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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 14 2013

OFFICE: SAN BERNARDINO, CA

FILE:

IN RE: APPLICANT:

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:

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 the Field Office Director, San Bernardino, 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 has resided in the United States since December 2000, when she entered without inspection. The applicant was previously ordered removed on November 12, 2000 after presenting a border crossing card which did not belong to her to procure admission. She was found to be inadmissible to the United States under 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 attempted to procure admission to the United States through fraud or misrepresentation. The applicant was also found to be inadmissible pursuant to section 212(a)(9)(A)(i) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed under section 235(b)(1) of the Act. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States with her U.S. citizen spouse and children.

The Field Office Director concluded that the applicant was also inadmissible under section 212(a)(9)(C) of the Act, was ineligible for a waiver given this inadmissibility, and denied the applicant's Form I-485, adjustment application, accordingly. *See Decision of Field Office Director* dated August 3, 2012. On August 5, 2012 the Field Office Director denied the applicant's Form I-601 waiver application finding that there was no underlying Form I-485 to support it.

On appeal, counsel contends the applicant is eligible to adjust status under section 245(i) of the Act regardless of inadmissibility pursuant to section 212(a)(9)(C) of the Act due to her reliance on *Acosta v. Gonzalez,* 439 F.3d 550 (9th Cir. 2006) and because she has been qualified for adjustment of status since 1989. Counsel further asserts that section 212(a)(9)(C) of the Act should not apply to her since the removal order was irregular and unlawful. Counsel submits additional documentation on appeal, claiming the applicant has demonstrated her spouse would experience extreme hardship given her inadmissibility.

The record includes, but is not limited to, statements from the applicant and her spouse, evidence of birth, marriage, residence, and citizenship, documentation of removal proceedings, school records, financial documents, letters from the community, other applications and petitions, and photographs. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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.

Section 212(i) of the Act provides:

> (1) The [Secretary] may, in the discretion of the [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 [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.

In the present case, the record reflects that on November 12, 2000 the applicant presented a border crossing card indicating she was a person named " " to immigration officials. She later admitted her true name was " ." Inadmissibility due to her fraud or misrepresentation is not contested on appeal. The applicant is therefore inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure admission to the United States through fraud or misrepresentation.

Counsel additionally asserts that the applicant's removal on November 12, 2000 is irregular and unlawful, and should consequently not trigger reinstatement of removal under section 241(a)(5) of the Act. Counsel explains that the applicant could have remained in the United States when she was ordered removed on November 12, 2000 because she was qualified under section 245(i) of the Act with a retroactive priority date of October 11, 1989. The AAO, however, does not have jurisdiction to determine the validity of an order of removal under section 235(b)(1) of the Act.[1]

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

The AAO cannot exercise appellate jurisdiction over additional matters on its own volition, or at the request of an applicant or petitioner. As a "statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy," the creation of appeal rights for adjustment application denials meets the definition of an agency "rule" under section 551 of the Administrative Procedure Act. The granting of appeal rights has a "substantive legal effect" because

---

[1] The AAO additionally notes that the applicant presented a border crossing card which did not belong to her to procure admission. In a sworn statement, she admitted she had no legal documents with which to enter and legally reside in the United States, nor had she applied for any benefits or documents from the legacy INS. *See sworn statement,* November 12, 2000. Furthermore, contrary to counsel's assertions, the applicant was served with a notice indicating she was barred from returning to the United States for a period of five years as a consequence of having been found inadmissible as an arriving alien in proceedings under section 235(b)(1) of the Act. *See Form I-296, Notice to Alien Ordered Removed / Departure Verification*, November 12, 2000.

it is creating a new administrative "right," and it involves an economic interest (the fee). "If a rule creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself, then it is substantive." *La Casa Del Convaleciente*, 965 F.2d at 1178. All substantive or legislative rule making requires notice and comment in the Federal Register. Given this lack of jurisdiction over the validity of removal orders under section 235(b)(1) of the Act, the AAO cannot address counsel's contentions on this specific matter.

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 ....

In the present case, the record reflects that the applicant, who indicated her true name was , was ordered removed under section 235(b)(1) of the Act on November 12, 2000. She was served with a Form I-860, Notice and Order of Expedited Removal, as well as a Form I-296, Notice to Alien Ordered Removed / Departure Verification, on that date. The applicant departed the United States, and admitted she subsequently entered without inspection. The applicant is therefore inadmissible under section 212(a)(6)(C)(i)(II) of the Act.

Counsel contends the applicant acted in reliance on *Acosta v. Gonzalez,* 439 F.3d 550 (9th Cir. 2006), and should therefore be eligible for adjustment of status. However, the Ninth Circuit Court of Appeals' holding with respect to the applicant's eligibility for adjustment of status despite inadmissibility under section 212(a)(9)(C) of the Act has since been reversed. 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). 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 discretionary waivers of inadmissibility 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).

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* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant is currently residing in the United States and therefore, has not remained outside the United States for 10 years since her last departure. 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)(6)(C) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.