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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**

**PUBLIC COPY**

H4

[redacted]

Date: NOV 16 2011 Office: LOS ANGELES, CA FILE: [redacted]

IN RE: APPLICANT: [redacted]

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:

[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,

Ellen C. Goleman

Perry Rhew,
Chief, Administrative Appeals Office

**DISCUSSION:** The Field Office Director, Los Angeles, California, 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 remanded to the Field Office Director for further action.

The record reflects that the applicant is a native and citizen of Mexico who was granted voluntary departure on January 29, 1992, failed to depart within the time allowed, was arrested by Immigration and Customs Enforcement, and was removed to Mexico on January 27, 1997. The applicant then entered the United States without inspection on February 3, 1997. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. Citizen spouse and children.

The field office director determined the applicant had an order of removal reinstated against him in 1997 and was also inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, and denied the Form I-212 accordingly. *See Field Office Director's Decision,* dated July 20, 2009.

On appeal, counsel for the applicant asserts the applicant is not inadmissible under section 212(a)(9)(C) of the Act, because more than ten years have elapsed since the applicant's January 1997 departure from the United States. *Brief in support of appeal,* October 27, 2009. Counsel also contends because the applicant's Form I-485, application to adjust status or register permanent residence under section 245(i) of the Act, was filed prior to the Ninth Circuit Court of Appeals' (Ninth Circuit) abrogation of *Perez-Gonzalez v. Ashcroft,* 379 F.3d 783 (9th Cir. 2004) the Field Office Director "impermissibly applies the new rule announced in *Duran Gonzalez* [*v. DHS*, 508 F.3d 1227 (9th Cir. 2007)] retroactively to him." *Id.*

The record contains a brief in support of appeal, correspondence between the applicant and USCIS, statements and a declaration from the applicant, a declaration from the applicant's spouse, birth, marriage, and naturalization certificates, letters from the applicant's and his spouse's employers, a report card for one of the applicant's children, federal income tax returns, paystubs, and applications and petitions related to the applicant. The entire available record was considered in rendering a decision on appeal.

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.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date 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.

The record reflects that the applicant was placed into removal proceedings and was granted voluntary departure on January 29, 1992. The record further reflects the applicant failed to leave within the time period allowed, so the grant of voluntary departure automatically became an order of removal. The applicant was later detained by Immigration and Customs Enforcement and removed to Mexico on January 27, 1997. The applicant admitted he entered the United States without inspection shortly thereafter, on February 3, 1997, and has remained in the United States since that date. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) 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. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—

(1) the alien's having been battered or subjected to extreme cruelty; and

(2) the alien's--

(A) removal;

(B) departure from the United States;

(C) reentry or reentries into the United States; or

(D) attempted reentry into the United States.

Counsel's assertion that the Board of Immigration Appeals' decision in *Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006) does not apply because the applicant left in 1997 is incorrect. An alien who is inadmissible under section 212(a)(9)(C)(i)(I) of the Act may not apply for consent to reapply for admission unless the alien has been outside the United States for more than 10 years since the date of the alien's last departure from the United States. *Matter of Briones,* 24 I&N Dec. 355, 358-59 (BIA 2007). To avoid inadmissibility under section 212(a)(9)(C) of the Act, the applicant must have departed the United States at least ten years ago, remained outside the United States during that time, and U.S. Citizenship and Immigration Services (USCIS) must consent to the applicant's reapplying for admission. *Id.* at 358, 371; *Matter of Torres-Garcia,* 23 I&N Dec. 866, 873 (BIA 2006), *aff'd.*, *Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007).

Despite this, section 212(a)(9)(C)(i)(II) of the Act does not in fact apply to the applicant. His re-entry occurred on February 3, 1997, before the April 1, 1997 effective date of that section as set forth in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See also*

*Memorandum by Paul W. Virtue, Acting Executive Associate Commissioner,* dated June 17, 1997 ("only those aliens entering or attempting to enter the United States without being admitted on or after April 1, 1998, following an aggregate period of unlawful presence of 1 year or more are inadmissible under section 212(a)(9)(C)(i)(I) of the Act.") Therefore, although the applicant was ordered removed and entered without inspection soon thereafter, he is not inadmissible under section 212(a)(9)(C) of the Act.

The Field Office Director denied the application for permission to reapply for removal based on its erroneous finding that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, without considering whether the applicant is eligible for permission to reapply under section 212(a)(9)(A)(iii) of the Act. The Field Office Director also stated Immigration and Customs Enforcement reinstated the order of removal against the applicant on February 3, 1997. *See Field Office Director's Decision,* dated July 20, 2009. However, the record does not contain any evidence that the order of removal was reinstated pursuant to section 241(a)(5) of the Act. Given the Field Office Director's incorrect finding that the applicant is inadmissible under section 212(a)(9)(C)(i)(II) of the Act, as well as its unsupported conclusion that the applicant's order of removal was reinstated in 1997, the AAO remands the decision to the Field Office Director to determine whether the applicant is eligible for permission to reapply under section 212(a)(9)(A)(iii) of the Act. Accordingly, the appeal will be remanded to the Field Office for a new decision consistent with this opinion. If that decision is adverse to the applicant the decision shall be certified to the AAO for review.

**ORDER:** The appeal is remanded to the Field Office for a new decision.