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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

H4

[redacted]

Date: FEB 2 1 2012 Office: SPOKANE, WA FILE: [redacted]

IN RE: [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,

Michael Hammond

for Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The District Director, Spokane, Washington, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), and the matter is now on appeal with the Administrative Appeals Office (AAO). The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible pursuant to sections 212(a)(9)(C) of the Immigration and Nationality Act (INA or the Act), 8 U.S.C. §§ 1182(a)(9)(C) for having unlawfully returned to the United States after having accrued over one year of unlawful presence and after having been ordered removed. On March 28, 2000, 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) after having been found to have been inadmissible under INA § 212(a)(7)(A)(i)(I). The applicant subsequently entered the United States without inspection two days later and remained in the United States unlawfully, accruing over one year of unlawful presence, until approximately July 1, 2005. After having accrued more than one year of unlawful presence, the applicant departed the United States to Mexico on approximately July 1, 2005 and again reentered the United States without inspection on approximately November 1, 2005. The applicant 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).[1]

On July 22, 2011, the Field Office Director determined that the applicant is inadmissible under INA § 212(a)(9)(C)(i)(I) & (II) and has not met the statutory criteria to apply for admission under INA § 212(a)(9)(C)(ii) and denied her application accordingly.

On appeal, counsel for the applicant, incorporating all prior briefs and supporting arguments filed in relation to this matter, states, among other arguments, that the applicant's Form I-212 was "re-filed more than 10 years after the last de facto departure from the United States" and that the applicant is thus eligible to apply for permission to reapply for admission to the United States because it has been more than 10 years between the last application for admission and the last "triggering event" under INA § 212(a)(9)(C). Counsel for the applicant argues that the applicant's case is distinguishable from current case law.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and considered in rendering a decision on the appeal. The AAO will first address the question of whether the applicant is admissible to the United States.

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-

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[1] Although the applicant submitted the appropriate fee for only one appeal, he initially filed a Form I-290B (Notice of Appeal or Motion) indicating that he wished to appeal the denial of three forms, Form I-212 (Permission to Reapply for Admission into the United States after Removal or Deportation), Form I-601 (Application for Waiver of Grounds of Inadmissibility), and Form I-485 (Application to Register Permanent Residence or Adjust Status). Through written correspondence in the record, the applicant later clarified that he wished to appeal only the denial of Form I-212.

> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
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> (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.
> ...

The record reflects that the applicant was ordered removed on March 28, 2000 and subsequently entered the United States without being admitted two days later. The applicant then accrued more than one year of unlawful presence before departing the United States on approximately July 1, 2005. The applicant then once again entered the United States without being admitted on approximately November 1, 2005. As a result of each of the applicant's unlawful entries into the United States after her removal order in 2000, the applicant is inadmissible under 212(a)(9)(C)(i)(II) of the Act. Moreover, the applicant is inadmissible under INA § 212(a)(9)(C)(i)(I) for having entered into the United States without being admitted after accruing over one year of unlawful presence in the United States.

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 ten years since the date of the alien's last departure from the United States. *See Carillo de Palacios v. Holder*, 662 F.3d 1128 (9th Cir. 2011) and *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). 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 that section 212(a)(9)(C)(i) of the Act bars aliens subject to its provisions from receiving permission to reapply for admission prior to the expiration of the ten-year bar. The Ninth Circuit clarified that its holding in *Duran Gonzalez* applies 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).

Counsel for the applicant states that due to ineffective assistance by the applicant's prior counsel, the applicant's last departure from the United States in 2005 should not be considered to be her last departure for the purposes of INA § 212(a)(9)(C)(ii). In summary, counsel for the applicant asserts that if not for the applicant's departure and unlawful reentry in 2005, the law would not bar her from

applying for permission to reapply for admission under INA § 212(a)(9)(C)(ii) because it has now been 10 years since the applicant's initial violation of INA § 212(a)(9)(C), which occurred in 2000.

