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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**

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DATE: **SEP 30 2011**

OFFICE: FRESNO, CA

FILE: 

IN RE: Applicant: 

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:



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 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 application for permission to reapply for admission after removal waiver application 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 citizen of Mexico who was found inadmissible to the United States pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) as he is seeking admission to the United States within ten years of his January 31, 1999 removal. He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States.

The Field Office Director determined that a favorable exercise of discretion regarding the Form I-212 would serve no purpose as the applicant was inadmissible under section 212(a)(9)(C)(i)(II) of the Act. Accordingly, he denied the Form I-212. *Decision of the Field Office Director*, dated June 26, 2009.

On appeal, counsel asserts that the Field Office Director's denial is based on the impermissible retroactive application of *Duran Gonzales v. DHS*, 508 F.3d. 1227 (9th Cir. 2007). *Form I-290B*, filed July 27, 2009.

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

(A) Certain aliens previously removed.-

(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 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 aliens 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 Attorney General [now Secretary, Homeland Security, "Secretary"] has consented to the alien's reapplying for admission.

The record reflects that on January 31, 1999 the applicant attempted to enter the United States at the San Ysidro Port of Entry by presenting a Resident Alien Card (Form I-551) that had not been issued to him. The applicant was removed from the United States under an order of removal on February 1, 1999.

The applicant is, therefore, inadmissible under section 212(a)(9)(A)(ii) of the Act as an alien who was removed from the United States and who seeks admission within 10 years of the date of such alien's departure or removal.

The AAO finds no purpose in considering the applicant's eligibility for an exception under section 212(a)(9)(A)(iii) of the Act as the applicant is also inadmissible under section 212(a)(9)(C)(i)(II) of the Act.

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 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 record reflects that as a result of his January 31, 1999 attempt to enter the United States, the applicant was removed from the United States under section 235(b)(1) of the Act on February 1, 1999. In a July 11, 2005 affidavit submitted for the record, the applicant states that he re-entered the United States without inspection on October 2, 2000. The applicant is, therefore, also inadmissible to the United States under section 212(a)(9)(C)(i)(II) of the Act for having entered the United States without inspection after he had been removed.

On appeal, counsel contends that the Field Office Director's denial of the waiver application is based upon his denial of the applicant's Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) under Section 212(a)(9)(C)(i)(II) of the Act, which counsel characterizes as an impermissible retroactive application of the decision in *Duran Gonzales v. DHS*, (*Gonzales II*), 508 F.3d 1227 (9th Cir. 2007) since the applicant relied upon the Ninth Circuit Court of Appeals' decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) in filing his Form I-212.

The AAO takes note of the preliminary injunction that was previously entered against the ability of the Department of Homeland Security to follow *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). *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 of Immigration Appeal'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 and 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, there is no judicial prohibition in force that precludes the AAO applying the rule laid down in *Matter of Torres-Garcia* when denying the instant application regardless of when it was filed by the applicant.

Furthermore, in *Morales-Izquierdo v. Department of Homeland Security*, 600 F.3d 1076 (9th Cir. 2010), 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.

As noted by the director, 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*, *Supra.*; *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 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 January 31, 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. The applicant is, therefore, currently statutorily ineligible to apply for permission to reapply for admission.

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 the exception or waiver under section 212(a)(9)(C) 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.

ORDER: The appeal is dismissed.