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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave. N.W. MS 2090
Washington, D.C. 20529-2090
U.S. Citizenship
and Immigration
Services



H4

DATE: **FEB 24 2012** OFFICE: SAN DIEGO, CALIFORNIA

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)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

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 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 from the United States on or about July 31, 1999, and subsequently entered the United States without inspection ten to fourteen days later. The applicant has resided in the United States since that date. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who reenters the United States without being admitted. She seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with her U.S. citizen spouse and children.

The District Director determined that the applicant was ineligible to obtain consent to reapply for admission to the United States and denied the Form I-212 accordingly. See *Decision of the District Director*, dated February 24, 2011.

Counsel submits a brief in support of the appeal, asserting that 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. See *Counsel's Brief*, dated March 22, 2011. Counsel asserts that the [REDACTED] decision allows the applicant, who entered the U.S. 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 that 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 (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Nevertheless, counsel asserts that the [REDACTED] decision cannot be retroactively applied to the applicant, whose waiver application was filed in reliance on the old law, i.e., the standard set forth in [REDACTED] within the jurisdiction of the Ninth Circuit. *Id.* Counsel asserts alternately that the applicant is eligible for adjustment of status because more than ten years have elapsed since her 1999 removal, and that consent to re-apply for admission may be granted *Nunc Pro Tunc*. *Id.* Counsel further asserts that the provisions of section 212(a)(9)(C)(ii) of the Act do not require the alien to remain "outside" the United States for a period of ten years before applying for a waiver for purposes of section 212(a)(9)(C)(ii). *Id.*

The record contains but is not limited to: Form I-290B and counsel's brief; Forms I-212, I-601 and denials of each; two letters from the applicant; a hardship letter; marriage and birth certificates; family photographs; Forms I-485 and I-130; and the applicant's inadmissibility and removal records. 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 on or about July 31, 1999, the applicant was expeditiously removed to Mexico for a period of five years. She entered the United States without inspection ten to fourteen days later and has resided in the United States ever since.

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 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 record reflects that the applicant was expeditiously removed from the United States on or about July 31, 1999. The applicant admitted that she entered the United States without inspection ten to fourteen days after her removal and has remained in the United States ever since. Thus the applicant 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 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 Duran Gonzales v. DHS*, 659 F.3d 930 (9th Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzales* prospectively only); *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.

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 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.

ORDER: The appeal is dismissed.