We will first address counsel's claim of ineffective assistance of prior counsel. In *Matter of Compean*, the Attorney General held that the Constitution affords no right to counsel or effective assistance of counsel to aliens in immigration proceedings under the Sixth Amendment or the Due Process Clause of the Fifth Amendment. *24 I. & N. Dec. 710, 711-27 (A.G. 2009)* 711-27. Although the Act and regulations also do not afford aliens a right to effective assistance of counsel, USCIS may exercise its discretion based on the deficient performance of an alien's prior attorney. *Id.* at 727. *Compean* establishes three elements of proof and six documentary requirements that an alien must meet to prevail on a claim of deficient performance of counsel. *Id.* Although *Compean* addresses deficient performance of counsel claims in the context of motions to reopen removal proceedings, the decision also applies to claims of deficient performance raised on direct review. *Id.* at 728 n.6.

To prevail on a deficient performance of counsel claim, the alien must show:1) that counsel's failings were egregious; 2) in cases where the alien moves to reopen beyond the 30-day limit, the alien must show that he or she exercised due diligence in discovering and seeking to cure the lawyer's deficient performance; and 3) that the alien was prejudiced by the attorney's error(s). To establish prejudice, the alien must show that but for the deficient performance, it is more likely than not that the alien would have been entitled to the relief he or she was seeking.[1] *Id.* at 732-34.

To establish these three requirements, the alien must submit six documents: 1) the alien's detailed affidavit setting forth the relevant facts and specifically stating what the lawyer did or did not do and why the alien was consequently harmed; 2) a copy of the agreement, if any, between the lawyer and the alien. If no written agreement exists, the alien must specify what the lawyer agreed to do in his or her affidavit; 3) a copy of the alien's letter to the attorney setting forth the attorney's deficient performance and a copy of the attorney's response, if any; 4) a completed and signed complaint addressed to the appropriate State bar or disciplinary authorities; 5) any document(s) the alien claims the attorney failed to submit; and 6) when the alien is subsequently represented, a signed statement from the new attorney attesting to the deficient performance of the prior attorney. *Id.* at 735-38. If any of the latter five documents are unavailable or missing, the alien must explain why the documents are unavailable or summarize the contents of any missing documents. *Id.* at 735.

The three substantive requirements must be met for all deficient performance claims filed before and after [redacted] was issued on January 7, 2009. *Id.* at 741. For claims pending prior to January 7, 2009, the alien is not required to meet the six new documentary requirements, but must still comply with the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Lozada* required an alien to submit: 1) an affidavit attesting to the relevant facts, detailing the agreement that was entered into, what actions were supposed to be taken and what the attorney did or did not do; 2) evidence that former counsel was informed of the allegations, given an opportunity to respond and former counsel's response, if any; and 3) evidence that a complaint has been filed with the appropriate disciplinary authorities regarding such representation or an explanation of why such a complaint was not filed. *Id.* at 638-39.

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[1] Where the alien sought discretionary relief, the alien must not only show that he or she was eligible for such relief, but also would have merited a favorable exercise of discretion. *Matter of Compean*, 24 I&N Dec. at 734-35.

In this case, even were USCIS to find ineffective assistance of counsel, the applicant has not shown that that her inadmissibility under INA § 212(a)(9)(C) is due to the deficient performance of her prior attorney. Even if the applicant had not departed the United States and unlawfully reentered in 2005, she would remain inadmissible under INA § 212(a)(9)(C) due to her unlawful reentry after a removal order in 2000. In both factual scenarios, the applicant has not remained outside of the United States for the requisite 10 year period. *Matter of Torres–Garcia,* 23 I. & N. Dec. 866 (BIA 2006), Although the applicant in *Torres-Garcia* was applying within ten years of their last departure, the law, as set forth below, is clear that the applicant must remain outside of the United States for ten years before being eligible to apply under INA § 212(a)(9)(C)(ii). Here, as in *Torres-Garcia*, the applicant has not done so. As such, the ineffective assistance claimed by the applicant does not prejudice her in relation to the application on appeal. Regardless of the actions of the applicant's prior counsel, the applicant remains inadmissible under INA § 212(a)(9)(C) and ineligible to apply for the exception at INA § 212(a)(9)(C)(ii).Moreover, the applicant did not exercise due diligence in making a claim of ineffective assistance of counsel after discovering her inadmissibility in 2005, but instead chose to reenter the United States unlawfully in lieu of trying to rectify the situation from outside of the United States.

