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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



Date: DEC 28 2011

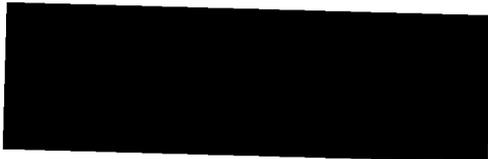
Office: SAN FRANCISCO, CA

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Permission to Reapply for Admission into the United States after Previous Immigration Violations 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:

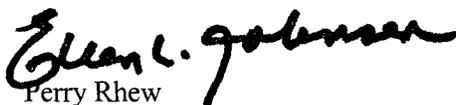


INSTRUCTIONS:

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 Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) was denied by the Field Office Director, San Francisco, California. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects the applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for fraud or willful misrepresentation of a material fact in order to procure an immigration benefit. Specifically, the record shows, and counsel concedes, that on May 4, 1997, the applicant was removed from the United States under an expedited removal order for presenting a bogus resident alien card in applying for admission to the United States. *Applicant's Brief in Support of Appeal of Denial of I-212 Waiver*, dated September 9, 2009; *Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867A)*, dated May 4, 1997; *Verification of Removal (Form I-296)*, dated May 4, 1997. The record further shows, and counsel concedes, that the applicant entered the United States without inspection on May 10, 1997, and has since remained in the United States. *Applicant's Brief in Support of Appeal of Denial of I-212 Waiver, supra*; *Application for Waiver of Grounds of Inadmissibility (Form I-601)*, dated February 24, 2006. The applicant is married to a U.S. citizen and seeks permission to reenter the United States after her removal in order to reside with her husband and children in the United States.

The field office director found that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act and does not meet the requirements for consent to reapply because she is currently living in the United States. The field office director denied the application accordingly. *Decision of the Field Office Director*, dated July 17, 2009.

On appeal, counsel contends that the applicant filed for adjustment of status in reliance on the Ninth Circuit Court of Appeals' decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9<sup>th</sup> Cir. 2004). Counsel contends that the court's decision in *Duran Gonzales v. Dep't of Homeland Sec.*, 508 F.3d 1227 (9<sup>th</sup> Cir. 2007), should not be retroactively applied to her. In addition, counsel contends that even if *Duran Gonzales* is retroactively applied to her, she is nonetheless eligible for adjustment of status because more than ten years have passed since her 1997 removal and her Form I-212 may be granted *nunc pro tunc*.

As an initial matter, the AAO notes that on the Notice of Appeal or Motion (Form I-290B), in Part 2, counsel purports to appeal the denial of the applicant's Form I-212, Form I-601, and Form I-485. The record shows that three separate decisions were issued by the field office director; however, the record indicates that the applicant paid only one fee for one appeal. Because counsel's brief expressly addresses an appeal of the denial of the Form I-212, the AAO will consider the applicant's appeal to be an appeal from the denial of the Form I-212. *Applicant's Brief in Support of Appeal of Denial of I-212 Waiver*, dated September 9, 2009.

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 of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver. - The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between--

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

Counsel's contention that *Duran Gonzales* should not be applied retroactively to her case is unpersuasive. 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 Gonzales 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. Significantly, the Ninth Circuit clarified that its holding in *Duran Gonzales* 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 (9<sup>th</sup> 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) (en banc) (stating that the general default principle is that a court's decisions apply retroactively to all cases still pending before the courts).

Regarding counsel's contention that ten years have already passed since the applicant's 1997 removal order and that her Form I-212 may be granted *nunc pro tunc*, as stated above, the applicant reentered the United States without inspection in May 1997, a few days after her removal, and has since remained in the United States. Therefore, although ten years have passed since her removal, she has not remained outside the United States for ten years as required. *Matter of Torres-Garcia*, 23 I&N Dec. at 875 ("as a result of having illegally reentered after previously being formally removed, . . . [the applicant's inadmissibility] may be waived 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)); see also *Morales-Izquierdo*, 600 F.3d. at 1079, 1088-89 (holding that the applicant, who was ordered removed in September 1994 and removed in January 1998, more than ten years ago, was ineligible for a *nunc pro tunc* Form I-212 waiver). To the extent counsel contends the regulation at 8 C.F.R. § 212.2(i)(2), which provides for the retroactive approval of some applications, should apply in the applicant's case, the Board of Immigration Appeals has expressly rejected this contention. *Matter of Torres-Garcia*, 23 I&N Dec. at 874 ("As the language, structure, and regulatory history of 8 C.F.R. § 212.2 make clear, the regulation was not promulgated to implement the current section 212(a)(9) of the Act.").

Therefore, *Duran Gonzales* is controlling here. Because the applicant has not remained outside of the United States for ten years, she is statutorily ineligible to apply for permission to reapply for admission. In proceedings for an application for admission, the burden of proving eligibility remains entirely with the applicant. See 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.