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

**U.S. Citizenship
and Immigration
Services**

[REDACTED]

H4

DATE: **OCT 21 2011** OFFICE: SAN DIEGO, CALIFORNIA

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,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Diego, 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 dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was expeditiously removed from the United States on December 19, 2003 pursuant to an Order of Removal of the same date, under section 235(b)(1) of the Immigration and Nationality Act (the Act) for a period of five (5) years. The applicant illegally re-entered the United States without inspection on or about December 25, 2003.

The field office director concluded that the applicant does not meet the requirements for consent to reapply because she is currently in the United States after reentering illegally; ten years have not elapsed since the date of her last departure; and she has not departed the United States since her unlawful reentry or prior to the filing of Form I-212. *Decision of the Field Office Director*, dated March 31, 2011.

On appeal, counsel for the applicant asserts that USCIS “erred as a matter of law in finding there was a deportation.” See *Form I-290B*, received April 18, 2011.

The record contains, but is not limited to, a brief from the applicant’s counsel; Form I-290B; the applicant’s sworn statement concerning her unlawful entry and removal; Form I-485 and Supplement A; Form I-601; hardship letter from the applicant’s husband; marriage certificate; birth certificates; family photos; tax returns and earnings statements; Form I-212; brief in support of I-212 filed by previous counsel; list of the applicant’s family relations in the U.S.; records pertaining to the applicant’s unlawful entry and expedited removal including her sworn statement, determination of inadmissibility, order of removal, and verification of removal (Forms I-867A, I-296, and I-860); and Form I-130. The entire record was reviewed and considered in rendering this decision.

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.

An applicant who is inadmissible under section 212(a)(9)(C) of the Act may not apply for consent to reapply for admission unless more than ten years have elapsed since the date of the applicant's last departure from the United States. See *Matter of Briones*, 24 I&N Dec. 355, 358-59 (BIA 2007); *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). 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 of the United States for those same ten years; and that USCIS has consented to the applicant's reapplying for admission. *Matter of Briones*, 24 I&N Dec. at 358, 371; *Matter of Torres-Garcia*, 23 I&N Dec. at 873, *aff'd.*, *Gonzalez v. Dept. of Homeland Security*, 508 F.3d 1227, 1242 (9th Cir. 2007). The AAO notes that although not raised by current counsel on appeal, prior counsel for the applicant asserted that because she filed her Form I-212 before the government took steps to reinstate her 2003 removal order, the Ninth Circuit's holding in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) applies here. See *Brief in Support of Form I-212*, dated July 1, 2008. In *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007), the Ninth Circuit overturned its previous decision in *Perez Gonzalez*, 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 *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).

The record reflects that the applicant first entered the U.S. without inspection in or about January 2000. See the applicant's signed sworn statement before USCIS interpreted by her husband (*Sworn Statement*), dated February 7, 2011. The applicant states that she returned to Mexico in May 2003 when her grandmother died. *Id.* She states that she unlawfully reentered the U.S. in December 2003, carrying the green card of another individual. *Id.* Service records show that on or about December 18, 2003, the applicant applied for admission into the United States from Mexico through the San Ysidro, California Port of Entry (POE), presenting a DSP Laser visa not lawfully issued to her. See *Form I-860*, Notice and Order of Expedited Removal, dated December 19, 2003. The applicant states that she was apprehended at the POE, taken to secondary inspection and detained for 24 hours, during which she provided a sworn statement to authorities using the name [REDACTED]. See *Sworn Statement*, dated February 7, 2011. See also *Form I-867A*, Record of Sworn Statement in Proceedings under Section 235(b)(1) of the Act, dated December 19, 2003. The applicant states that she was sent back to Mexico after 24 hours. *Sworn Statement*, dated February 7, 2011. Service records show that the applicant was ordered removed on December 19, 2003 pursuant to section 235(b)(1) of the Act, 8 U.S.C. 1225(b)(1), after it was determined that she was inadmissible to the

U.S. under sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Act, as amended, and was removed the same day. See *Form I-860* (order of removal); and *Form I-296* (verification of removal). The applicant states that after her removal, she reentered the U.S. without inspection (hiding in the back seat of a car), on or about December 25, 2003. See *Sworn Statement*, dated February 7, 2011. She states that she has never departed to Mexico since last entering the U.S. in December 2003. *Id.*

Counsel asserts that the I-212 denial was “purportedly based on a purported order of removal at an unspecified time and date.” *Appellate Brief*, dated May 11, 2011. He asserts that “there is absolutely no documentary basis in the DD’s decision establishing a formal order of deportation/removal or date for that matter.” *Id.* Counsel asserts that, therefore, “the DD’s decision is both unsupported by any substantial evidence and in legal error.” *Id.* The AAO notes that in these proceedings, the applicant bears the burden of establishing that she is not inadmissible under any provision of the Act. See Section 291 of the Act, 8 U.S.C. § 1361. As noted above, the record includes documents relating to the applicant’s December 19, 2003 expedited removal. The record shows that the applicant was personally served with the Form I-860, Notice and Order of Expedited Removal on December 19, 2003. In addition, the applicant signed the Form I-296, Notice to Alien Ordered Removed/Departure Verification. If the applicant has lost this documentation she may request a copy of it by filing a Freedom of Information Act Request (FOIA). Counsel has failed to make a proper inquiry in order to obtain such documentation. Further, the AAO notes that the applicant herself confirmed under oath in the form of a sworn statement that she has entered the U.S. unlawfully on a number of occasions, both before and after her December 2003 removal. In addition, the Form I-212 at issue on appeal indicates that the applicant has been “arrested and deported or removed (less than five years ago)”; and that the “date of deportation or removal from the United States” was “12/19/2003.” See *Form I-212*, at questions 7 and 13, dated July 14, 2008. In a brief submitted in support of the Form I-212 prior counsel acknowledged that the applicant “was expeditiously removed from the United States for a period of five (5) years.” See *Brief in Support of Form I-212*, dated July 1, 2008. Therefore, the AAO finds that counsel’s assertions on appeal are not persuasive and that the record amply demonstrates that the applicant was removed on December 19, 2003.

The applicant is inadmissible under section 212(a)(9)(C) of the Act due to the fact that she was removed on December 19, 2003 and she subsequently entered the United States without inspection only days later. The applicant has not departed the United States since her entry without inspection in December 2003. As the applicant has not been outside of the United States for a total of ten years, she is currently statutorily ineligible to apply for permission to reapply for admission.

In proceedings for application for permission to reapply for admission under section 212(a)(9)(A)(iii) of the Act, 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, in that she is inadmissible under section 212(a)(6)(C)(i) of the Act. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.