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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**

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APR 08 2010

FILE:

Office: SAN FRANCISCO, CA

Date:

IN RE:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, San Francisco, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who, on January 9, 1999, was apprehended by immigration officers. On January 11, 1999, the applicant voluntarily returned to Mexico.

On December 20, 2002, the applicant was convicted of driving under the influence and was sentenced to two days in jail and five years of probation. On April 21, 2003, the applicant was convicted of felony corporal injury to spouse in violation of section 273.5(a) of the California Penal Code (CPC). The applicant was sentenced to 39 days in jail and three years of probation. On October 29, 2003, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by his naturalized U.S. citizen spouse. During an interview in regard to the Form I-485, the applicant testified that he first entered the United States without inspection in 1995 and remained in the United States until he was returned to Mexico in January 1999. The applicant testified that he reentered the United States without inspection in March 1999. On May 19, 2004, the Form I-130 was approved. On July 15, 2004, the Form I-485 was denied. On August 2, 2006, the applicant filed a second Form I-485 based on the now approved Form I-130. On November 8, 2006, the applicant filed the Form I-212, indicating that he resided in the United States. On June 26, 2009, the Form I-485 was denied. On July 21, 2009, the Form I-212 was 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 naturalized U.S. citizen 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) 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 21, 2009.

On appeal, counsel contends that the applicant is eligible for adjustment of status under *Acosta v. Gonzalez*, 439 F. 3d 550 (9<sup>th</sup> Cir. 2006).<sup>1</sup> Counsel contends that *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) did not address whether it should be applied in the Ninth Circuit.<sup>2</sup> Counsel contends that it has been more than ten years since the applicant last departed the United States and he is, therefore, eligible to apply for permission to reapply for admission. Counsel contends that the field office director erred in retroactively applying *Gonzales v. DHS (Gonzales II)*, when the applicant, in

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<sup>1</sup> The AAO finds counsel's contention unpersuasive. The case law upon which *Acosta* based its decision has been overturned. See *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007) and *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10<sup>th</sup> Cir. Jul 27, 2009). Furthermore, the BIA has held that *Acosta* is no longer binding law and that *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) is applicable. See *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

<sup>2</sup> As discussed in footnote 1, *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007) is applicable. See *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010).

filing the Form I-212, relied upon the Ninth Circuit Court of Appeals (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft, Supra. See Counsel's Brief*, dated August 11, 2009. In support of her contentions, counsel submits only the referenced brief. The entire record was reviewed in rendering a decision in this case.

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.

The record reflects that the applicant accrued unlawful presence in the United States from April 1, 1997, the date on which unlawful presence provisions were enacted, until January 11, 1999, the date on which he returned to Mexico. The applicant subsequently reentered the United States without inspection. Accordingly, the applicant has illegally reentered the United States after having accrued more than one year of the unlawful presence in the United States.

The AAO notes that a waiver to section 212(a)(9)(C)(i) ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also*

8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless he or she has *remained outside* the United States for more than 10 years since the date of the alien's last departure from the United States. See *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007); and *Matter of Diaz and Lopez*, 25 I&N Dec. 188 (BIA 2010). 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 since that departure, *and* that U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, while the applicant's last departure from the United States occurred on January 11, 1999, more than ten years ago, he has not remained outside the United States since that departure and he is currently in the United States.<sup>3</sup> The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that the Ninth Circuit's decision in *Gonzales v. DHS* is impermissibly retroactive. Counsel contends that the Ninth Circuit's *Perez-Gonzalez v. Ashcroft* decision should be applied in the applicant's case because he filed his Form I-212 in reliance on *Perez-Gonzalez*. Counsel contends that it has been more than ten years since the applicant's last departure from the United States and that the regulations permit the applicant to apply for *nunc pro tunc* permission to reapply for admission from inside the United States.

The applicant's Form I-212 was filed while an injunction restraining USCIS from applying agency policy as set forth in *Matter of Torres-Garcia* had been issued. The AAO finds, therefore, that in filing the Form I-212 under such circumstances, counsel's contention that the applicant reasonably relied upon the Ninth Circuit's *Perez-Gonzalez v. Ashcroft* decision is illogical.

The Ninth Circuit, in deferring to the BIA's decision in *Matter of Torres-Garcia*, found that the BIA's findings were reasonable and that the statute is unambiguous and unchanged since its promulgation. While the Ninth Circuit found that its decision in *Perez-Gonzalez v. Ashcroft* was based on a finding of statutory ambiguity that left room for agency discretion, the court also found that the issue might have been resolved under the first step of *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 87, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), by examining the text of the relevant statutes and their legislative histories. The court concluded that, by declining to adhere to the plain language of the inadmissibility provision and instead falling back on the regulations, *Perez Gonzalez* did not find the inadmissibility provision or the statutory scheme to be unambiguous. It is on this basis that the court found that it was not bound by the decision in *Perez Gonzalez* and must defer to *Torres Garcia*, while, at the same time, finding that the statute itself is unambiguous. In *Matter of Torres-Garcia*, the BIA found that 8 C.F.R. § 212.2 was not promulgated to implement the current section 212(a)(9) of the Act and that the very concept of retroactive 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, which in its own right makes unlawful reentry after removal a ground of inadmissibility that can only be waived by the passage of at least ten years.

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<sup>3</sup> The applicant will be required to provide proof that he is currently outside the United States and has resided outside the United States for a period of ten years at the time he is eligible to apply for permission to reapply for admission.

The BIA found that the *Perez-Gonzalez v. Ashcroft* decision contradicts the clear language of the statute and the legislative policy underlying the statute in general. The statute clearly states that an alien who has been ordered removed and enters or attempts to reenter the United States without being admitted may seek an exception to permanent grounds of inadmissibility when seeking admission more than ten years after the date of the alien's last departure from the United States, if, the applicant receives permission to reapply for admission prior to reentering the United States.<sup>4</sup> Since the statute is unambiguous and has been in effect since April 1, 1997, counsel's contention that the correct application of the statute is impermissibly retroactive is unfounded since the applicant's accrual of unlawful presence, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for a waiver or the exception under section 212(a)(9)(C)(ii) and (iii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed as a matter of discretion.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> The AAO notes that the reentry after obtaining permission to reapply for admission must be a lawful admission to the United States; otherwise, the applicant has again illegally reentered the United States after having been removed and renewed his or her inadmissibility under section 212(a)(9)(C) of the Act.