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



U.S. Citizenship  
and Immigration  
Services

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NOV 07 2011

DATE:

OFFICE: SAN BERNARDINO

FILE:

IN RE:

APPLICATION: Application for Permission to Reapply for Admission into the United States after  
Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and  
Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

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 Field Office Director, San Bernardino, 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 Colombia. The applicant was ordered removed from the United States on August 26, 1999, based upon her inadmissibility for willfully misrepresenting a material fact in seeking admission 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). The applicant attempted to enter the United States using a border crossing card belonging to another individual. The applicant was removed from the United States on August 26, 1999. The applicant subsequently entered the United States on September 19, 1999 without admission or parole. The applicant is inadmissible pursuant to sections 212(a)(9)(A)(i) and 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(i) and 1182(a)(9)(C)(i)(II). She seeks permission to reapply for admission into the United States under sections 212(a)(9)(A)(iii) and 212(a)(9)(C)(ii) of the Act, 8 U.S.C. §§ 1182(a)(9)(A)(iii) and 1182(a)(9)(C)(ii), in order to reside in the United States with her USC spouse and child.

The Field Office Director determined that the applicant did not meet the requirement for consent to reapply because the applicant was currently in the United States after reentering illegally and ten years had not elapsed since the date of her last departure, and denied Form I-212 accordingly. See *Decision of Field Office Director*, dated May 29, 2009.

On appeal, counsel for the applicant asserted that there is ongoing litigation at the Ninth Circuit level concerning whether the applicant is eligible for an I-212 form waiver. In support of the appeal, counsel for the applicant submits a brief including the opening brief submitted to the Ninth Circuit in challenging the retroactive application of their decision in *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007). The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9) of the Act states in pertinent part:

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

....

(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 applicant was removed from the United States under a removal order on August 26, 1999 and illegally returned on September 19, 1999. The applicant, therefore, is also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II).

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 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 *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). 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 remained outside the United States for less than a month following her removal. She is currently statutorily ineligible to apply for permission to reapply for admission.

**ORDER:** The appeal is dismissed.