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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

[redacted]

H6

FILE: [redacted] Office: PORTLAND, OR Date: APR 0 8 2010
RELATES)

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:

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 Acting Field Office Director, Portland, Oregon, 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 December 9, 1997, pled guilty to and was convicted of theft III. The applicant was sentenced to 18 months probation and 20 hours of community service. On December 2, 1998, the applicant was placed into immigration proceedings for having entered the United States without inspection in 1996.[1] On December 30, 1998, the immigration judge ordered the applicant removed from the United States subject to a Stipulated Request for Removal Order and Waiver of Hearing. On January 5, 1999, the applicant was removed from the United States and returned to Mexico.

On October 15, 2006, 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 U.S. citizen spouse.[2] During an interview in regard to the Form I-485, the applicant testified that he had originally entered the United States without inspection in April 1995. The applicant testified that, after he had been removed from the United States, he reentered the United States without inspection in late January 1999. The applicant testified that he had not departed the United States since his January 1999 reentry. On or after January 25, 2007, the applicant filed the Form I-212 indicating that he resided in the United States. On August 3, 2009, the Form I-485 was denied.

On September 24, 2009, the applicant filed a motion to reopen immigration proceedings, which was granted on October 13, 2009. The applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I) for illegally reentering the United States after having been removed. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(ii) in order to remain in the United States and reside with his U.S. citizen spouse and two U.S. citizen children.

The acting 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), for illegally reentering the United States after having been removed. The acting 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 acting field office director denied the Form I-212 accordingly. *See Acting Field Office Director's Decision,* dated August 3, 2009.[3]

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[1] The applicant later testified, during an interview in regard to the Form I-485, that he entered the United States without inspection in 1995.

[2] The AAO notes that the applicant is a derivative on a Form I-130, filed on his mother's behalf by her lawful permanent resident spouse which was approved on August 31, 1993; however, the applicant did not file a Form I-485 based on this approved Form I-130 at any time.

[3] The acting field office director noted that counsel had failed to properly file the Form I-212 with the proper filing fee.

On appeal, counsel contends that the acting field office director failed to provide the applicant an opportunity to review and rebut the evidence against him in regard to his removal order.[4] Counsel contends that the applicant's due process rights were violated.[5] Counsel contends that the applicant is statutorily eligible for a waiver pursuant to section 212(a)(9)(C)(ii) of the Act because it has been more than ten years since the applicant reentered the United States.[6] Counsel contends that, since the applicant's motion to reopen was granted, the rescission of the stipulated removal order has the legal effect of "nullifying" the order and the applicant's departure from the United States, essentially mooting the applicant's need for a waiver.[7] Counsel contends that it would be impermissibly retroactive to apply *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 Brief in Support of Appeal,* dated September 25, 2009, and *Letter,* dated February 2, 2010. In support of his contentions, counsel submits the referenced brief and copies of documentation filed with the motion to reopen. The AAO reviewed the entire record in rendering a decision in this case.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

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[4] Counsel has been provided a copy of documentation in the record subject to a Freedom of Information Act (FOIA) request and has the opportunity to rebut such evidence on appeal.

[5] The AAO has no authority to review the decision to remove the applicant. The only issue before the AAO is whether the applicant, who was physically removed from the United States in 1999 and illegally reentered the United States and is, therefore, inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, despite the reopening of his immigration proceedings, is eligible for permission to reapply for admission under section 212(a)(9)(C) of the Act.

[6] The statute and case law 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. An applicant must, therefore, apply from outside the United States and have resided outside the United States for at least ten years. *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). Additionally, the case law to which counsel cites holds that "as a result of having illegally reentered after previously been formally removed, [they] are by default in admissible for life [and their] disability may be waived only after the alien has been outside the United States for ten years." *Berrum-Garcia v. Comfort,* 390 F. 3d 1158 (10th Cir. 2004).

[7] The AAO notes that the order granting the motion to reopen does not indicate the basis for such a grant, and that a granting of a motion to reopen does not necessarily mean that the applicant's prior removal order has been rescinded when an applicant has already departed the United States. Furthermore, even if the applicant's prior removal order is rescinded, the applicant still departed the United States while an order of removal was outstanding and subsequently illegally reentered the United States and is, therefore, inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Finally, rescission of a removal order cannot cure the fact that the applicant is also inadmissible under section 212(a)(9)(C)(i)(I) of the Act, for illegally reentering the United States after having accrued more than one year of unlawful presence, from April 10, 1997, the date on which the applicant turned 18 years old, until January 5, 1999, the date on which he departed the United States.

(i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

. . . .

(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
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> 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 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 May 7, 1999, more than ten years ago, he has not remained outside the United States for the required ten years and he is currently present in the United States.[8] The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

On appeal, counsel contends that it would be impermissibly retroactive to deny the applicant's Form I-212 because of his reliance on *Perez-Gonzalez.*

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.

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[8] The applicant will be required to submit evidence establishing that he is currently outside the United States and has remained outside the United States for period of ten years when he becomes eligible to apply for permission to reapply for admission.

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. The Ninth Circuit 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 found that it must defer to *Torres-Garcia* and 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. 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. 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 removal, unlawful reentry and filing of the Form I-212 occurred after the statute's enactment.

Finally, the statute and case law 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.[9] *Matter of Torres-Garcia, Supra.; Matter of Briones, Supra.; and Matter of Diaz and Lopez, Supra.*

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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[9] 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.