Counsel for the applicant also states that "there is no known current case law, regulation, or statute, which specifically bars the applicant" from filing for permission to reapply for admission, even where she is subject to INA § 212(a)(9)(C). In *Carillo de Palacios*, however, the Ninth Circuit Court of Appeals, the circuit in which this case arises, held that "the law of our circuit is now settled:"

> According [redacted]deference to the BIA's interpretation of the relevant statutes, we have held that aliens who are inadmissible under 8. U.S.C. § 1182(a)(9)(C)(i)(I)-(II) are ineligible for adjustment of status under 8 U.S.C. § 1255(i).

Id. at 1130 (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). It is clear that the applicant must "exit the United States and wait ten years before applying" for permission to reapply under INA § 212(a)(9)(C)(ii) regardless of any claimed eligibility under INA § 245(i). *Id.* at 1133 (quoting *Gonzalez v. Department of Homeland Security*, 508 F.3d 1227, 1231 (9th Cir. 2007;and citing Delgado v. Mukasey, 516 F.3d 65, 73 (2d Cir.2008) (stating that the alien may only "seek permission to reapply for admission from outside of the United States after ten years have passed since his most recent departure from the United States"); Mortera–Cruz v. Gonzales, 409 F.3d 246, 250 n. 4 (5th Cir.2005) (noting that the alien must have "been outside the United States more than 10 years since his or her last departure"); Fernandez–Vargas v. Ashcroft, 394 F.3d 881, 885 (10th Cir.2005) (describing requirement as "an unwaivable ten-year period outside of the United States"), *aff'd,* 548 U.S. 30, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006); *Torres–Garcia,* 23 I. & N. Dec. at 875 (noting that the exception applies " 'only after the alien has been outside the United States for ten years' ") (quoting Berrum–Garcia v. Comfort, 390 F.3d 1158, 1167 (10th Cir.2004)). The law makes clear that the applicant's claimed eligibility to apply for adjustment of status under INA § 245(i), it does not negate the applicability of the ground of inadmissibility at INA § 212(a)(9)(C) to the applicant's case. *See Carillo de Palacios,* 662 F.3d at 1130. Although counsel states that the factual scenario in *Carillo de Palacios* differs from the applicant's case in that the applicant in *Carillo de Palacios* was not applying for admission under INA § 245(i) more than 10 years after their last unlawful entry for the purposes of INA § 212(a)(9)(C), the BIA and the Court of

Appeals for the Ninth Circuit, among other courts cited above, have held that the applicant must remain outside of the United States for 10 years before being eligible to apply for permission to reapply under INA § 212(a)(9)(C)(ii). *Id.* Thus, regardless of when applicant is applying for adjustment of status, if they are inadmissible under INA § 212(a)(9)(C), they must remain outside of the United States for 10 years since their last departure before applying for readmission.

Lastly, the counsel for the applicant states that discretion should be exercised in the applicant's favor. However, USCIS does not have discretion under the Act until the applicant has met the criteria INA set forth in the statute at § 212(a)(9)(C)(ii).

Because the applicant has not met the statutory criteria set forth in INA § 212(a)(9)(C)(ii), 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 Field Office Director. Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish she is eligible for the benefit sought. After a careful review of the record, the AAO finds that the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.