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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

[REDACTED]

Office: NEWARK, NJ

Date:

MAR 18 2009

; AND
(RELATE)

IN RE:

[REDACTED]

APPLICATION:

Application for Status as a Lawful Permanent Resident pursuant to Section 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i).

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Application to Register Permanent Residence or Adjust Status (Form I-485) was denied by the Field Office Director, Newark, New Jersey, who certified her decision to the Administrative Appeals Office (AAO) for review. The decision of the field office director will be affirmed.

The applicant is a native and citizen of El Salvador who, on November 20, 1999, appeared at Newark International Airport. The applicant presented an altered Costa Rican passport containing an altered U.S. nonimmigrant visa bearing the applicant's photograph and the name "[REDACTED]." The applicant was placed into secondary inspections. The applicant admitted that the passport and U.S. nonimmigrant visa was fraudulent and that she did not have documentation to enter the United States; however, the applicant failed to admit to her true identity. The applicant was found to be inadmissible pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1182(a)(6)(C)(i) and 1182(a)(7)(A)(i)(I), for attempting to enter the United States by fraud and being an immigrant without valid documentation. On November 21, 1999, 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 the name "[REDACTED]" and was returned to Costa Rica.

On February 16, 2000, the applicant's stepfather filed a Petition for Alien Relative (Form I-130) on her behalf, which was approved on September 18, 2000. On December 20, 2001, the applicant filed a Form I-485 based on the approved Form I-130. On April 19, 2002, the applicant withdrew the Form I-485. On November 25, 2002, the applicant filed an Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and an Application for Waiver of Grounds of Inadmissibility (Form I-601). On October 14, 2003, the applicant filed a second Form I-485 based on the approved Form I-130. On October 31, 2003, the applicant appeared at U.S. Citizenship and Immigration Services' (USCIS) Newark, New Jersey Field Office. The applicant testified that she had reentered the United States without inspection on October 21, 2000. On October 31, 2003, the district director denied the Form I-212 and Form I-601. The applicant appealed the denials to this office. On June 14, 2005, the AAO remanded the denials to the district director because she had failed to issue two separate decisions for each application. On July 11, 2005, the district director approved the Form I-212. On July 23, 2005, the district director approved the Form I-601. On December 14, 2007, the field office director reopened the Form I-212. On March 5, 2008, the Form I-485 and Form I-212 were denied. The applicant seeks to adjust her status to lawful permanent residence under section 245(i) of the Act, 8 U.S.C. § 1255(i).

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), for illegally reentering the United States after having been removed. The field office director determined that the applicant 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 field office director denied the Form I-485 accordingly. *See Field Office Director's Decision and Certification*, dated March 5, 2008.

In response to the field office director's certification, counsel contends that the approval of the Form I-212 should be upheld because the regulations permit an applicant to file for permission to reapply for admission to the United States in conjunction with an application to adjust status. *See Copy of Counsel's Opposition to USCIS' Motion to Reopen*, dated April 29, 2008. In support of his

contentions, counsel submits only the referenced letter. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (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 on a 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 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 has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

The AAO notes that an exception to the 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). 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 USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on November 21, 1999, less than ten years ago, and she has not remained outside the United States since that departure. The applicant is currently statutorily ineligible to apply for permission to reapply for admission.

The AAO takes note of the preliminary injunction that had been entered against the ability of the Department of Homeland Security (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 was issued on January 23, 2009. On February 6, 2009, the district court denied the plaintiffs' motion for a new

preliminary injunction. Order Denying Plaintiffs' Motion for Preliminary Injunction (Dkt # 59), *Gonzales v. DHS*, No. C06-1411-MJP (W.D. Wash. Filed February 6, 2006). 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 she is eligible for the benefit sought. The applicant in the instant case does not qualify for an 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. As the applicant is inadmissible under section 212(a)(9)(C)(i) of the Act, the field office director properly concluded that the applicant is ineligible to become a lawful permanent resident of the United States.

ORDER: The field office director's decision is affirmed.