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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

H4

Date: OCT 17 2011 Office: SAN DIEGO, 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)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 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 District Director, San Diego, 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 record reflects that the applicant is a native and citizen of Mexico who was expeditiously removed on October 15, 1997, and subsequently entered the United States without inspection on October 21, 1997. The applicant has resided in the United States since that date. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii), as well as section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II). 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 with his U.S. Citizen children.

The District Director determined the applicant was ineligible to obtain consent to reapply for admission to the United States and denied the Form I-212 accordingly. *See District Director's Decision,* dated July 30, 2009.

Counsel submits a brief in support of the appeal. Therein, counsel asserts the Ninth Circuit Court of Appeals' (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004) applies in the present case. *Form I-290B, Notice of Appeal or Motion,* August 24, 2009. Counsel explains [redacted] allows the applicant, who entered the United States without inspection shortly after being expeditiously removed, to adjust status to that of a permanent resident under Section 245(i) of the Act. *Id.* Counsel concedes the Ninth Circuit reversed that decision in *Duran Gonzales v. Department of Homeland Security,* 508 F.3d 1227 (9th Cir. 2007), granting deference to the Board of Immigration Appeals's (BIA) decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). Nevertheless, counsel asserts "the prior decision in [redacted] should not apply retroactively to the following class members such as the applicant in this matter: individuals who are inadmissible under INA §212(a)(9)(C)(i)(II) and whose waiver applications were filed in reliance on the old law, i.e., the standard set forth in [redacted] within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA §245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision." *Form I-290B, Notice of Appeal or Motion,* August 24, 2009.

The record includes, but is not limited to, counsel's brief in support of appeal, birth and marriage certificates, paystubs and federal income tax returns, a letter from the applicant's employer, declarations from the applicant, evidence of real estate transactions, other immigration applications and petitions, documentation of removal proceedings, and copies of case law. The entire record was reviewed in rendering a decision on appeal.

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 record reflects that the applicant entered the United States without inspection on October 15, 1997, and was expeditiously removed to Mexico on that same date. The applicant subsequently entered the United States without inspection on October 21, 1997. The applicant has resided in the United States since that date.

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* CIS has consented to the applicant's reapplying for admission. In the present matter, the record reflects the applicant was expeditiously removed from the United States on October 15, 1997.[1] The applicant admitted he entered the United States without inspection on October 21, 1997, and has remained in the United States ever since. As such, he is currently statutorily ineligible to apply for permission to reapply for admission.

In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the BIA's holding in *Matter of Torres-Garcia* that section 212(a)(9)(C)(i) of the Act bars aliens subject to its

[1] Although counsel asserts the applicant "has maintained that he had no independent recollection that he had been removed to Mexico rather than given a voluntary return to his country" and he "simply did not realize that what had happened to him at the port of entry was the issuance of an expedited removal order" the record reflects the applicant's fingerprints and photograph were taken, the applicant was served in person with the Notice and Order of Expedited Removal, and the applicant signed the Verification of Removal form.

provisions from receiving discretionary waivers of inadmissibility prior to the expiration of the ten-year bar. Counsel asserts the Ninth Circuit's "prior decision in [redacted] should not apply retroactively to the following class members such as the applicant in this matter: individuals who are inadmissible under INA §212(a)(9)(C)(i)(II) and whose waiver applications were filed in reliance on the old law, i.e., the standard set forth in [redacted] within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA §245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision." *Form I-290B, Notice of Appeal or Motion,* August 24, 2009. However, the Ninth Circuit clarified that its holding in *Duran Gonzalez* does apply retroactively, even to those aliens who had Form I-212 applications pending before *Perez Gonzalez* was overturned. *Morales-Izquierdo v. DHS*, 600 F.3d. 1076 (9th Cir. 2010). *See also Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) (stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the courts). Therefore, despite counsel's assertions to the contrary, the applicant remains inadmissible to the United States.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(9)(C)(i)(II) of the Act. No waiver is available to such an alien, only an exception for aliens who have departed and remained outside the United States for 10 years. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the Form I-212 was properly denied by the District Director.

ORDER: The appeal is dismissed.