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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: **SEP 28 2011** Office: FRESNO, CA

FILE: [REDACTED]

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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 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 application for permission to reapply for admission after removal was denied by the Field Office Director, Fresno, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and a citizen of Mexico who was removed from the United States pursuant to a section 235(b)(1) proceeding and then re-entered within 30 days without inspection. The applicant was found to be inadmissible pursuant to section 212(a)(9)(C)(i)(II). She is the spouse of a lawful permanent resident (LPR). She is seeking permission to reapply for admission into the United States pursuant to section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

The Field Office Director concluded that the applicant was inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act and denied the Application for Permission to Reapply for Admission After Deportation or Removal, (Form I-212) June 18, 2009.

On appeal, counsel for the applicant asserts that a case before the 9th Circuit Court of Appeals, *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006), deals with the issue of allowing a section 245(i) applicant to concurrently file an I-212 with an I-601 application while residing in the United States and that the AAO should sustain the appeal until the case is decided. *Form I-290B*, received June 26, 2009. Counsel further asserts that the applicant has not received notice that her previous removal order has been reinstated and that the removal order has no effect until she receives such notice.

The record indicates that the applicant was removed from the United States on January 6, 1999, pursuant to section 235(b)(1). The applicant re-entered the United States within 30 days without inspection, took up residence, married the petitioner and filed a section 245(i) adjustment application.

Section 212(a)(9)(C)(i) 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 . . . the Attorney General [now the Secretary of Homeland Security] has consented to the alien's reapplying for admission....

The applicant was removed on January 6, 1999, pursuant to section 235(b)(1) and then re-entered the United States without inspection prior to February 1, 1999. She is therefore inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

With regard to counsel's assertion that the reinstatement of the applicant's removal order is not valid until she receives notice, the AAO notes that this proceeding covers the applicant's admissibility and does not have jurisdiction over issues relating to the applicant's deportability.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply unless the alien has been 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). 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 and U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant has not remained outside the United States since her last departure. Therefore she is currently inadmissible, and is statutorily ineligible to apply for permission to reapply for admission. *See In Re Briones*, 24 I&N Dec. 355 (BIA 2007); *see also Memorandum, Adjudicating Forms I-212 for Aliens inadmissible under section 212(a)(9)(c) or Subject to Reinstatement Under Section 240(a)(5) of the Immigration and Nationality Act in light of Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), Michael Aytes, Acting Deputy Director, May 19, 2009. As such, no purpose would be served in adjudicating his waiver application.

The AAO takes note of the preliminary injunction referred to by counsel that had been entered against the ability of DHS to follow *Matter of Torres-Garcia*. *Gonzales v. DHS*, 239 F.R.D. 620 (W.D. Wash. 2006). The Ninth Circuit, however, reversed the district court, and ordered the vacating of that injunction. *Gonzales v. DHS (Gonzales II)*, 508 F.3d 1227 (9th Cir. 2007). In its opinion, the Ninth Circuit held that the Board's decision in *Matter of Torres-Garcia* was entitled to judicial deference. *Gonzales II*, 508 F.3d at 1241-42. The Ninth Circuit's mandate issued January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new preliminary injunction. Thus, as of the date of this decision, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of Torres-Garcia*.

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. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant in the instant case does not qualify for the exception under section 212(a)(9)(C)(ii) 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.

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ORDER: The appeal is dismissed.