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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

H6

FILE:

Office: SAN JOSE, CA

Date: SEP 08 2010

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)

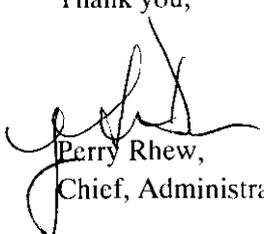
ON BEHALF OF APPLICANT:

INSTRUCTIONS:

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 \$585. 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, San Jose, 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 December 29, 1989, filed an Application for Temporary Residence (Form I-687) under the *Zambrano* lawsuit. The applicant was issued employment authorization valid until March 28, 1998. On May 7, 1998, the *Zambrano* lawsuit was settled and the applicant was no longer entitled to employment authorization, a stay of removal or any other immigration benefit under *Zambrano*.¹ The applicant failed to depart the United States.

On April 30, 2001, the applicant's U.S. citizen adult daughter filed a Petition for Alien Relative (Form I-130) on behalf of the applicant, which was approved on December 14, 2001. On July 22, 1999, the applicant appeared at the San Francisco International Airport. The applicant presented her Mexican passport containing an expired U.S. nonimmigrant visa and an employment authorization card which expired in 1991. The applicant was placed into secondary inspection. The applicant was given an Order to Appear for Deferred Inspection (Form I-546).² On November 17, 1999, the applicant appeared for deferred inspection and admitted that she knew that it was illegal for her to continue to reside and work in the United States and that she had returned to Mexico on July 11, 1999. The applicant was found to be inadmissible pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(7)(A)(i)(I), for being an immigrant without valid documentation. The applicant was permitted to withdraw her application for admission. On November 17, 1999, the applicant was returned to Mexico.

On October 26, 2005, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on the approved Form I-130. The Form I-485 indicates that the applicant entered the United States without inspection on November 22, 1999. On September 25, 2006, the applicant filed the Form I-212, indicating that she resided in the United States. On July 16, 2007, the applicant filed an Application for Waiver of Grounds of Inadmissibility (Form I-601), indicating that she continued to reside in the United States. On September 25, 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. She 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 her now lawful permanent resident spouse, two U.S. citizen adult children and one lawful permanent resident adult 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 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 September 25, 2009.

¹ The AAO notes that counsel incorrectly states that the applicant did not start to accrue unlawful presence until December 1998.

² The AAO notes that counsel incorrectly states that the applicant was paroled into the United States.

On appeal, counsel contends that the applicant is eligible for adjustment of status under *Acosta v. Gonzalez*, 439 F. 3d 550 (9th Cir. 2006).³ Counsel contends that the field office director erred in applying *Matter of Briones*, 24 I&N Dec. 355 (BIA 2007).⁴ On appeal, counsel submits a copy of an *amicus curiae* brief in regard to retroactivity of the new Ninth Circuit and BIA case law. See *Brief*, dated November 18, 2009. In support of her contentions, the applicant submits the referenced brief and copies of documentation already in the record. 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

³ 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 (9th Cir. 2007) and *Herrera-Castillo v. Holder*, 573 F.3d 1004 (10th 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).

⁴ 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).

(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 May 7, 1998, the date on which *Zambrano* case members were no longer eligible for immigration benefits or stays of removal, until July 11, 1999, the date on which she 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. While the applicant's last departure from the United States occurred on July 11, 1999, *more than ten years ago*, she has not remained outside the United States since that departure and she is currently in the United States.⁵ The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

The retroactivity arguments in the *amicus curiae* brief and before the AAO mirror retroactivity arguments dismissed by the Ninth Circuit in *Morales-Izquierdo v. Department of Homeland Security*, 2010 WL 1254137 (9th Cir. 2010). The Ninth Circuit, in *Morales-Izquierdo*, found that *Gonzales II* is a judicial interpretation of a federal statute, which places the decision on a fundamentally different plane from the body of retroactivity jurisprudence upon which counsel relies and that new judicial decisions interpreting old statutes have long been applied retroactively to all cases open on direct review, regardless of whether the events predate or postdate the statute-interpreting decision. *Morales-Izquierdo* at 10, 12. The Ninth Circuit held that applicants, even those eligible for adjustment of status under section 245(i) of the Act, are bound by *Gonzales II*, that *Gonzales II* is not impermissibly retroactive and that a Form I-212 waiver cannot cure inadmissibility under section 212(a)(9)(C) of the Act until an applicant, while residing outside the United States, applies for and receives advance permission, but only after ten years have elapsed since the applicant's last departure from the United States. *Morales-Izquierdo* at 1, 12.

In *Gonzales II*, 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

⁵ The applicant will be required to provide proof that she is currently outside the United States and has resided outside the United States for a period of ten years at the time she is eligible to apply for permission to reapply for admission.

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, the applicant'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.

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.⁶ *Matter of Torres-Garcia, Supra.*; *Matter of Briones, Supra.*; *Matter of Diaz and Lopez, Supra.*; *Morales-Izquierdo, Supra.*

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish that she 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.

⁶ 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.