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

[redacted]

H5

DATE: DEC 0 8 2012 Office: SAN FRANCISCO, CA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by District Director, San Francisco, 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 is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having sought admission to the United States through fraud or the willful misrepresentation of a material fact. The applicant seeks a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her lawful permanent resident spouse and U.S. citizen children.

In his September 11, 2006 decision, the director indicated that the applicant's adjustment application had been denied due to her inadmissibility under section 212(a)(9)(C)(i)(II) of the Act. Accordingly, he denied the Form I-601, Application for Waiver of Grounds of Inadmissibility.

On appeal, counsel asserts that the applicant is eligible for a discretionary waiver of her section 212(a)(6)(C) inadmissibility if she can demonstrate that her inadmissibility would result in extreme hardship to a qualifying relative.

The record contains, but is not limited to: counsel's brief; declarations from the applicant and her spouse; documents relating to the applicant's removal from the United States; employment and identification documents for the applicant's spouse; income tax records; and birth certificates for the applicant's children. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

> (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Although not addressed by the director in his decision, the AAO notes that on the Form I-485, Application to Register Permanent Resident or Adjust Status, the applicant indicated that she had used a fraudulent Resident Alien Card in an attempt to enter the United States in 1997. Accordingly, we find the record to establish that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having sought a benefit under the Act through fraud or the willful misrepresentation of a material fact.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The AAO will not, however, address the applicant's eligibility for a waiver under section 212(i) of the Act as the record also establishes that she is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, which 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
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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 has consented to the alien's reapplying for admission. . . . .

The record reflects that on April 5, 2001, the applicant was expeditiously removed from the United States under section 235(b)(1) of the Act. It further demonstrates that she returned to the United States the same month, entering without inspection. In that the applicant was ordered removed and subsequently entered the United States without inspection, she is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act.

An alien who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply by filing the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, unless that alien has been outside the United States for more than ten years since the date of his or her last departure. *See Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *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 *and* United States Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission.

On appeal, counsel contends that the applicant is eligible to file the Form I-212 pursuant to the decision reached by the Ninth Circuit Court of Appeals in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). However, in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its decision in *Perez Gonzalez* and deferred to the Board of Immigration Appeals' 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 subsequently 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, the applicant is not eligible for consideration under section 212(a)(9)(C)(ii) of the Act pursuant to *Perez Gonzalez*.

In the present matter, the record reflects that the applicant was removed from the United States on April 5, 2001 and that she returned to the United States later that month. As the applicant has not remained outside the United States for ten years since her last departure, she is currently statutorily ineligible to apply for permission to reapply for admission.[1]

In that the applicant is not yet eligible to apply for an exception from her section 212(a)(9)(C)(i) inadmissibility, she is ineligible to adjust status or otherwise be admitted to the United States. Accordingly, the AAO finds no purpose would be served in considering whether she is eligible for a waiver of inadmissibility under section 212(i) of the Act. The appeal of the Form I-601 will therefore be dismissed.

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 has not met this burden.

ORDER: The appeal is dismissed.

[1] The Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, was denied by the director in a separate decision on September 11, 2006. The appeal from the denial of the Form I-212 has been addressed by the AAO under separate cover.