

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY**



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**

H4

DATE:

OFFICE: LOS ANGELES, CALIFORNIA

FILE:

OCT 28 2011
IN RE:

Applicant:

APPLICATION:

Application for Permission to Reapply for Admission into the United States after Deportation or Removal 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 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 dismissed.

The record reflects that the applicant is a native and citizen of Mexico who was expeditiously removed on August 24, 1997, and subsequently entered the United States without inspection in or about March 1999.¹ The applicant has resided in the United States since that date. The applicant is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(II), as an alien who has been ordered removed under section 235(b)(1) and who reenters the United States without being admitted. He seeks permission to reapply for admission into the United States under section 212(a)(9)(C)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(C)(ii) in order to reside in the United States with his U.S. citizen wife and children.

The Field Office Director determined that the applicant was ineligible to obtain consent to reapply for admission to the United States and denied the Form I-212 accordingly. See *Decision of the Field Office Director*, dated July 23, 2009.

Counsel submits a brief in support of the appeal. Therein, counsel asserts that the Ninth Circuit Court of Appeals' (Ninth Circuit) decision in *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004) applies in the present case. *Form I-290B*, received August 16, 2009. Counsel asserts that [REDACTED] allows the applicant, who entered the U.S. without inspection after being expeditiously removed, to adjust status to that of a permanent resident under Section 245(i) of the Act. See *Counsel's Brief*, dated August 11, 2009. Counsel concedes that the Ninth Circuit reversed that decision in *Duran Gonzales v. Department of Homeland Security*, 508 F.3d 1227 (9th Cir. 2007), granting deference to the Board of Immigration Appeals (BIA) decision in *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). Nevertheless, he asserts that the [REDACTED] decision cannot be retroactively applied to the applicant, whose waiver application was filed in reliance on the old law, i.e., the standard set forth in *Perez-Gonzalez*, within the jurisdiction of the Ninth Circuit. *Id.* Counsel asserts alternately that the applicant is eligible for adjustment of status because more than ten years have elapsed since his 1997 removal, and that consent to re-apply for admission may be granted [REDACTED]. See *Form I-290B*, received August 16, 2009. Counsel further asserts that the provisions of section 212(a)(9)(C)(ii) of the Act do not require the alien to remain "outside of"

¹ Counsel asserts that the applicant, after being removed on August 24, 1997, "subsequently returned unlawfully to the United States the following day." See *Counsel's Brief*, dated August 11, 2009. Counsel's assertion is not reflected by the record. The applicant's Form I-485 lists his "date of last arrival" as "03/1999." See *Form I-485*, received July 30, 2007, at page 1, part 1. The denial of Form I-212 confirms: "During your interview, you acknowledged that you had last entered the United States without being inspected or admitted on or about March 1999." See *Decision of the Field Office Director*, dated July 23, 2009. On an earlier form I-485, the applicant listed his date of last arrival as "01/1999." See *Form I-485*, received January 30, 2001, at page 1, part 1. The AAO notes that whether the applicant entered the U.S. without inspection in August 1997, January 1999 or March 1999, he is inadmissible pursuant to section 212(a)(9)(C)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(C)(i)(II).

the United States for a period of ten years before applying for a waiver for purposes of section 212(a)(9)(C)(ii). See *Counsel's Brief*, dated August 11, 2009.

The record includes, but is not limited to: Form I-290B; counsel's brief in support of appeal; Forms I-212, I-485, I-601 and denials of each; Form I-290 motion to reopen and reconsider, brief in support of motion, and dismissal of motion; Form I-130; inadmissibility and removal records; tax, birth, and marriage records; and two psychological evaluations for the applicant's spouse. The entire record was reviewed in rendering a decision on appeal.

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 record reflects that the applicant entered the United States without inspection on August 24, 1997, and was expeditiously removed to Mexico the same date. The applicant subsequently entered the United States without inspection in or about March 1999 and has resided in the U.S. since that time.

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 10 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). 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 U.S. Citizenship and Immigration Services (USCIS) has consented to the applicant's reapplying for admission. In the present matter, the record reflects that the applicant was expeditiously removed from the United States on August 24, 1997. The applicant admitted that he

entered the United States without inspection in March 1999, and has remained in the United States ever since. Thus the applicant is currently statutorily ineligible to apply for permission to reapply for admission.

In [REDACTED] the Ninth Circuit overturned its previous decision, [REDACTED] and deferred to the BIA's holding in [REDACTED] of the Act bars aliens subject to its provisions from receiving discretionary waivers of inadmissibility prior to the expiration of the ten-year bar. Counsel asserts the Ninth Circuit's "prior decision in [REDACTED] should not apply retroactively to the following class members such as the applicant in this matter: individuals who are inadmissible under INA §212(a)(9)(C)(i)(II) and whose waiver applications were filed in reliance on the old law, i.e., the standard set forth in [REDACTED], within the jurisdiction of the Ninth Circuit in conjunction with applications for adjustment of status under INA §245(i) and were pending at any time on or after August 13, 2004 and on or before November 30, 2007 and prior to any final reinstatement of removal decision." *Form I-290B, Notice of Appeal or Motion*, August 24, 2009. However, the Ninth Circuit clarified that its holding in [REDACTED] does apply retroactively, even to those aliens who had Form I-212 applications pending before [REDACTED] 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). Therefore, despite counsel's assertions to the contrary, the applicant remains inadmissible to the United States.

Matter of Martinez-Torres, 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

Section 291 of the Act, 8 U.S.C. §1361, provides that the burden of proof is upon the applicant to establish that he is eligible for the benefit sought. The applicant in the instant case does not qualify for the exception under section 212(a)(9)(C)(ii) of the Act. Thus, as a matter of law, the applicant is not eligible for approval of a Form I-212. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.