously removed from the United States or making a false claim to U.S. citizenship. On April 3, 2008, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601) and the Form I-212, indicating that she resided in the United States. On June 25, 2009, the Form I-485 and Form I-601 were denied. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(i). She 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 her lawful permanent resident spouse and two U.S. citizen children.

The field office director determined that 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. The field office director determined that the applicant was not eligible to apply for permission to reapply for admission because she 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 25, 2009.

On appeal, counsel contended that the applicant's case should be remanded for an additional interview regarding the 1998 incident because an FBI fingerprint record is insufficient evidence to warrant the submission of the Form I-212.¹ On appeal, counsel contended that the decision in

¹ The AAO notes that the applicant was served with documentation informing her that she was being removed from the United States on January 12, 1998. If the applicant has lost this documentation she may request a copy of it by filing a Freedom Of Information Act Request (FOIA). Counsel contends that she has requested service records documenting the alleged removal. The record reflects that counsel has failed to make a proper inquiry in order to obtain such

Gonzales v. DHS (Gonzales II), 508 F.3d 1227 (9th Cir. 2007), was on appeal and the applicant's application should therefore be held in abeyance.² Counsel contended that the field office director erred in retroactively applying *Gonzales II*, 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 she is eligible to apply for permission to reapply for admission. *See Form I-290B and Counsel's Memorandum*, dated July 23, 2009 and August 20, 2009. In support of her contentions, counsel submitted the referenced Form I-290B and memorandum and copies of documentation already in the record.

On April 16, 2010, 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 she has not remained outside the United States for the required ten years. The AAO also found that the applicant was inadmissible pursuant to section 212(a)(6)(C)(ii) of the Act and that no waiver is available to the applicant. *Decision of AAO*, dated April 16, 2010.

The AAO dismissed the first motion to reconsider because the applicant did not file her motion within the required time period proscribed by the regulation at 8 C.F.R. § 103.5(a)(1)(i). *See AAO's Decision*, dated November 15, 2010. Counsel incorrectly filed the motion with the AAO. A motion to reconsider is not properly filed until the field office receives it. The AAO returned the motion to counsel and informed her that she had incorrectly filed the appeal with this office. On June 9, 2010, or 54 days after the decision was issued, U.S. Citizenship and Immigration Services (USCIS) received the motion. Accordingly, the motion was untimely filed.

In the second motion to reconsider, counsel contends that the applicant's untimely filing should be excused since the decision to timely file the motion with the AAO is harmless error; in the alternative, the applicant timely filed the motion with the agency who would inevitably review the motion; in the alternative, the fact that the motion was filed with the wrong office should not preclude the applicant from establishing that she was responsible in ensuring that she filed the motion in a timely fashion; and

documentation. Counsel states that the applicant did not make a false claim to U.S. citizenship since the evidence in the record will show that she attempted entry into the United States with a group of people and she does not recall carrying any documents that would have permitted her to enter the United States. Counsel states that the applicant also contends that she was not the subject of a removal from the United States. The record contains a Record of Sworn Statement in Proceedings Under section 235(b)(1) of the Act (Form I-867A), a Notice to Alien Ordered Removed/Departure Verification (Form I-296) and a Determination of Inadmissibility (Form I-860) reflecting that the applicant presented a U.S. birth certificate in order to enter the United States. The record also contains a copy of the U.S. birth certificate with which the applicant attempted to enter the United States. The record does not reflect that the applicant attempted to enter the United States as part of a group.

² 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).

the regulations provide that it is in the discretion of the AAO to excuse an untimely filing. Counsel submits additional arguments in regard to the applicant's inadmissibility. *See Counsel's Letter*, dated December 9, 2010.

The regulation at 8 C.F.R. § 103.5(a)(1)(i) states, in pertinent part:

Any motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires, may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

As discussed in the AAO's prior decision, as provided in the regulations, the applicant's motion was not properly filed until it was received by the field office. Furthermore, the AAO provided explicit instructions in its dismissal of the applicant's appeal that any further inquiries should be made to the field office and that any motions should be filed directly with the office that originally decided the applicant's case, i.e. the field office. Counsel's contention that the applicant's filing with the AAO is harmless error has no basis in law and the untimely filing of a motion may only be excused in cases in which counsel or the applicant establishes that the delay in filing was reasonable and beyond the applicant's control. Counsel's contentions and the record do not indicate that the untimely filing of the motion was either reasonable or beyond the control of counsel, but rather, the untimely filing was made through a failure to follow the instructions provided on the AAO's dismissal of the appeal. Counsel has failed to establish that the contentions submitted in the motion meet the requirements of a motion to reconsider or reopen.

Counsel's contention that the applicant made a timely retraction of her false claim to U.S. citizenship is unpersuasive. A timely retraction has been found only in cases where applicants used fraudulent documents *en route* and did not present them to U.S. officials for admission, but, rather, immediately requested asylum. *See, e.g., Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *cf. Matter of Shirdel*, 18 I&N 33 (BIA 1984). Counsel contends that the applicant made a timely retraction of her claim to U.S. citizenship and refers to the guidance set forth by the State Department in its Volume 9, Foreign Affairs Manual (FAM), Sec. 40.63 Note 4.6, which indicates that a timely retraction would serve to purge a misrepresentation. The AAO notes that 9 FAM Sec. 40.63 Note 4.6, as cited by counsel, relates to misrepresentations under section 212(a)(6)(C)(i), not false claims to U.S. citizenship under section 212(a)(6)(C)(ii) of the Act, the section under which the applicant is inadmissible. More importantly, the State Department's FAM is not binding guidance on officers of USCIS in their administration of the Act. 8 C.F.R. § 103.3(c).

Counsel's contentions that the applicant's case should be held in abeyance since *Gonzales II* is on appeal and that she is entitled to a hearing before an immigration judge are unpersuasive. As discussed above and in the AAO's prior 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 and 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). Finally, U.S. Immigration and

Customs Enforcement (USICE) may reinstate the applicant's prior removal order under section 241(a)(5) of the Act at any time. See *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S. Ct. 2422 (U.S. 2006); *Perez-Gonzalez v. Ashcroft*, 379 F. 3d 783 (9th Cir. 2004).

The applicant's motion does not meet applicable requirements and must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).

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