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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

#4

[redacted]

Date: APR 1 1 2012 Office: LOS ANGELES, CALIFORNIA [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)(C)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(C)(ii)

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 application for permission to reapply for admission after removal was denied by the Field Office Director, Los Angeles, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found inadmissible to the United States under 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), for being removed from the United States and reentering the United States without being admitted. The applicant now 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 spouse.

On July 17, 2009, the Field Office Director determined that the applicant did not meet the requirements for consent to reapply because he is in the United States after reentering illegally and denied his Application for Permission to Reapply for Admission After Deportation or Removal (Form I-212) accordingly. *Decision of the Field Office Director*, dated July 17, 2009.

On appeal, the applicant, through counsel, contends that the applicant filed his Form I-212 "in reliance on the law in effect at the time he filed his applications." *Form I-290B*, filed August 17, 2009. Counsel also claims that the applicant "is a member of the redefined class of Plaintiffs in which the case of [redacted] should not be applied retroactively." *Id.*

The record includes, but is not limited to, counsel's appeal brief, statements from the applicant and his wife, letters of support, photographs, financial documents, court documents for the applicant's wife's restraining order, and documents pertaining to the applicant's removal proceeding. The entire record was reviewed and considered in arriving at a decision on the appeal.

In the present case, the record indicates that on January 12, 1998, the applicant attempted to enter the United States by using a fraudulent entry document. On January 13, 1998, the applicant was removed from the United States. In November 2000, the applicant entered the United States without inspection.

The AAO finds the applicant inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(II) of the Act for being removed from the United States, and subsequently entering the United States without inspection.

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.

In her brief dated August 14, 2009, counsel claims that it has been more than ten years since the applicant's removal, he is eligible for a *nunc pro tunc* adjudication of his Form I-212, and the *Duran Gonzalez* decision cannot be retroactively applied to him. Counsel also claims that United States Citizenship and Immigration Services (USCIS) "erred in stating that [the applicant] was required to remain outside of the United States for a period of ten years before applying for a waiver."

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 Court of Appeals (Ninth Circuit) overturned its previous decision, *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004), and deferred to the Board of Immigration Appeals' (BIA) 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 Duran Gonzalez v. DHS*, 659 F.3d 930 (9th Cir. 2011) (affirming the district court's order denying the plaintiff's motions to amend its class certification and declining to apply *Duran Gonzalez* prospectively only); *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).

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* USCIS has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on January 13, 1998. The applicant has been residing in the United States since November 2000 and therefore has not remained outside the United States for 10 years since his last departure. He is currently statutorily ineligible to apply for permission to reapply for admission. The appeal will be dismissed.

ORDER: The appeal is dismissed.