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U.S. Department of Homeland Security
Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

#4

DATE: MAR 19 2012 OFFICE: LOS ANGELES, CALIFORNIA File: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(a)(9)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C).

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,

for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Los Angeles, California. The matter came before the Administrative Appeals Office (AAO) on appeal and the appeal was dismissed. The matter is again before the AAO on motion to reconsider. The motion will be granted and the prior decision of the AAO will be affirmed. The application will be denied.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within 10 years of her last departure from the United States. The applicant was further found to be inadmissible under section 212 (a)(9)(C) of the Act for having been ordered removed under section 235(b)(1) or section 240 and entering the United States without being admitted. The applicant seeks a waiver of inadmissibility in order to remain in the United States with her U.S. citizen spouse and U.S. citizen and lawful permanent resident children.

The AAO concluded that the applicant is currently statutorily ineligible to apply for permission to reapply for admission and as such, no purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act. See *Decision of the Administrative Appeals Office*, dated August 3, 2009.

On motion, counsel asserts that the applicant filed her Form I-601, Application for Waiver of Grounds of Inadmissibility, in reliance on *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006) and that the retroactive application of *Duran-Gonzalez v. Department of Homeland Security*, 508 F.3d 1127 (9th Cir. 2007) to her inadmissibility under § 212(a)(9)(B)(i)(II) of the Act is improper. See *Counsel's Brief*, dated September 1, 2009.

The applicant has supplemented the record with a brief from counsel. The record also contains, but is not limited to: Form I-290B and dismissal; Form I-601 and denial; counsel's earlier letter/brief; applicant's spouse's hardship affidavit and earlier letter; applicant's affidavit; letters from the applicant's children; psychological assessment; medical/disability records; employment letter; income tax records; marriage and birth records; family photographs; Form I-485; copy of the *Acosta* decision; and the applicant's removal and inadmissibility records. The entire record was reviewed and considered in rendering this decision.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." In support of the present motion to reconsider, counsel sites the Ninth Circuit Court of Appeals decision in *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir.

> 2006) as the precedent decision that should have controlled in the present case and upon which the applicant relied when she filed her Forms I-485 and I-601. The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(3), and the motion will be granted and the application reconsidered.

The record reflects that the applicant entered the United States without inspection in or about April 1994. The applicant departed the United States in 1999 to visit her mother. On August 18, 1999 the applicant attempted to enter the United States without inspection at the San Ysidro Port of Entry by concealing herself in the trunk of an automobile. When questioned by immigration officials at the port of entry, the applicant identified herself with a name not her own. On August 19, 1999 the applicant was expeditiously removed from the United States.

The AAO concurs with its earlier decision on appeal that the Field Office Director erred in finding the applicant inadmissible under section 212(a)(6)(C)(1) of the Act for misrepresenting her identity. Counsel asserts on motion that this error "caused undue delay of [redacted] case such that by the time of the adjudication of her appeal, the precedent case law on which her appeal rested had been overturned." Counsel's assertion is unpersuasive. The error by the Field Office Director is harmless because the applicant would have been expeditiously removed even if she had provided her actual name as she had attempted to enter the United States without inspection and had no lawful right to entry or admission. The applicant's subsequent entry without inspection into the United States shortly after her removal triggered the unlawful presence provisions of the Act and her inadmissibility under section 212(a)(9)(B)(i)(II), regardless of whether she had been found inadmissible under section 212(a)(6)(C)(1) of the Act.

Section 212(a)(9) of the Act provides:

> (B) ALIENS UNLAWFULLY PRESENT.-
>
> (i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who- ...
>
> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> ...
>
> (v) Waiver.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have

> jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

As stated above, the record reflects that the applicant entered the United States without inspection in or about April 1994 and remained until she voluntarily departed to Mexico in 1999. On August 18, 1999 the applicant attempted to enter the United States without inspection and was expeditiously removed on August 19, 1999. The applicant entered the United States without inspection sometime after August 19, 1999 and the record contains no documentary evidence that she has ever departed the United States after her August 19, 1999 removal. The applicant accrued unlawful presence from April 1, 1997, the date of enactment of the unlawful presence provisions under the Act, until August 19, 1999, a period in excess of one year. As the applicant was unlawfully present in the United States for more than one year and seeks readmission within 10 years of her August 1999 departure she is inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 USC § 1182(a)(9)(B)(i)(II). Though counsel disputes, the record supports this finding and the AAO concurs that the applicant is inadmissible under section 212(a)(9)(B)(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. . . . .

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 applicant is inadmissible under section 212(a)(9)(C) of the Act due to the fact that she was expeditiously removed from the United States on August 19, 1999 and she entered the United States without inspection shortly thereafter. The record contains no documentary evidence that the applicant has ever departed the United States after her August 1999 removal. As the applicant has not been outside of the United States for a total of ten years, she is currently statutorily ineligible to apply for permission to reapply for admission. As such, no purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act.

Counsel asserts that the applicant filed her Form I-601 in reliance on *Acosta v. Gonzales*, 439 F.3d 550 (9th Cir. 2006), and that the retroactive application of *Duran-Gonzalez v. Department of Homeland Security*, 508 F.3d 1127 (9th Cir. 2007) to her inadmissibility under § 212(a)(9)(B)(i)(II) of the Act is improper. The AAO concurs with its decision on appeal that counsel's assertion is not persuasive. The Ninth Circuit Court of Appeals held in *Acosta v. Gonzalez* that its decision was controlled by *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned the *Perez Gonzalez v. Ashcroft* decision 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 has not met that burden, in that she has not shown that a purpose would be served in adjudicating her waiver under section 212(a)(9)(B)(v) of the Act due to her inadmissibility under section 212(a)(9)(C) of the Act. Accordingly, the decision on appeal is affirmed.

ORDER: The motion to reconsider is granted. The prior decision of the AAO is affirmed. The application is denied.